Kingston University London

Rule of Law and Justice in Petroleum Law in Sub-Saharan Africa:

Critical analysis of socioeconomic rights and the World Bank New Africa Strategy

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DECLARATION

I *Adam Abukari* do testify and declare that this thesis on "Rule of Law and Justice in Petroleum Law in Sub-Saharan Africa: Critical Analysis of Socioeconomic Rights and the World Bank New Africa Strategy" is completely the product of my original and independent academic work conducted between 2016 and 2019. I have duly referenced all the sources I consulted in the course of carrying out the research and writing the thesis. I further declare that my thesis Supervisors only gave me the necessary expert guidance that enabled me to make independent decisions on what and how to conduct and write the thesis. Therefore, any errors and weaknesses associated with this thesis are not and cannot be associated with any of my thesis Supervisors. I bear the sole responsibility for any short comings, if ever there are any.

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DEDICATION

I dedicate this thesis to my dearest Father, Abukari Mahama, who gave me all the needed support and had belief that I will get this far but never lived to see it happening. May His Soul Rest in Perfect Peace! Amen!

Table of Contents

LIST OF TABLES

LIST OF FIGURES

LIST OF ACRONYMS

AAP	African Action Plan
AAPG	American Association of Petroleum Geologists
AfDB	African Development Bank Group
AU	African Union
BITs	Bilateral Investment Treaties
CAPI	Carried and Participating Interest
CC	Concession Contract
CIT	Corporate Income Tax
CSOs	Civil Society Organisations
DPs	Development Partners
DRTD	Declaration on the Right to Development
DT	Deepwater Tano
EITI	Extractive Industries Transparency Initiative
E&P	Exploration and Production
EISB	Extractive Industries Source Book
EPCC	Engineering, Procurement, Construction and Commissioning
EROL	Environmental Rule of Law
EU	European Union

FDI	Foreign Direct Investment
GNPC	Ghana National Petroleum Corporation
HFO	Heavy Fuel Oil
HS	Host States
IBA	International Bar Association
IBH	International Bill of Human Rights
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IDL	International Development Law
IEG	Independent Evaluation Group
IFC	International Finance Corporation
IGOs	Intergovernmental Organisations
IMF	International Monetary Fund
IOs	International Organisations

ITT	Invitation to Treat/Tender
JVCs	Joint Venture Contracts
LPG	Liquefied Petroleum Gas
MFA	Master Facility Agreement
MITs	Multilateral Investment Treaties
MIGA	Multilateral Investment Guarantee Agency
MMBOE	Million Barrels of Oil Equivalent
MNCs	Multinational Corporations
MNPCs	Multinational Petroleum Companies
NAS	The World Bank New Africa Strategy
NGL	Natural Gas Liquid
NOC	National Oil Company
NRGI	Natural Resource Governance Institute
OHCHR	Office of High Commissioner for Human Rights
OPEC	Petroleum Exporting Countries
PCA	Permanent Court of Arbitration
PIAC	Public Interest and Accountability Committee
PML	Petroleum Mining Leases
PPL	Petroleum Prospecting Licences

PRR	Petroleum Resource Revenues
PSCs	Production Sharing Contracts
RAHL	Rule According to Higher Law
RAL	Rule According to Law
RCCM	Relationship-Centred Clinical Method
RFO	Residual Fuel Oil
RGI	Resource Governance Index
ROL	Rule of Law
SAP	Structural Adjustment Programme
SCs	Service Contracts
SDGs	Sustainable Development Goals
SGN	Sankofa-Gye-Nyame
SSA	Sub-Saharan Africa
SDGs	Sustainable Development Goals
TEN	Tweneboa-Enyenra-Ntomme
WCTP	West Cape Three Points
WJP	World Justice Project
UDHR	Universal Declaration of Human Rights
UK	United Kingdom

UN	United Nations
UNCS	Convention on the Continental Shelf
UNCLOS	United Nations Law of the Sea Convention
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

ABSTRACT

Sub-Saharan Africa (SSA) is endowed with huge quantities of petroleum, which attracts private and public interests. Within the framework of municipal law and international law, these interests are crammed with competing forces over ownership, extraction and marketing of the resource. SSA countries are in desperate need of acquiring equitable share of the financial wealth that is derived from their petroleum commodities in order to adequately enhance their socioeconomic rights such as adequate standard of living. Evidence from countries such as Ghana, Nigeria and Angola suggest that petroleum legislation and contracts with petroleum companies are largely inconsistent with key requirements of the rule of law (ROL), justice and socioeconomic rights. SSA lacks the capacity to effectively address this imbalance. The World Bank New Africa Strategy (NAS) of 2011 could be one of intervening instruments to help address this challenge. Therefore, to what extent can petroleum law be harnessed with the ROL, justice, and the NAS to enhance socioeconomic rights in SSA? The thesis argues that when tenets of the ROL (such as transparency and accountability) and justice (such as equity, entitlement and fairness) are effectively integrated in petroleum law in SSA, there is the greater possibility that petroleum law can effectively protect socioeconomic rights such as adequate standard of living, especially when there is an intervening factor such as the NAS to build the capacity of SSA to achieve fair share (entitlement) from its petroleum. The contribution of the thesis is anchored on deepening the understanding of and/or establishing the delicate relations between rule of law, justice and petroleum law in SSA in the light of socioeconomic rights and the NAS. The thesis concludes that there is the need for continued reformation of the current petroleum legal architecture in SSA to maximise socioeconomic benefits from their petroleum resources.

CHAPTER ONE

GENERAL INTRODUCTION TO THE THESIS

> At his best, man is the noblest of all animals; separated from law and justice he is the worst.[1]

1.1 Introduction

Petroleum (or crude oil)[2] is a highly competitive global resource.[3] Its extraction goes through complex processes that tend to be diverse, time-consuming and costly. The diversity of processes of petroleum extraction depends on the expertise of many specialties drawn from disciplines such as geology and reservoir engineering which interact with law, politics and management.[4] The complexity of these petroleum processes is exemplified by the diverse interests and stakeholders involved and the need to coordinate and reconcile these interests and stakeholders to produce best outcomes and avoid disputes.[5]

Additionally, the stakeholders include both international and local actors whose different backgrounds come with competing demands. The technology involved in

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[1] Gerald R Ferrera and others, *The Legal and Ethical Environment of Business: An Integrated Approach* (Wolters Kluwer 2014) 293.

[2] Hydrocarbons such as oil and gas that have not yet been refined. When extracted, they are still usually referred to as petroleum with diverse products; see The American Heritage, 'Dictionary of the English Language' (5th edn, Houghton Mifflin Harcourt Publishing Company 2019) < www.ahdictionary.com/word/search.html?q=petroleum > accessed 12 March 2019; Knut Bjorlykke, *Petroleum Geoscience: From Sedimentary Environments to Rock Physics* (Springer 2010).

[3] The American Heritage (n 2); Bjorlykke (n 2).

[4] Nadine Bret-Rouzaut and Jean-Pierre Favennec, *Oil and Gas Exploration and Production: Reserves, Costs, Contracts* (Editions TECHNIP, 3rd edn, IFP Publications 2011).

[5] ibid.

the extraction of petroleum is equally complex.[6] The costly nature of petroleum extraction processes is related to huge sums involved in the investment required to extract petroleum products. The exploration stage particularly involves a lot of financial and technical risk-taking.[7] For instance, it is estimated that only one out of five wells is found to produce marketable oil. The processes involved are also time-consuming.[8]

It takes many years to discover petroleum reserves that are worth investing in.[9] For instance, it took Ghana about a century to discover petroleum in huge commercial quantities in 2007.[10] It also takes a couple of years to develop petroleum fields and start producing oil and gas. For example, it took Ghana about three years to develop Ghana's first commercial oil field, the Jubilee Field, before production started in the last quarter of 2010.[11]

Given the diverse, costly, complex and time-consuming nature of petroleum exploration and production (E&P), the legal framework of petroleum transactions is multidimensional and comprehensive with consideration of both private and public interests. In developing countries such as those in "petroleum rich Sub-

[6] ibid.

[7] ibid.

[8] ibid.

[9] ibid.

[10] Ghana Petroleum Commission, 'Exploration History' < www.petrocom.gov.gh/exploration-history.html > Accessed 13 February 2017.

[11] Bret-Rouzaut and Favennec (n 4).

Saharan Africa"[12] (hereinafter, SSA)[13] where there are huge financial and institutional weaknesses, the capacity of the legal framework to address the

[12] It must be noted that Sub-Saharan Africa has usually been described as a geographical area of the African continent that is positioned or located at the south of the Sahara or the "great desert"; see Wayback Machine, 'Definition of major areas and regions' < https://web.archive.org/web/20100420040243/http://esa.un.org/unpp/definition.html#SSA > accessed 26 July 2019; Kerry H Cook and Edward K Vizy, 'Detection and Analysis of an Amplified Warming of the Sahara Desert' (2015) 28 Journal of Climate 6560 -6580; According to UNDP, there are 46 countries in SSA. These are: Angola, Gabon, Nigeria, Benin, Gambia, Rwanda, Botswana, Ghana, Sao Tome and Principe, Burkina Faso, Guinea, Senegal, Burundi, Guinea-Bissau, Seychelles, Cameroon, Kenya, Sierra Leone, Cape Verde, Lesotho, South Africa, Central African Republic, Liberia, South Sudan, Chad, Madagascar, Swaziland, Comoros, Malawi, Tanzania, Democratic Republic of Congo, Mali, Togo, Republic of Congo, Mauritania, Uganda, Cote d'Ivoire, Mauritius, Zambia, Equatorial Guinea, Mozambique, Zimbabwe, Eritrea, Namibia, Ethiopia and Niger; see UNDP Africa, 'About Sub-Saharan Africa' < www.africa.undp.org/content/rba/en/home/regioninfo.html > accessed 26 April 2019; Note that it is arguable that countries such as Somalia, Sudan (some classify this as part of North Africa) and Djibouti are not included in the UNDP's list of 46 SSA countries. For instance, instead of 46 countries, the Wayback Machine has listed 51 SSA countries (admittedly having more than the normal 54 African countries, including Somalia and Djibouti as part of SSA but excluding 'Sudan thereof – at the time South Sudan had apparently not gained independence and the two Sudanese areas were one'); see Wayback Machine, 'Definition of major areas and regions' (n 12).

[13] Out of the 46 SSA countries, about 25 + 1 (Sudan is not part of the 46 SSA countries identified by the UNDP) of them have so far exhibited significant recoverable oil and reserves as of 2016. These are: Nigeria, Angola, Republic of Congo, South Sudan, Gabon, Democratic Republic of Congo, Chad, Sudan, Equatorial Guinea, Uganda, Ghana, Sierra Leone, Niger, Cameroon, Ivory Coast, Mauritania, South Africa, Mozambique, Benin, Ethiopia, Namibia, Rwanda, Somalia, Senegal, Tanzania, and Madagascar; see World Energy Council, 'Energy Resource – Africa – Oil' (Latest year, 2016) < www.worldenergy.org/data/resources/region/africa/oil/ > 20 July 2019; World Energy Council, 'Energy Resource – Africa – Gas' (Latest year, 2016) < www.worldenergy.org/data/resources/region/africa/gas/ > 20 July 2019; Note that countries such as Mali, Sierra Leone, Kenya and Malawi have high prospects for petroleum: see African Development Bank and the African Union, *Oil and Gas in Africa* (Oxford University Press 2009); Tullow Oil, 'About Tullow in Kenya' (East Africa Kenya, Last updated, 25 July 2019)< www.tullowoil.com/operations/east-africa/kenya > accessed 26 July 2019; Mining in Malawi, 'Oil & Gas' < https://mininginmalawi.com/category/oil-gas/ > accessed 20 July 2019.

interests of stakeholders especially the citizens of the host states (HS) has been called into question.[14]

In particular, the nature of legal frameworks that gives birth to petroleum contracts in most SSA countries largely allow for unfair distribution of petroleum income.[15] This has adverse consequences on socioeconomic rights such as right to adequate standard of living[16] of the citizens of the HS drawn from the Universal Declaration of Human Rights 1948 (UDHR),[17] International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR),[18] Declaration on the Right to Development 1986 (DRTD)[19] and the African Charter on Human and People's

[14] EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (Extractive Industries Source Book, 16 May 2016) < www.eisourcebook.org/uploads/files/146340749934135Policy,LegalandContractualFrameworkEISB.pdf > accessed 24 September 2017; NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (Natural Resource Governance Institute Reader, March 2015) < https://resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf > accessed 8 May 2017; NRGI, 'Compare both oil and gas and mining sectors for dual sector countries: 2017 Resource Governance Index, Natural Resources Governance Institute (NRGI)' < https://resourcegovernanceindex.org/compare?country1=AGO_oil-gas&country2=GHA_oil-gas&country3=NGA_oil-gas > accessed 15 April 2019; see also Pereowei Subai, *Local Content Oil and Gas Law in Africa: Lessons from Nigeria and Beyond* (1st edn, Routledge 2019).

[15] Melaku Geboye Desta, 'Competition for Natural Resources and International Investment Law: Analysis from the Perspective of Africa' in Zeray Yihdego, Melaku Geboye Desta and Fikremarkos Merso (eds), *Ethiopian Yearbook of International Law 2016* (Springer 2017) 117.

[16] See chapter 5 of the thesis for details of adequate standard of living as proclaimed in Art 25(1) of the Universal Declaration of Human rights [1948].

[17] Universal Declaration of Human Rights [proclaimed by General Assembly resolution 217 A of 10 December 1948], Art 25.

[18] International Covenant on Economic, Social and Cultural Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27), Art 11.

[19] Declaration on the Right to Development (UNGA, 4 December 1986, A/RES/41/128, 97th plenary meeting).

Rights 1981 (ACHPR)[20] as well as Permanent Sovereignty over Natural Resources[21] 1962 (PSNR).[22]

The primary research question concerns weak pillars of rule of law (ROL)[23] and justice[24] in the petroleum legal architecture of SSA, which adversely affect socioeconomic rights, especially, in SSA countries such as Ghana, Angola and Nigeria. The thesis critically evaluates the feasibility of using these principles in addressing contentious issues pertaining to socioeconomic rights in the petroleum industry of SSA. At the same time, "the World Bank[25] New Africa Strategy"

[20] African (Banjul) Charter on Human and Peoples' Rights [Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 I LM 58, 1982] < www.achpr.org/files/instruments/achpr/banjul_charter.pdf > accessed 12 February 2017

[21] Permanent sovereignty over natural resources [General Assembly resolution 1803 (XVII) [14 December 1962], Art 1< www.ohchr.org/EN/ProfessionalInterest/Pages/NaturalResources.aspx > accessed 28 January 2017.

[22] ibid.

[23] ROL, essentially, is about ensuring that power is exercised according to clearly established and defined laws or rules; that no one is above the law; that laws are consistent and uniformly understood and applied; see Thomas Bingham, *The Rule of Law* (Penguin 2010); Randy E Barnett, 'Can Justice and the Rule of Law Be Reconciled? Foreword to the Symposium on Law and Philosophy' (1988) 11(3) Harvard Journal of Law & Public Policy 597.

[24] Justice is characterised by a situation or an instance in which values such as fairness, accountability, entitlement, moral rightness and equity are deemed to be upheld; see Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); John Rawls, *A theory of Justice* (Rev edn, Harvard University Press 1999); John Rawls, J*ustice as Fairness: A Restatement* (Erin Kelly, ed, Harvard University Press 2001); Michelle Maiese, 'Principles of Justice and Fairness' (Beyond Intractability, Guy Burgess and Heidi Burgess (eds), Conflict Information Consortium, University of Colorado, Boulder, July 2003) < www.beyondintractability.org/essay/principles-of-justice> accessed 19 October 2016; Michael J Sandel, *Justice: What's the Right Thing to Do?* (Penguin group 2009).

[25] The World Bank consists of International Development Association (IDA) which targets poorest countries for interest free financing and grants, as well as the International Bank for Reconstruction and Development (IBRD) which targets "middle-income and creditworthy low-

(hereinafter,[26] the NAS) has largely been geared towards promoting and protecting socioeconomic rights of SSA, yet success in this direction has been limited.[27]

For socioeconomic rights in SSA to be sufficiently realised, it is imperative that the ROL and justice are demonstrably operationalised in the petroleum laws (i.e. laws on oil and gas exploitation) of SSA, particularly with respect to petroleum licencing and contracts.[28] The thesis, therefore, makes a case for the ROL and justice to be sufficiently integrated in petroleum laws in SSA so as to enhance socioeconomic rights in SSA countries. And that, the NAS could not only support the process of this integration but also could be harnessed by the ROL and justice.[29]

This chapter establishes the relevant background, general perspectives, purpose, research questions, methodology, scope, limitation, significance and contribution of the study. It takes a bird's eye view of the angles from which the thesis is situated. The thesis has ten subsequent chapters. Chapter two articulates the

income countries" for non-interest-free financing; see The World Bank, 'About the World Bank' < www.worldbank.org/en/about > accessed 11 October 2016.

[26] The NAS is championed by the World Bank (IDA and IBRD) but is supported by all the five key institutions of the World Bank Group, namely: IBRD, IDA, International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and International Centre for Settlement of Investment Disputes (ICSID); see The World Bank, 'About the World Bank' (n 25).

[27] Bryan Johnson, 'The World Bank and Economic Growth: 50 Years of Failure' (The Heritage Foundation, 16 May 1996) < www.heritage.org/trade/report/the-world-bank-and-economic-growth-50-years-failure > accessed 15 January 2017; The World Bank, 'Africa Action Plan' < http://web.worldbank.org/archive/website01010/WEB/0__CO-17.HTM > accessed 12 November 2016.

[28] Ibrahim F I Shihata, 'Legal Framework for Development: Role of the World Bank in Legal Technical Assistance' (1995) 23 International Business Lawyer 360; Desta, 'Competition for Natural Resources and International Investment Law (n 15).

[29] Shihata, 'Legal Framework for Development (n 28).

systematic procedures and requisite techniques used in the thesis.[30] Socio-legal (law in action) and doctrinal (black letter law) methodologies have been primarily used. The literature review in chapter three has shown that no research has been conducted on relationships between petroleum law, the ROL and justice on the one hand and how they are related to the NAS on the other hand. Furthermore, the literature on the beneficial relationship between petroleum law, the ROL, justice and socioeconomic rights in the light of the NAS is very scant.

Chapter four analyses the interesting harmonious but sometimes paradoxical relationships between the ROL and justice in the context of petroleum E&P in SSA. The ROL and justice are generally similar and complementary legal principles in which laws and their uniform and consistent application, as dictated by the ROL, ultimately aim at the achievement of justice. Highlighting fairness as a key common factor of the two legal principles, the other interrelationships between the ROL and justice in the petroleum industry are drawn out in the end.

Chapter five takes a critical look at the components of adequate standard of living such as adequate education, health, housing and food as captured by measures such as Human Development Index (HDI)[31] in the light of petroleum exploitation

[30] Charles Chatterjee, *Methods of Research in Law* (2nd edn, Old Bailey Press 2000); see also Mark Van Hoecke and Francois Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (European Academy of Legal Theory Monograph Series, Hart Publishing 2011).

[31] HDI is a 'composite index that measures average achievement in three basic dimensions of human development - a long and healthy life, knowledge and a decent or adequate standard of living'; see UNDP, 'Human Development Indices and Indicators' (Human Development Report, 2018 Statistical Update, HDRO -Human Development Report Office) < http://hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf > accessed 15 October 2018.

in SSA.[32] Chapter six analyses the sources of petroleum law and development of *lex petrolea* as well as the dimensions of ownership theories that provide explanatory basis for the formation of entitlements in petroleum legislation and contracts.

Chapter seven examines the various petroleum legal regimes in the world. It underscores that the architecture of global legal regime of petroleum is a complex combination of international legal instruments such as international contracts, treaties, arbitrary awards, works of jurists, and resolutions of international organisations; as well as municipal legal instruments such as the national constitution, petroleum legislation, petroleum model contract and petroleum contracts.[33]

Chapter eight provides a detailed examination of petroleum legal regimes of five case studies such as: Ghana, Angola and Nigeria - with greater focus on Ghana. It argues that an effective legal framework for petroleum E&P must be one that has the capacity to generate maximum economic benefits for the HS and to deliver reasonable investment returns to petroleum E&P companies.[34]

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[32] Bill & Melinda Gates Foundation, 'Goalkeepers: The Stories behind the Data' (2018) < www.gatesfoundation.org/goalkeepers/static/downloads/report_en.pdf > accessed 13 July 2019.

[33] Nwosu E Ikenna, '"International Petroleum Law": Has it emerged as a Distinct Legal Discipline?' (1996) 8 Africa Journal International & Comparative Law 428.

[34] Shihata, 'Legal Framework for Development (n 28); Ikenna, "International Petroleum Law" (n 33); Ibrahim Shihata and William Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' in Gerald H Blake and others (eds), *Boundaries and Energy: Problems and Prospects* (Kluwer Law International 1998) 433; Farouk Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (Oxford Institute of Energy Studies 2006); Irena Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System' (Final Report, IHS CERA, US Department of the Interior, October 2011) 7.

Chapter nine explores the NAS to identify the opportunities and strengths which the NAS provides for harnessing the ROL and justice in the governance of the petroleum industry. The NAS is a useful but insufficient instrument that can enhance the ROL and justice in petroleum law.

Chapter ten is the penultimate of the chapters in this thesis. Owing to the adverse implications of petroleum exploitation for the environment or nature, especially climate change, this chapter examines the challenge of protecting the planet and the human beings while trying to generate revenues and profits from petroleum E&P to enhance socioeconomic rights in SSA. Chapter 11 is the last chapter of the thesis, which provides final thoughts of the thesis along with the key conclusions within the thesis.

1.2 Defining the Key Terms of the Thesis

1.2.1 The rule of law, justice and socioeconomic rights in context

The ROL can be broadly defined as "a durable system of laws, institutions, and community commitment that delivers four universal principles":[35] 'accountability,[36] just laws,[37] open government,[38] and accessible and impartial

[35] World Justice Project, 'The Four Universal Principles' (What is the Rule of Law?) < https://worldjusticeproject.org/about-us/overview/what-rule-law > accessed 23 May 2017.

[36] 'Accountability' means that actors in both public and private sectors are supposed to be 'accountable under the law' or that no one is above the law and no one must be made to be above the law. For instance, Multinational Petroleum Companies (MNPCs) must not be made to be above the petroleum law; ibid.

[37] 'Just laws' refer to legal rules that "are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights"; see WJP, 'The Four Universal Principles' (n 35).

[38] 'Open government' denotes 'accessible, fair, and efficient processes of law enactment, administration and enforcement'; see WJP, 'The Four Universal Principles' (n 35).

dispute resolution'.[39] These principles, according to the World Justice Project (WJP), have been used as "a working definition of [the ROL done in accord] with internationally accepted standards and norms".[40] The four principles of the ROL have been further developed into nine factors which are used in the annual ROL index of the WJP.[41] The nine factors are: 'Constraints on government powers, absence of corruption, open government, fundamental rights such as socioeconomic rights, order and security, regulatory enforcement, civil justice, criminal justice, and informal justice[42] such as can be obtained in traditional institutions'.[43] These are the key factors that define the limits of the ROL in a jurisdiction, which have been in accord with expert views.

[39] 'Accessible and impartial dispute resolution' is characterised by 'timely delivery of justice by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve'; WJP, 'The Four Universal Principles' (n 35).

[40] WJP, 'The Four Universal Principles' (n 35).

[41] The WJP rule of law index surveys views of households and experts in order 'to measure how the rule of law is practically perceived and experienced daily on the world stage'; see ibid; see also World Justice Project, *World Justice Project Rule of Law Index* (WJP 2019) < https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced_0.pdf > accessed 2 June 2019.

[42] 'Informal justice' relates to the role that is played by "customary and 'informal' systems of justice – including traditional, tribal, and religious courts, and community-based systems – in resolving disputes" in several countries such as in SSA where indigenous or local system of adjudication is still rife especially in rural communities. The informal factor encapsulates three key concepts: (1) as to 'whether dispute resolution systems are timely and effective'; (2) as to whether the dispute resolution systems are impartial and free of improper influence'; and (3) how far the dispute resolution systems respect and protect fundamental rights' such as socioeconomic rights; see World Justice Project, 'Informal Justice (Factor 9)' < https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/factors-rule-law/informal-justice-factor-9 > accessed 23 May 2017.

[43] WJP, 'The Four Universal Principles' (n 35).

Turksen has, for instance, observed that the ROL, amongst others, entails "legitimacy,[44] independent judiciary, and equality before the law, legal certainty, effective legal remedy and continuous assessment of the quality of the legal norms".[45] The components of the ROL provided by Turksen have been featured by the nine factors of the ROL that have been forwarded by the WJP. However, Turksen has highlighted another important lever of the ROL. This is about the need to continue to examine the quality of the legal norms in order to see if legal reforms are required to maintain or improve the credibility of the legal norms.[46]

Turksen has also reinforced the shared characteristics of legitimacy and ROL by highlighting legitimacy as a contributory factor of ROL. According to Tyler, legitimacy can be seen as the "psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just".[47] In this regard, Jackson and others, 'found that appropriate behaviour can be dictated not only when people have the feeling of a duty to obey officers of an institution but also when the people have the belief that the officers and/or the institution acts in accord with a shared moral purpose

[44] Legitimacy basically refers to a situation whereby a process, action, authority, power, institution and/or other social arrangements and outcomes have received the needed trust of the public or applicable persons as being "appropriate, proper, and just"; Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 Annual Review of Psychology 375; Rudiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (Springer 2008).

[45] Umut Turksen, *EU Energy Relations with Russia: Solidarity and the Rule of Law* (Routledge Research in EU Law, 1st edn, Routledge 2018).

[46] ibid.

[47] Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (n 44).

with the citizens'.[48] At the heart of legitimacy is morality,[49] validation and acceptance of citizens towards a process, entity and/or outcome in the light of existing rights provided by the law.[50] Legitimacy can, therefore, be defined as "the right to rule and the recognition by the ruled of that right"[51] without necessarily being subject to punishment but often led by voluntary will to recognise and respect the established systems. What this means is that there has to be a consanguinity in the interaction between law, morality, institution and the society for legitimacy to be procured. Institutions such as the World Bank and the United Nations (UN), therefore, need to acquire the legitimacy of requisite proportions 'if they are to develop and function effectively'.[52] This also applies to the legitimacy

[48] Jonathan Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (2012) 52 British Journal of Criminology 1051.

[49] For interconnecting relationship between morality and law, see Philip Anthony Harris, *The Distinction between Law and Ethics in Natural Law Theory* (Edwin Mellen 2002).

[50] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) The European Journal of International Law 907; Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (n 48); CA Thomas, 'The Concept of Legitimacy and International Law' (LSE Law, Society and Economy Working Papers 12/2013).

[51] Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (n 48); see David Beetham, *The Legitimation of Power* (Issues in Political Theory, Macmillan 1991); Jean-Marc Coicaud, *Legitimacy and Politics* (edited and translated: David Ames Curtis, Cambridge University Press 2009); Dolf Sternberger, 'Legitimacy' in David L Sills (ed), *International Encyclopedia of the Social Sciences* (Vol 9, Macmillan 1968) 244; Matthew Parish, 'An Essay on the Accountability of International Organizations' (2010) 7(2) International Organizations Law Review 277; Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102(1) Journal of Criminal Law and Criminology 119-170.

[52] Kumm, 'The Legitimacy of International Law' (n 50); Parish, 'An Essay on the Accountability of International Organizations' (n 51); Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (n 48).

of the international law[53] that provides the infrastructure for such institutions.[54] Highlighting legitimacy in ROL therefore reinforces the characteristics of ROL such as participation, openness, accountability and just laws.[55] All the tenets of the ROL above are important in the petroleum industry because they provide the safety, order, confidence and credibility required for a competitive resource such as

[53] International law refers to a legal framework that entails established rules and principles for the purpose of regulating the relations *inter se* nations, the jurisdictions and individuals and international organizations and other organisations. International law is categorised broadly into public international law and private international law, both of which concern international organisations such as the World Bank. Whereas public international law deals with the relations and appropriated rights and duties between and among many nations or the nations and their citizens or subjects of other nations, private international law addresses itself to the relations and associated controversies between private persons - both legal and natural ones. The two realms are increasingly becoming closely related and uncertain because of, for instance, the growing interests of nations over their citizens who engage in private ventures in foreign countries. By the orientation of international law where nations that already have their own domestic laws are central to the making and enforcement of the international law, the domains of international law are characterised by tenets such as "the basic, classic concepts of law in national legal systems (i.e. statutes, property law, tort law, etc)". The domains also encapsulate areas of law such as "substantive law, procedural law, due process, and remedies" which respectively means the actual content of the law, the processes of the law, the right processes of the law and the solutions or compensation for damages or breaches of the law. The key substantive fields in international law include human rights law, economic law, and environmental law (all the three being germane to this thesis) as well as diplomatic law, criminal law, security law and humanitarian law; see Legal Information Institute, 'International law' (LII, Cornell Law School) < www.law.cornell.edu/wex/international_law > accessed 15 July 2019; Martin Dixon, *Textbook on International Law* (7th edn, Oxford University Press 2013); Martin Dixon, Robert McCorquodale and Sarah Williams*, Cases & Materials on International Law* (6th edn, Oxford University Press 2016); Peter Muchlinski, 'Corporations in International Law' in Rudiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2009).

[54] Alan Boyle and Christine Chinkin, *The Making of International Law* (Foundations of Public International Law, Oxford University Press 2007); Wolfrum and Roeben (eds), *Legitimacy in International Law* (n 44); Parish, 'Accountability an Essay on the Accountability of International Organizations' (n 51).

[55] WJP, 'The Four Universal Principles' (n 35).

petroleum to be exploited for the benefit of all stakeholders.[56] In this context, the ROL is operationalised as just about how the above principles and tenets are integrated in the enactment and enforcement of petroleum laws so as to enhance socioeconomic rights in SSA.

Although the ROL has traditionally been seen "as the domain of lawyers and judges",[57] they are not the only stakeholders – everyone is. This is because the ROL cuts across daily necessities such as "safety, rights, justice, and governance".[58] Stakeholders in the petroleum industry are equally affected by the ROL. If fairness in the ROL is not effectively integrated in petroleum law in SSA, for instance, either the HS or the Multinational Petroleum Companies (MNPCs) or their partners will be adversely affected through undeserved petroleum income that can affect the rights of shareholders or ownership rights of the citizens of the HS.

When the ROL is effective in petroleum law,[59] corruption in the petroleum industry[60] can be mitigated.[61] The ROL can also assist in combating poverty in SSA

[56] ibid.

[57] ibid.

[58] ibid.

[59] William T Onorato and J Jay Park, 'World Petroleum Legislation: Frameworks that Foster Oil and Gas Development' (2001) 39 (1) Alberta Law Review 9.

[60] James Osborne, 'Oil industry rocked by global corruption scandals' (The Star, 2 February 2018) <www.thestar.com/business/2018/02/02/oil-industry-rocked-by-global-corruption-scandals.html > accessed 9 December 2018; CMI, 'Basic guide to corruption and anti-corruption in oil, gas, and mining sectors' (U4 - Chr. Michelsen Institute) < www.u4.no/topics/oil-gas-and-mining/basics> 3 August 2019; Global witness, 'Oil, Gas and Mining' < www.globalwitness.org/en/campaigns/oil-gas-and-mining/ > accessed 3 August 2019.

[61] Raymond J Learsy, *Oil and Finance: The Epic Corruption from 2006 to 2010* (iUniverse 2011); Ken Silverstein, *The Secret World of Oil* (Verso Books 2014).

since it can eliminate constraints that hamper the process of harnessing petroleum resources for socioeconomic development.[62] With the ROL, the stakeholders in the petroleum industry are protected from injustices. According to the WJP, the ROL serves as 'the foundation for justice, opportunity and peace, which underpin socioeconomic development, accountable government and the respect for fundamental rights' including socioeconomic rights such as rights to education and health as well as to adequate standard of living.[63]

Justice is characterised by the moral and/or legal obligation that society imposes on people to ensure that their conduct, in any given situation, are based on fair adjudication between any competing claims or interests such as those between the HS and the MNPCs in the petroleum industry of SSA. This imperative is built on elements such as entitlement, legitimacy, fairness, equity and equality.[64] Fairness is popularly defined as a situation in which rules are impartially formulated and applied to all manner of persons in any transactional arrangements or disputation.[65] Fairness has also been identified with a situation in which every transactional arrangement or disputation is approached based on 'moral rightness'.[66]

[62] Shihata, 'Legal Framework for Development (n 28).

[63] WJP, 'The Four Universal Principles' (n 35).

[64] Rawls, *A theory of Justice* (n 24); Rawls, *Justice as Fairness: A Restatement* (n 24); Maiese, 'Principles of Justice and Fairness' (n 24); Sandel, *Justice: What's the Right Thing to Do?* (n 24).

[65] John Broome, *Weighing goods: equality, uncertainty, and time* (Basil Blackwell 1995) 192

[66] Brad Hooker, 'Fairness' (2005) 8(4) Ethical Theory and Moral Practice 329; Wade Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (2007) 99 (3) Newfoundland Quarterly 8 < www.mun.ca/harriscentre/policy/memorialpresents/2006e/NF_Quarterly_article.pdf> accessed 15 November 2018.

When fairness is limited to only about consistently applying rules (without considering whether the rules are bad or good rules), that amounts to formal fairness but not substantive fairness. Substantive fairness is where there is a higher requirement for the rules not only to be formulated and applied impartially to every agent but also ensure that these processes meet the higher requirement of moral rightness while also considering what each agent needs and what they deserve or are entitled to. One can aver that the first step in fairness is to ensure that each party receives what is due them according to standard rules. When that tends to unreasonably make another party worst off and the other party better off, then there is the need to apply moral persuasion to redress the balance.[67]

Bearing the above disposition of substantive fairness in mind, justice can be seen from the following three angles in the field of petroleum E&P: the distributive justice as found in distributing scarce petroleum resources fairly; [68] the rights-based justice which is anchored on respecting people's human rights including right to adequate standard of living; as well as the legal justice which is concerned about ensuring fairness in petroleum law or law on oil and gas.[69] In effect, the ROL and justice are complementary legal principles based on mutually coherent common factors such as fairness and equity.

When the ROL is effectively exhibited in the formulation and enforcement of petroleum legislation and contracts, the opportunity for the HS to benefit more

[67] Sandel, *Justice: What's the Right Thing to Do?* (n 24).

[68] Raanan Gillon and Ann Lloyd (eds), *The Principles of Health Care Ethics* (Wiley 1994); Raanan Gillon, 'Medical ethics: four principles plus attention to scope' [1994] 309 BMJ 184.

[69] ibid.

from their petroleum resources can be high.[70] When the tenets of the ROL reconcile with and complement the application of justice, there will be greater legitimacy and the opportunity for HS to effectively harness their petroleum resources to enhance socioeconomic rights can be higher.[71] The other stakeholders in the petroleum industry such as the MNPCs also have the opportunity to benefit more in the long term if the ROL and justice are effectively integrated in the enactment and enforcement of petroleum legislation and contracts. This is notwithstanding the fact that the ROL and justice are sometimes not used in relation to business transactional fairness and commercial benefits but public-centred benefits.[72]

There is sufficient basis, however, to also apply the ROL and justice for business transactional fairness and commercial benefits since the inadequacy, misapplication or absence of these legal precepts can undermine the level of business confidence and trust in the transactional chain which can ultimately determine the nature of business output and profits.[73] Thus, fair benefit from

[70] Shihata, 'Legal Framework for Development (n 28).

[71] Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (n 48).

[72] Turksen, *EU Energy Relations with Russia: Solidarity and the Rule of Law* (n 45).

[73] Smarajit Kr Mandal, *Ethics In Business and Corporate Governance* (Tata McGraw Hill 2010); Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford University Press 2012); Willem van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Practices and National Legal Systems* (Markets and the law, Ashgate 2014); see also Ashley D Penn, 'Why Fairness in Business Wins' (Chediston Partners LLP 29 January 2017) < www.chedistonpartners.com/single-post/2017/01/29/Why-Fairness-in-Business-Wins > accessed 13 January 2018; Charles Wookey, 'Should Fairness be a Core Business Goal?' (a blueprint for better business, 8 September 2018) < www.blueprintforbusiness.org/fairness-as-a-business-goal/ > accessed 11 January 2019.

petroleum resources for both HS and MNPCs in SSA can be harnessed by the ROL and justice.[74] Ensuring that ROL and justice are effective in petroleum law is critical in substantially enhancing human rights including socioeconomic rights.[75]

Socioeconomic rights constitute social[76] and economic[77] rights such as rights to education, health, food, employment, and adequate standard of living that have been proclaimed in international legal instruments such as UDHR, ICESCR, DRTD, ACHPR and PSNR.[78] Most of these instruments have been transposed into many municipal constitutions including of Ghana, Nigeria and Angola which are examined in this thesis.[79] Although socioeconomic rights are usually regarded as the second generation of rights,[80] they are as important as the first generation rights vis-à-vis civil and political rights enshrined in International Covenant on

[74] Rawls, *A theory of Justice* (n 24); Rawls, *Justice as Fairness: A Restatement* (n 24); Maiese, 'Principles of Justice and Fairness' (n 24); Sandel, *Justice: What's the Right Thing to Do?* (n 24).

[75] Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford Handbooks in Law, Oxford University Press 2012).

[76] D M Davis, 'Socio-Economic Rights' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford Handbooks in Law, Oxford University Press 2012)1020.

[77] K D Ewing, 'Economic rights' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012)1036.

[78] Davis, 'Socio-Economic Rights' (n 76); Ewing, 'Economic rights' in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (n 77); Stephen P Marks, 'Emerging Human Rights: A New Generation for the 1980s' (1981) 33 Rutgers Law Review 435; Cecile Fabre, 'Constituting Social Rights' (1998) 6(3) The Journal of Political Philosophy 263-284; Amartya Sen, 'Elements of the Theory of Human Rights' (2004) 32(4) Philosophy and Public Affairs 315.

[79] Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (n 75).

[80] Marks, 'Emerging Human Rights: A New Generation for the 1980s' (n 78); Sen, 'Elements of the Theory of Human Rights' (n 78).

Civil and Political Rights[81] 1966 (ICCPR) as well as other international and regional legal instruments.[82]

1.2.2 Petroleum law and nature of petroleum

Petroleum law confers rights and duties, and dictates the efficiency, effectiveness and benefits of the petroleum industry in a given state.[83] Petroleum law often represents an integrated collection of rules, norms, principles and structures that have been occasioned by petroleum policy orientation and generated from different levels of negotiations and decision-making processes.[84]

Petroleum law and the related legal precepts surrounding it such as ROL and justice are anchored on the effective regulation of petroleum. Therefore, petroleum is central to the whole superstructure of this thesis. According to the American heritage dictionary, petroleum is a natural resource that can be described as:

> A thick, flammable, yellow-to-black mixture of gaseous, liquid, and solid hydrocarbons that occurs naturally beneath the earth's surface, can be separated into fractions including natural gas, gasoline, naphtha, kerosene, fuel and lubricating oils, paraffin wax,

[81] International Covenant on Civil and Political Rights [1966] 999 UNTS 171.

[82] Davis, 'Socio-Economic Rights' (n 76).

[83] See chapter 6 of the thesis for details of defining petroleum law.

[84] Mohd Naseem and Saman Naseem, 'World Petroleum Regimes' in Kim Talus (ed), *Research Handbook on International Energy Law* (Research Handbooks in International Law, Edward Elgar, Cheltenham 2014)149; Ikenna, "International Petroleum Law" (n 33); Richard W Bentham, 'The International Legal Structure of Petroleum Exploration' in Judith Rees and Peter Randon O'Dell (eds), *The International Oil Industry* (Palgrave Macmillan 1987) 57.

and asphalt and is used as raw material for a wide variety of derivative products.[85]

For the American Association of Petroleum Geologists (AAPG), in addition to the above defining features, petroleum should be known to come "from the Latin *petra*, meaning "rock," and *oleum*, meaning "oil'".[86] Crude oil or non-refined petroleum in commercial quantities was first discovered by Edwin Blake in 1859. This was found close to Titusville, Pennsylvania in the United States of America (USA).[87] Usually, petroleum is referred to as 'mineral oil or related hydrocarbon and natural gas'[88] in the petroleum industry[89] due to their predominant nature.[90] Many parts of the world have rich deposits of oil and natural gas especially in areas such as Middle East and North Africa (MENA), North and South America, Europe,

[85] The American Heritage (n 2); see also Bjorlykke, *Petroleum Geoscience: From Sedimentary Environments to Rock Physics* (n 2).

[86] AAPG, 'Petroleum through Time: What Is Petroleum?' < www.aapg.org/about/petroleum-geology/petroleum-through-time/what-is-petroleum > accessed 12 March 2019.

[87] Ronald R Charpentier and Thomas S Ahlbrandt, 'Petroleum (Oil and Gas) Geology and Resources' in Benedetto De Vivo, Bernhard Grasemann and Kurt Stüwe (eds), *Geology: Encyclopaedia of Life Support Systems* (Vol V, EOLSS Publishers/UNESCO 2009) 31; Ione L Taylor, 'Methods of Exploration and Production of Petroleum Resources' (Geology-Encyclopaedia of Life Support Systems (EOLSS), Vol V) < www.eolss.net/sample-chapters/c01/e6-15-08-04.pdf > accessed 6 November 2016.

[88] Petroleum Act 1998 c 17, s 1.

[89] For participants and make-up of the petroleum industry, see AAPG, 'World of Petroleum: Exploration Today' < www.aapg.org/about/petroleum-geology/world-of-petroleum/exploration-today#3483325-about > accessed 12 March 2019.

[90] Charpentier and Ahlbrandt, 'Petroleum (Oil and Gas) Geology and Resources' in Vivo, Grasemann and Stüwe (eds), *Geology: Encyclopaedia of Life Support Systems* (n 87) 31.

Russia, and SSA.[91] Indeed, SSA countries such as Ghana, Nigeria, Angola, Gabon, Equatorial Guinea and South Sudan are endowed with huge quantities of oil and natural gas.[92]

Discovery, development and extraction of petroleum go through very complex processes which involve legalities, huge capital outlay and specialised scientific knowledge as well as high-tech machinery or equipment.[93] As an underdeveloped region where these requirements are scarce to find and to acquire, it is reasonable to agree with Collier's assertion that SSA may still have much of its petroleum resources undiscovered and that Africa is likely to be one of the most petroleum-resourced regions in the world.[94] Despite the evidence of the likelihood of huge deposits of petroleum in SSA, there is no absolute certainty regarding the real existence of such commercial quantities of petroleum which can attract the needed foreign investment.[95] Accordingly, there is a real risk to investors who offer huge

[91] BP, 'BP Statistical Review of World Energy' (67th edn, June 2018) 12 < www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2018-full-report.pdf > accessed 11 March 2019.

[92] ibid.

[93] Robert C Milici, 'Coal, Oil, and Gas for the Twenty-First Century' in Benedetto De Vivo, Bernhard Grasemann and Kurt Stüwe (eds), *Geology: Encyclopaedia of Life Support Systems* (Vol V, EOLSS Publishers/UNESCO 2009) 1-30; Ione L Taylor, 'Methods of Exploration and Production of Petroleum Resources' in Benedetto De Vivo, Bernhard Grasemann and Kurt Stüwe (eds), Geology: Encyclopaedia of Life Support Systems (Vol V, EOLSS Publishers/UNESCO 2009) 107.

[94] Paul Collier, 'Using Africa's Resources for Development - Part 1' (presentation, *Uongozi Institute*, 4 July 2012) < www.youtube.com/watch?v=vLSBXye-Ngs > accessed 5 February 2017; Paul Collier and Ami Mpungwe (panellists), 'In Focus - Managing Natural Resources in Africa' (*Uongozi Institute*, 19 December 2012) <www.youtube.com/watch?v=H5pi88PmvYA > accessed 5 February 2017.

[95] L Benkherouf and J A Bather, 'Oil exploration: Sequential decisions in the face of uncertainty' (1988)25(3) Journal of Applied Probability 529.

capital and other human resources,[96] with the probability of not finding any commercial quantities of petroleum after the investment and exploration.[97] Petroleum E&P companies are high risk-taking investors that engage in the investment adventure because there is expected high-reward from the E&P process that will 'find, augment, produce and merchandise the petroleum'.[98]

The petroleum industry consists of upstream, midstream and downstream sectors.[99] A full life cycle of petroleum processing can be viewed from different dimensions with classifications that may entail detailed components or consist of a condensed form. Taylor has given some form of elaborate composition of the 'petroleum product life cycle' consisting of seven main processes:

i. Prospecting for petroleum;[100]
ii. Leasing or acquiring access;
iii. Drilling operations;
iv. Developing and producing petroleum;
v. Transporting of petroleum;

[96] Kenneth S Deffeyes, *Hubbert's Peak, The Impending World Oil Shortage* (Princeton University Press 2001).

[97] MA Adelman, 'Economics of exploration for petroleum and other minerals' (1970) 8 (3-4) Geo-exploration 131-150.

[98] J M Jr Campbell, J M Sr Campbell and R A Campbell, *Analysis and Management of Petroleum Investments: Risk, Taxes and Time* (CPS Publishing 1987); Taylor, 'Methods of Exploration and Production of Petroleum Resources' (n 87); Deffeyes, *Hubbert's Peak, The Impending World Oil Shortage* (n 96); James Chen (Reviewer), 'Exploration & Production - E&P' (Investopedia, Updated, 4 January 2018) < www.investopedia.com/terms/e/exploration-production-company.asp > accessed 11 January 2019.

[99] Taylor, 'Methods of Exploration and Production of Petroleum Resources' in Vivo, Grasemann and Stüwe (eds), *Geology: Encyclopaedia of Life Support Systems* (n 93) 107.

[100] ibid.

vi. Processing and refining of petroleum;[101]

vii. Marketing and selling of petroleum.[102]

Technically, the activity of petroleum E&P occurs in the upstream sector. This involves prospecting, acquisition of access (leasing) and drilling[103] for petroleum at the exploration phase, as can be seen in steps 'i, ii and iii' above. This is the most difficult part where many unsuccessful trials of acquiring evidence of existence of commercial quantities of petroleum can be experienced. With scientific advancement in geoscience and development in technology, however, the success rates of 'wildcat drilling' have increased from about 10% a few decades ago to about 56% of wells discovering hydrocarbons'.[104] The exploration risks have, therefore, been significantly reduced over the years.

If there was successful 'wildcat drilling', there would have been evidence of commercial quantities of petroleum at the explorative phase. If so, then the production phase kicks in whereby petroleum fields and wells are developed before moving on to engage in actual extraction or production of the petroleum, at least, from a geoscientist's perspective.[105] This process can be found at step 'iv' above.[106]

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[101] ibid.

[102] Taylor, 'Methods of Exploration and Production of Petroleum Resources' (Geology-Encyclopedia of Life Support Systems (n 87).

[103] Ron Baker, *A Primer of Oilwell Drilling* (Pap/Chrt edn, University of Texas at Austin Petroleum 2000).

[104] Taylor, 'Methods of Exploration and Production of Petroleum Resources' (n 93) 107.

[105] ibid.

[106] Benedetto De Vivo, Bernhard Grasemann and Kurt Stüwe (eds), *Geology: Encyclopaedia of Life Support Systems* (Vol V, EOLSS Publishers/UNESCO 2009).

The significance of petroleum resource or crude oil is underpinned by the fact that, for many generations, petroleum products[107] have been powerful enablers in critical sectors[108] of any country.[109] Petroleum products have many crucial uses including fuel for airplanes, cars, and power plants as well as ethylene (ethene) and propylene (propene) in nylon-based plastics, methane in ammonia fertilizer, oil in agricultural pesticides, and oil in pharmaceuticals.[110] In fact, being central to the strategies of every nation, especially with respect to their socioeconomic success, and being highly valued in the global political order, petroleum is one of the most vital energy resources in the world.[111] Therefore, it is a global commodity with local essence.[112]

[107] Petroleum products such as 'fuel oil /diesel fuel or distillate fuel oil, residual fuel oil (RFO)/heavy fuel oil (HFO), natural gas liquids (NGL), still gas, motor gasoline, aviation gasoline, kerosene jet fuel, naphtha jet fuel, kerosene, propane/liquefied petroleum gas (LPG), petrochemical feedstocks, petroleum coke, asphalt, road oil, waxes and lubricants'; see EIA, 'Glossary' (Independent Statistics & Analysis - US Energy Information Administration) < www.eia.gov/tools/glossary/index.php?id=P#petro > accessed 13 May 2018.

[108] Strategic areas such as transportation, industry and households.

[109] IAG, '144 Products Made from Petroleum that may Shock You' (Innovative Advisory Group, Wealth Management, 27 January 2015) < www.innovativewealth.com/inflation-monitor/what-products-made-from-petroleum-outside-of-gasoline/ > accessed 19 July 2017; see Patrick H Martin and Bruce M Kramer, *Williams & Meyers, Oil and Gas Law* (3rd edn, Lexis Nexis Matthew Bender 2007).

[110] Petroleum.co.uk, 'Other uses of petroleum' < www.petroleum.co.uk/other-uses-of-petroleum > accessed 15 August 2018.

[111] Zhiguo Gao (ed), *International Petroleum Contracts: Current Trends and New Directions* (1st edn, Kluwer Law International 1994) 1.

[112] Frederick Van der Ploeg, 'Natural Resources: Curse or Blessing?' (2011) 49 (2) Journal of Economic Literature 366; Natural Resource Governance Institute, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (NRGI Reader, March 2015) < www.resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf > accessed 26 March 2017.

1.3 Stating the Problem of the Study

SSA is wealthy in petroleum but poor in socioeconomic development. With the abundance of precious natural resources ranging from petroleum deposits to gold and so on,[113] the lingering wonderment has been that of why SSA countries are still so undeservedly poor[114] in a way that undermines their human rights such as socioeconomic rights.[115] For instance, in the 2018 HDI[116] report, majority of SSA countries fell in the 'low human development' category with Gross National Income (GNI)[117] of between US$796 for Democratic Republic of Congo and US$5,231 for Nigeria (see section 5.2 below).[118] In 2018, SSA's average poverty rate was 'about 41%, and of the 28 poorest countries in the world,[119] 27 of them were from SSA all which having a poverty rate above 30%'.[120] One of the key contributory factors

[113] Joseph Ayee, 'The Status of Natural Resource Management in Africa: Capacity Development Challenges and Opportunities' in Kobena T Hanson, Cristina D'Alessandro and Francis Owusu (eds), *Managing Africa's Natural Resources: Capacities for Development* (International Political Economy Series, Palgrave Macmillan 2014) 15.

[114] Desta, 'Competition for Natural Resources and International Investment Law (n 15).

[115] OHCHR, 'Special Rapporteur on extreme poverty and human rights' (Your Human Rights, Poverty, 2017) < www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx > accessed 20 March 2017.

[116] UNDP, 'Human Development Indices and Indicators' (n 31).

[117] Measured in 2011 Purchasing Power Parity (PPP) US$.

[118] UNDP, 'Human Development Indices and Indicators' (n 31).

[119] Nirav Patel, 'Figure of the week: Understanding poverty in Africa' (Africa in Focus, 21 November 2018) < www.brookings.edu/blog/africa-in-focus/2018/11/21/figure-of-the-week-understanding-poverty-in-africa/> accessed 15 February 2019.

[120] ibid; Homi Kharas, Kristofer Hamel and Martin Hofer, 'Rethinking global poverty reduction in 2019' (Future Development, Brookings, 13 December 2018) < www.brookings.edu/blog/future-development/2018/12/13/rethinking-global-poverty-reduction-in-2019/ > accessed 21 February 2019.

to this poverty situation is 'weak institutions, aside from things like lack of resilience and political instability'.[121]

There is a clear lack of capacity of SSA countries to effectively own and dispense their petroleum resources[122] in fair contractual arrangements with multinational companies (MNCs) that often have the huge wherewithal required to turn natural 'neutral stuff'[123] into usable natural resources.[124] It results in unfair petroleum legal relations that have limited regard for the ROL, justice and socioeconomic rights.[125] This contributes to a situation where a country owns huge commercial petroleum deposits but has poor socioeconomic development.[126] The greater challenge is about how to chart a more reliable course of action to harness ROL and justice in petroleum laws so as to meaningfully promote and protect the socioeconomic rights of citizens of SSA.

[121] ibid.

[122] Ayee, 'The Status of Natural Resource Management in Africa: Capacity Development Challenges and Opportunities' (n 113)15.

[123] According to Erich Zimmermann (1951), resources like petroleum do not become resources until capabilities are found to realise their value and extract it; Robert L Bradley Jr, 'Are we running out of oil?' (2004) 22(3) Property and Environment Research Center (PERC) < www.perc.org/2004/09/01/are-we-running-out-of-oil/ > accessed 15 May 2017.

[124] Desta, 'Competition for Natural Resources and International Investment Law (n 15); Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66).

[125] Cotula Lorenzo, *Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments* (No 20, IIED 2010).

[126] Lisa Callaghan, 'Social Well-Being in Extra Care Housing: An Overview of the Literature' (PSSRU Discussion Paper 2528, March 2008) < www.pssru.ac.uk/pdf/dp2528.pdf > accessed 16 June 2017.

1.3.1 A snapshot of the Ghanaian scenario

Ghana, in West Africa, is a typical example of unfair legal relations between her and MNPCs. Although Ghana is estimated to generate about 1/3rd of its revenues from oil, this is just a small fraction of the total expected earnings.[127] This has been occasioned by the fact that the foundational petroleum contracts Ghana has signed with MNPCs have left Ghana with just about 18.64% of the total ownership share in the Jubilee[128] oil field. The 18.64% consists of: 5% of total oil production as royalties and 13.64% carried and participating interest (CAPI).[129] There are also, however, receivables such as corporate income tax (CIT) and ground rentals which are nonetheless marginal.[130] The shares on the Tweneboa-Enyenra-Ntomme

[127] For instance, according to Public Interest and Accountability Committee (PIAC), about '800 million barrels of proven reserves and an upside potential of about 3 billion barrels of oil' are expected from the Jubilee Field which, if oil prices are favourable, is most likely to rake in billions of US dollars. Based on agreements with the operating partners, Ghana cannot earn up to at least 35%; see PIAC, 'Annual Report on Management of Petroleum Revenues for year 2011' (Republic of Ghana, 2012), 1 < www.piacghana.org/portal/files/downloads/piac_reports/piac_2011_annual_report.pdf > accessed 16 February 2017.

[128] The Jubilee field is the official name for the area hosting the Deepwater Tano (DT) and West Cape Three Points (WCTP) where the first oil discovery of huge commercial quantities of petroleum were made in western region of Ghana in 2007. Other discoveries such as Tweneboa-Enyenra-Ntomme (TEN) field (started Production in August 2016) and Sankofa-Gye-Nyame (SGN) field have, however, been recently made, which together with the Jubilee field and others, have as of the end of year 2016 a 'total proven oil reserve base of about 1,253 million barrels of oil equivalent (MMBOE), consisting of about 898 million barrels of oil and 2,024 billion cubic feet of proven gas reserves'; see Public Interest and Accountability Committee (PIAC), 'Annual Report on Management of Petroleum Revenues for year 2016' (Republic of Ghana, 2017) < www.piacghana.org/portal/files/downloads/piac_reports/piac_2016_annual_report.pdf > accessed 16 February 2017.

[129] Jubilee Field, 'Ghana's world-class Jubilee field was discovered in 2007 by the Mahogany-1 (M-1) and Hyedua-1 (H-1) exploration wells' (Last updated, 22 February 2019) < www.tullowoil.com/operations/west-africa/ghana/jubilee-field > accessed 12 April 2019.

[130] PIAC, 'Annual Report on Management of Petroleum Revenues for year 2016' (n 128).

(TEN) and Sankofa-Gye-Nyame (SGN) oil fields are equally way below what may be regarded as fair.[131]

This situation is because after several years of explorative activities spearheaded by the Ghana National Petroleum Corporation (GNPC) as the NOC in which relevant petroleum data was being gathered at a very high cost, Ghana could not discover petroleum in commercial quantities that would be profitable.[132] This was mainly due to lack of requisite capital and technology – in effect, lack of needed capacity and capability thereof.[133] Ghana was, thus, vulnerable to the dictates of MNPCs. So, when Kosmos Oil[134] and Tullow Oil[135] were contracted by Ghanaian government along the line, the MNPCs made the difference. Thus, with their huge capital capabilities, these MNPCs discovered petroleum deposits in large commercial quantities in June 2007 – almost with a relatively minimum effort, *albeit* with potential high risks.[136]

This instigates the question of where such heavy capital outlay could have come from within a 'struggling and highly dependent economy' such as Ghana's.[137] The

[131] Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66); see Ghana Petroleum Commission, 'Contract Areas' (Petroleum Register) < www.ghanapetroleumregister.com/contract-areas > accessed 23 April 2019; Ghana National Petroleum Corporation, 'Our Business - Oil & Gas Marketing' (Oil & Gas Marketing) <www.gnpcghana.com/marketing.html> accessed 13 May 2018.

[132] PIAC, 'Annual Report on Management of Petroleum Revenues for year 2016' (n 128).

[133] ibid.

[134] An American / USA company.

[135] Registered in Ireland with its headquarters in London, UK.

[136] ibid.

[137] The World Bank, 'Ghana's 2018 Economic Outlook Positive but Challenges Remain' (Press Release, Accra, 5 March 2018) <www.worldbank.org/en/news/press-

country was simply poor economically to risk its meagre financial resources into an explorative venture that could generate huge commercial petroleum discovery. The apparent asymmetric relationship of Ghana and MNPCs, therefore, appears to have started from Ghana's disadvantageous financial position, right from the point of expression of interest stages. This narrative applies *mutatis mutandis* to other petroleum-rich countries in SSA such as South Sudan, Equatorial Guinea, Nigeria, Gabon and Angola.[138]

1.4 A Call to Legal Action

1.4.1 Engaging with the World Bank and its New Africa Strategy

The World Bank strives to 'eliminate poverty, reduce inequity and improve opportunity for people in developing countries'.[139] This, if pursued to the letter, enhances a duty to promote the rights of SSA countries to have the capacity to fair and just transactions with MNCs. The World Bank facilitates and at times guarantees security for investments made by MNCs in developing countries, thus promoting investments of MNCs.[140]

Indeed, since its inception, the World Bank has been rolling out various coordinated actions such as strategies, policies, plans, goals, programmes and projects that seek to ultimately give meaning and expression to its operations and

release/2018/03/05/ghanas-2018-economic-outlook-positive-but-challenges-remain> accessed 14 July 2018.

[138] See Chapter 8 for case studies on Angola, Nigeria and Ghana as well as the UK and Norway.

[139] The World Bank, 'A guide to the World Bank' (3rd edn, 2011) <https://openknowledge.worldbank.org/bitstream/handle/10986/2342/638430PUB0Exto00Box0361527B0PUBLIC0.pdf?sequence=1>accessed 9 February 2017.

[140] ibid.

mission. They are largely encapsulated in comprehensive development framework, poverty reduction strategies, structural adjustment programmes, 'highly indebted poor countries initiative',[141] amongst others. These serve as operational frameworks whose jurisdictions are often situated within global, regional, sub-regional, country, sectoral or multi-sectoral contexts.[142]

One of such operational frameworks is the NAS, which was launched in 2011 with a blueprint label, 'Africa's Future and the World Bank's Support to it'.[143] The development blueprint has 'governance and public sector capacity', 'vulnerability and resilience' and 'competitiveness and employment'[144] as the main themes while having finance, knowledge, and partnerships as its key instruments or means of achieving the objectives thereof.[145] This new development blueprint for Africa had emerged primarily on the backdrop of the recognition that there was the need to exert more energy into marshalling superior forces and strategies that would take advantage of the several growth potentials and opportunities to accelerate the development of SSA in ways that match up with the remarkable strides made by China over 30 years and India over 20 years ago.[146] An area which the NAS could

[141] The World Bank Group, 'Heavily Indebted Poor Country (HIPC) Initiative' (Brief, October 2016) < www.worldbank.org/en/topic/debt/brief/hipc > accessed 27 February 2017.

[142] The World Bank, 'A guide to the World Bank' (n 139); The World Bank, 'Articles of Agreement' (1944) < www.worldbank.org/en/about/articles-of-agreement > accessed 14 November 2017.

[143] The World Bank, 'Africa's Future and the World Bank's Support to It' (The World Bank Africa Region, March 2011) < http://siteresources.worldbank.org/INTAFRICA/Resources/AFR_Regional_Strategy_3-2-11.pdf > accessed 17 March 2017.

[144] ibid.

[145] See details of the NAS in chapter nine of the thesis.

[146] The World Bank, 'Africa's Future and the World Bank's Support to it' (n 143).

make maximum impact on social and economic rights is petroleum E&P. This is because:

- Petroleum E&P in SSA could significantly help the World Bank in achieving its poverty eradication objectives and enhancing socioeconomic rights of SSA; and
- There is a lot of low capacity in petroleum exploration and production, particularly relating to weak petroleum legislation and contracts.

The World Bank has mechanisms for ensuring integrity in contracts whose projects have been financed by the World Bank's resources. The World Bank also contributes to ensuring good governance at national and international levels to help in mitigating poverty and economic crimes such as bribery and corruption. Manacorda and Grasso, have averred that, the World Bank has found the need "to promote ethical and transparent governmental processes, endorse public accountability, and reduce corruption"[147] in order to succeed in this contribution to good governance. The World Bank has had to especially 'address the need to safeguard the integrity of contracts' it enters into with its clients or the beneficiary states of its loans.[148] This measure can be leveraged by the NAS as it fosters the ROL, socioeconomic rights and justice in the broader level of governance and in the specific areas of legislation and contracts in SSA countries.[149]

[147] Stefano Manacorda and Costantino Grasso, *Fighting Fraud and Corruption at the World Bank: A Critical Analysis of the Sanctions System* (1st edn, Springer 2018).

[148] ibid.

[149] Ibrahim F I Shihata, 'The Role of Law in Business Development' (1996) 20(5) Fordham International Law Journal 1577 < http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1800&context=ilj > accessed 1 March 2017.

1.5 Purpose

The purpose of this study is to independently and originally contribute to knowledge in petroleum law with a focus on how this field of law interrelates with the NAS, the ROL and justice to enhance socioeconomic rights in SSA.

1.6 Main Research Question and Objective

The main research question is:

To what extent can petroleum law interrelate with the ROL, justice and the NAS to enhance socioeconomic rights in SSA?

The principal objective of the thesis, therefore, is:

To determine the extent to which petroleum law can interrelate with the ROL, justice, and the NAS to protect and promote socioeconomic rights in SSA.

1.6.1 Specific questions of the thesis

The following seven questions have been used to develop the thesis. Under each question, an indication is given as to where to find the response to the question:

i. What is the relationship framework in which the ROL and justice can be harnessed to enhance petroleum law and socioeconomic rights in SSA?

    1. *The answer to this question cuts across the thesis, but it is more revealing in Chapter four.*

ii. What are the contours of socioeconomic rights in SSA?

    2. *This question is tackled in Chapter five. The rest of the other chapters provide supporting answers.*

iii. What are the requisite sources and theories of petroleum law that can be used to design suitable petroleum legislation and contracts in SSA?

3. *This question is primarily answered in Chapter six.*

iv. Can the global petroleum legal regime provide a suitable framework for enacting robust petroleum law in SSA?

4. *This question is primarily answered in Chapter seven.*

v. Can the petroleum legal regimes in the UK and Norway provide a good example for SSA countries such as Ghana, Nigeria and Angola?

5. *Chapter eight provides answers to this question.*

vi. Can the NAS interrelate with the ROL, justice and petroleum law to enhance socioeconomic rights in SSA?

6. *Chapter nine provides answers to this question.*

vii. How can sustainability and socioeconomic rights be achieved in the context of petroleum exploitation in SSA?

7. *This question is addressed in Chapter ten.*

1.6.2 Brief research methodology

The mixed legal research methodology has been utilised in this thesis to collate, analyse, synthesise and present data in relation to the research questions.[150] The research methodologies that have been used are the doctrinal (black letter law) methodology, socio-legal (law in action) methodology and comparative law methodology (see details in Chapter two).[151]

[150] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing Ltd, 2011); Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30); Glanville Williams, *Learning the Law* (12th edn, Sweet & Maxwell 2002); Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018); Carl F Stychin and Linda Mulcahy, *Legal Methods and Systems* (4th edn, Text and Materials, Sweet & Maxwell 2010).

[151] ibid.

1.7 Significance of the Study and Contribution to Knowledge

The operations of MNPCs in SSA leave much to be desired. The asymmetric relations thereof have been widely researched particularly in the context of general natural resource exploitation.[152] However, addressing the asymmetric relations through harnessing justice and ROL in petroleum legal architecture to enhance socioeconomic rights in SSA have been given scant attention. The world's attention needs to be drawn to it from an academic perspective such as the orientation of this thesis.

An additional aspect of the problem is that the NAS has just been one of many solutions IGOs[153] (along with the UN Millennium Development Goals and Sustainable Development Goals)[154] have been proffering for SSA since the second half of 20th Century. Yet, the poverty continues to persist, most likely owing to lack of orderliness in pursuing the development agenda. This challenge has been established by existing literature.[155] But, how the NAS can be tied with petroleum law that integrate ROL and justice to help in overcoming the challenges in the

[152] Desta, 'Competition for Natural Resources and International Investment Law (n 15); Collier, 'Using Africa's Resources for Development - Part 1' (n 94); Collier and Mpungwe (panellists), 'In Focus - Managing Natural Resources in Africa' (n 94).

[153] Intergovernmental Organisations.

[154] See Chapter 10 of the thesis; Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation (*Edward Elgar Publishing 2018).

[155] Beegle and others, 'Poverty in a Rising Africa' (Africa Poverty Report, World Bank Group 2016) < www.worldbank.org/en/region/afr/publication/poverty-rising-africa-poverty-report > accessed 8 December 2017; Rosina Foli and Daniel Beland, 'International Organizations and Ideas about Poverty in Sub-Saharan Africa' (2014) 6(1) Poverty & Public Policy 3.

petroleum industry so as to foster socioeconomic rights in SSA is an outstanding challenge which has been given scant attention.[156]

The thesis deepens the understanding of the legal interrelationships between World Bank's strategies, ROL, justice and petroleum law. The study brings cutting-edge perspectives to the interesting debate on the role of Intergovernmental Organisations (IGOs) in harnessing legal imperatives, bearing in mind the competing interests of MNPCs and SSA. This provides new perspectives that will assist the World Bank in its line of development work in SSA. Other international development agencies will also find the thesis useful in undertaking their development activities particularly in petroleum E&P. In addition, the thesis provides a useful toolkit for MNPCs to develop new legal relations with developing countries based on win-win and fair contractual arrangements. The new perspectives offer a great source of inspiration for students and academic scholars researching the role of IGOs in harnessing justice, ROL and socioeconomic rights.

The thesis presents a framework for carrying out legal reform and features insights for policymakers concerned about sound petroleum legal regime that substantially supports socioeconomic rights in SSA. In fact, the primary focus of the study neither needs distraction nor straying than to point out that the thesis can be a

[156] Gavin Hilson, 'The extractive industries and development in sub-Saharan Africa: An introduction' (2014) 40 Resources Policy 1-3; Morgan Bazilian and others, 'Energy governance and policy' (2014) 1 Energy Research & Social Science 217–225; Olajumoke O Oduwole, 'International Law and the Right to Development: A Pragmatic Approach For Africa' (Inaugural Lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015, International Institute of Social Studies, The Hague, The Netherlands, 20 May 2014); Kate Manzo, 'Africa in the rise of right-based development' (2003) 34 Geoforum 437.

pivotal point of reference for constructing better legal instruments in the petroleum industry for enhancing socioeconomic rights in SSA.

1.8 Scope of the Study

This thesis focuses primarily on the upstream sector of the petroleum industry in SSA. Critical observations have been made on the global petroleum legal arrangements to provide a framework of 'best practice' in which selected petroleum legal regimes in SSA are comparatively analysed. These countries include Ghana, Nigeria and Angola. The cases selected and the whole of petroleum-rich countries in SSA that has been targeted are by no means a detailed representation of ROL, justice, socioeconomic rights and petroleum law issues in individual countries of SSA. Rather, the thesis gives general perspectives that align with most, if not all, SSA countries that have petroleum resources.

1.9 Limitations of the Study

The limitations of the study include the following:

- It was challenging to get translated legal instruments from non-English speaking countries such as Angola.
- Although mixed research methods helped to approach the study from different dimensions that elicited relevant data to meet the purpose of the study,[157] they were neither equally applied nor proportionally used. The methodologies were only purposively deployed.

[157] Alan Bryman, Saul Becker and Joe Sempik, 'Quality criteria for quantitative, qualitative and mixed methods research: A view from social policy' (2008) 11(4) International Journal of Social Research Methodology 261.

1.10 Organisation of the Thesis

There are eleven chapters in this thesis:

Chapter 1 - General Introduction

It highlights the definitions of key terms such as the ROL, justice, petroleum law and socioeconomic rights as well as petroleum and the NAS. The chapter also includes purpose, research questions and significance of the study. The rationale is to highlight the overview and direction of the study.

Chapter Two - Legal Research Methodology

Multiple methodologies of legal research have been used: Doctrinal, socio-legal and comparative. The rationale for this chapter is to effectively provide answers to the research questions and achieve the research purpose.

Chapter Three - Review of Literature

Literature review provides the necessary foundation and motivation to ensure that the research is novel, substantial, meaningful and useful. The rationale is to unravel the intricacies of the subject matter and knowledge gaps required to be filled by the study. The chapter makes a case that no research has ever been conducted to achieve exactly the same aim of this thesis.

Chapter Four - The Paradox of Rule of Law and Justice

Although they can sometimes have contradictory relationships, the complementarity of ROL and justice can be used to harness petroleum E&P for the benefit of private and public interests. The aim of this chapter is to provide the rationale for the evaluation of the relationships between the above concepts and to illustrate how they can enhance petroleum law and socioeconomic rights.

Chapter Five - Socioeconomic Rights - Adequate Standard of Living

Adequate standard of living is centripetal to socioeconomic rights. Adequate standard of living imperative that was launched by Article 25 of the UDHR is the starting point to examine socioeconomic rights and related legal precepts. This chapter has a rationale of exploring the contours of socioeconomic rights in SSA.

Chapter Six - Sources and Theories of Petroleum Law

This chapter evaluates the key sources of petroleum law, especially as they relate to international petroleum law. It also explores theories of ownerships of petroleum. It establishes the dimensions of petroleum law and ownership scenarios that can benefit socioeconomic rights in SSA.

Chapter Seven - Global Petroleum Legal Architecture

Petroleum E&P is governed by a menu of diverse legal regimes that aim to provide standards for engagements in the legal architecture. While carefully evaluating types of petroleum contractual arrangements in the world such as production sharing agreements, concession contracts and service contracts, the chapter critically establishes best practice in petroleum contracting across different jurisdictions which could be pertinent to SSA.

Chapter Eight - Case Studies of Petroleum

Five main case studies have been used to provide a critical illustration of nature and scope of legislative and contractual arrangements in the petroleum industry. Three cases (Ghana, Nigeria and Angola) are drawn from SSA while two cases (UK and Norway) are drawn from Europe in order to provide examples of good practices. Cases drawn from SSA countries are examples of legally questionable

petroleum structures. The rationale of this chapter is to appreciate the petroleum legal frameworks of these countries and to establish best practice in petroleum resource governance that integrates the ROL and justice for the benefit of socioeconomic rights in SSA.

Chapter Nine - World Bank New Africa Strategy and the Law

The NAS is the current organised strategy of the World Bank in SSA since it was launched in 2011. This chapter explores the vision, themes and instruments as well as transitional issues of the NAS in the light of the ROL and justice that should be effectively integrated in petroleum laws of SSA to ensure the effective enjoyment of socioeconomic rights of the people therein.

Chapter Ten - Sustainability, Petroleum and Socioeconomic Rights

Petroleum exploitation serves as a pivot around which socioeconomic rights can be harnessed in SSA. However, in trying to extract and use the petroleum, serious and detrimental consequences such as environmental degradation, can arise. This is a controversial dilemma. The argument is that much as petroleum E&P can have adverse effects on the environment and the people, for SSA to effectively enhance sustainability, it is imperative that petroleum E&P activities continue to be responsibly carried out.

Chapter Eleven - Conclusion, Contributions, Areas for Future Research and Recommendations

This chapter presents the overview of the thesis, key findings, and the key contributions of the thesis to knowledge. Future research areas have also been highlighted. The final section looks at key recommendations. The rationale of this chapter is to briefly articulate the structure, content and reasoning of this thesis

for a handy understanding of the aims and findings of the study. The next chapter is to demonstrate the procedures and techniques that have been employed to come out with the thesis.

CHAPTER TWO

RESEARCH METHODOLOGIES

2.1 Introduction

In order to effectively procure appropriate answers for the research questions and achieve the research purpose thereof, the legal research methods and methodologies have been employed.[158] Legal research methodology refers to designs, procedures, analytical techniques and tools used to determine the state of the legal phenomena,[159] how they have been addressed overtime and any recommendations required to reform the legal regime in order to remedy the situation.[160] This view of research methodology is aligned with many other law related scholarly inquiry[161] which has been demonstrated in this chapter.

Methodology can be distinguished from methods by considering how broad or narrow the research approach is described.[162] According to Henn, Weinstein and Foard, whereas research methodology is characterised by the strategy of the research as a whole, research methods deal with the specific research techniques that can be used to collect relevant data about a phenomenon, to serve as evidence concerning the propositions or prescriptions associated with the

[158] Chatterjee, *Methods of Research in Law* (n 30); Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30).

[159] Williams, *Learning the Law* (n 150).

[160] ibid; Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30).

[161] ibid.

[162] Matt Henn, Mark Weinstein and Nick Foard, *A Critical Introduction to Social Research* (2nd edn, Sage 2009).

phenomenon.[163] Details regarding the methodology and methods, as used in this study, are articulated below.

2.2 Research Design

A research design shows the framework of inquiry which the researcher adopts to undertake the study.[164] Research design in general social science research and legal research are almost the same except that with respect to legal research, normative principles are utilised and more critical analysis are put forward with varying degrees of 'command, coherence, certainty and stability'[165] depending upon the kind of legal research being conducted.[166] There is little difference between the two disciplines because some of the values espoused by the legal research methods are also applied by other social sciences.[167]

[163] ibid.

[164] John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Method Approaches* (4th edn, Sage 2014); Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1ff; Tim May, *Social Research: issues, methods and process* (4th edn, Open University Press 20011).

[165] S N Jain, 'Doctrinal and Non-Doctrinal Legal Research' (1975) 17 Journal of the Indian Law Institute 516.

[166] Morris and Murphy, *Getting a PhD in Law* (n 150).

[167] Richard Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 University of Toronto Law Journal 333, 345; Chatterjee, *Methods of Research in Law* (n 30); Carol M Bast and Margie Hawkins, *Foundations of Legal Research and Writing* (5th edn, Delmar Cengage Learning 2013); Richard Schwartz, 'Internal and External Method in the Study of Law' (1992) 11(3) Law and Philosophy 179, 185; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012)17(1) Deakin Law Review 83; see also Victor C X Wang (ed), *Scholarly Publishing and Research Methods Across Disciplines* (IGI Global 2019).

However, legal research methodologies are popularly categorised into three: the doctrinal, socio-legal and comparative research methodologies.[168] Depending upon the context and purposes of the research, these methodologies can be distinct or mutually unexclusive. The latter aligns with the research design of this study since it has utilised all the three research methodologies.[169]

The study employed these three methodologies and utilised the desk-based method for collecting, analysing and presenting data which were available via print and internet.[170] Field work (e.g. interviewing)[171] was not used primarily because of the qualitative and/or text-focused nature of the research questions and secondarily by reason of financial resource limitations of the researcher.[172] The use of research tools to retrieve relevant texts, organise the texts, and present results was, therefore, theoretically driven by mainly focusing on the interpretation, explanation and evaluation of relevant texts and materials on petroleum law, the NAS, ROL, justice and socioeconomic rights.[173]

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[168] Morris and Murphy, *Getting a PhD in Law* (n 150).

[169] Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30).

[170] Peter Clinch, with David R Hart, *Using a Law Library: A Student's Guide to Legal Research Skills* (2nd edn, Blackstone Press 2001); Bast and Hawkins, *Foundations of Legal Research and Writing* (n 167).

[171] May, *Social Research: issues, methods and process* (n 164).

[172] Clinch, with Hart, *Using a Law Library: A Student's Guide to Legal Research Skills* (n 170); Bast and Hawkins, *Foundations of Legal Research and Writing* (n 167).

[173] Zina O'Leary, *The essential guide to doing your research project* (2nd edn, Sage Publications 2014); Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30); Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007).

2.3 The Legal Research Methodologies

2.3.1 Doctrinal research methodology

Doctrinal research methodology refers to the systematic process of examining the current law, "arranging, ordering and systematising legal propositions, and study of legal institutions[174] [as well as creating] law and its major tool to do so is through legal reasoning or rational deduction".[175] In this regard, Hutchinson and Duncan argue that doctrinal research entails a systematic exposition of the rules governing a particular legal category, the analysis of the relationship between rules, explanation of areas of difficulty and, perhaps, the prediction of future developments of the law'.[176] Doctrinal research is, therefore, a 'black letter'[177] research that is characterised by careful consideration and analysis of only legal instruments, judicial cases and any legal text of particular relevance to the research. This rendition tends to be supported by the position of many legal research scholars.[178]

In large part, the 'legal doctrine is primarily characterised by the hermeneutical discipline interspersed with logical, argumentative, normative and empirical

[174] Jain, 'Doctrinal and Non-Doctrinal Legal Research' (n 165).

[175] ibid; Terry Hutchinson, *Researching and Writing in Law* (3rd edn, Reuters Thomson 2010).

[176] Terry C Hutchinson, 'Developing legal research skills: expanding the paradigm' [2008] 32 Melbourne University Law Review 1065-1095, 1068 < http://eprints.qut.edu.au/20330/1/c20330.pdf> accessed 30 March 2017; Hutchinson, *Researching and Writing in Law* (n 175) 7; Hutchinson and Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (n 167) 101.

[177] Salter and Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (n 173) 108-118.

[178] Morris and Murphy, *Getting a PhD in Law* (n 150); Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30).

imperative aspects'.[179] In this case, it critically interprets legal texts, reasons with the sense the texts make, argues or presents positions, and considers values and norms to form reasonable viewpoints.[180] Thus, doctrinal methodology focuses only on legal reality.

In this study, doctrinal methodology was deployed through utilisation of expository and analytical research techniques.[181] These techniques entail careful retrieval and critical analysis of documents[182] and applicable articles or principles of legal instruments such as constitutions, legislations, covenants, and treaties. The doctrinal research methodology, as applied here, seeks to critically establish the current discourse in petroleum law, ROL, justice and the NAS.[183] Of particular focus, under this methodology, is the analysis of the petroleum legislations, contracts and cases.[184]

The key limitation of doctrinal methodology is that it focuses analysis only on legislation, cases and such other elements within the sphere of the law.[185] As it

[179] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke and Francois Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (European Academy of Legal Theory Monograph Series, Hart Publishing 2011) 1-17.

[180] Hutchinson and Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (n 167).

[181] Clinch, with Hart, *Using a Law Library: A Student's Guide to Legal Research Skills* (n 170).

[182] CR Kothari, *Research Methodology Methods and Techniques* (2nd edn, New Age International 2004).

[183] Morris and Murphy, *Getting a PhD in Law* (n 150).

[184] William H Putman and Jennifer R Albright, *Legal Research, Analysis, and Writing* (3rd edn, Delmar Cengage Learning 2014).

[185] Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30) 1-17.

does not analyse issues that are beyond the sphere of the law, the use of doctrinal methodology is unable to appreciate how the law works and the reforms required to address the concerns of the society.[186] This methodology does not consider social reality. Law's key function is focused on 'ordering society and influencing human behaviour;[187] considering only legal reality that is limited to legislation and case law can thus be said to be insufficient'.[188] Doctrinal research fails 'to build, structure, interpret and apply the law in such a way that it fulfils its obvious function in society'.[189] Due to this limitation, it became necessary to also use socio-legal methodology in this study.

2.3.2 Socio-legal research methodology

Socio-legal (law in action) methodology makes use of research techniques that unravel the particular problems or challenges confronting the current legal regime as well as deconstructing the policy prescriptions or orientations of the existing laws and principles while endeavouring to provide pathways for possible legal modifications or reforms that reflect current and future societal needs - done through interdisciplinary approaches.[190] In this study, these involved techniques such as critical analysis of legal instruments or frames and critically establishing the relationship between legal imperatives, the NAS and petroleum E&P.[191]

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[186] ibid.

[187] ibid, vii.

[188] ibid.

[189] ibid.

[190] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in Built Environment* (Wiley-Blackwell 2008) 28.

[191] Morris and Murphy, *Getting a PhD in Law* (n 150); McConville and Chui (eds), *Research Methods for Law* (n 164).

The approach, thus, goes beyond the 'blackletter law' to interrogate external perspectives such as issues, opinions and theoretical persuasions that are not internal to the letter of the law.[192] Socio-legal methodology, therefore, examines diverse textual sources and perspectives from different disciplines and cultures, as well as operational issues and daily situations that attract legal remedies.[193]

In socio-legal research, the very nature of law and how this relates to the state and society in a dynamic context is investigated from both theoretical and empirical standpoints.[194] In this case, legal phenomena such as petroleum legislation and contracts as well as ROL, justice and socioeconomic rights have been investigated in the context of the NAS, MNPCs and socio-economic development. Socio-legal imperative does also engage itself with the critical analysis of 'socioeconomic and political factors' that result in the development of law.[195] The socio-legal methodology, therefore, deals with the socio-economic analysis of law and critical legal studies. It considers the social reality of petroleum law in SSA, for example.[196]

Despite the fact that socio-legal research is overdosed with interdisciplinary approach to understanding law, there is another pillar of socio-legal research which analyses 'the operation of law in formal contexts', including in the courts

[192] Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (1st edn, Hart Publishing 2002); McConville and Chui (eds), *Research Methods for Law* (n 164).

[193] McConville and Chui (eds), *Research Methods for Law* (n 164).

[194] Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Onati International Series in Law and Society, UK ed edn, Hart Publishing 2005); Putman and Albright, *Legal Research, Analysis, and Writing* (n 184).

[195] McConville and Chui (eds), *Research Methods for Law* (n 164); Putman and Albright, *Legal Research, Analysis, and Writing* (n 184).

[196] Putman and Albright, *Legal Research, Analysis, and Writing* (n 184) vii.

and law offices.[197] This dimension has also been applied in this study especially with respect to participation of the public in the enactment of petroleum legislation.[198] In socio-legal research, consideration is also given to the analysis of experiences of human beings that have had to be impacted by legal actions. The HS in SSA and their citizens whose socioeconomic rights have been affected by petroleum contracting processes do exemplify this angle of socio-legal research.[199] With the socio-legal imperative law, in effect, is made to be interfaced between its contribution to a social fact or phenomenon and the remedies provided for the phenomenon such as rearranging the social phenomenon.[200]

Although socio-legal methodology also utilises field research,[201] the desk-based method was employed for this methodology primarily because of the nature of research questions and secondarily by reason of limited availability of funds to finance an expensive field study.[202] Due to the nature of the research questions requiring comparative investigation into five jurisdictions, it was imperative to also

[197] ibid.

[198] ibid.

[199] Sally Falk Moore, 'Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) Law and Society Review 719-746; Martin Chanock, *Law, Custom and Social Order* (Cambridge University Press 1985) 3ff.

[200] ibid.

[201] Penny Darbyshire, *Darbyshire on the English Legal System* (11th edn, Sweet & Maxwell 2014).

[202] Creswell, *Research Design: Qualitative, Quantitative and Mixed Method Approaches* (n 164); McConville and Chui (eds), *Research Methods for Law* (n 164); Putman and Albright, *Legal Research, Analysis, and Writing* (n 184).

employ the comparative methodology to effectively harmonise the outputs from the doctrinal and socio-legal methodologies as they relate to SSA.[203]

2.3.3 Comparative legal research methodology

There are a number of approaches or rationale for conducting comparative legal research. One of the approaches is what Collins calls "positivist and utilitarian approach to comparative law"[204] which "seeks through a comparison of the legal rules and techniques of different jurisdictions the best solutions to legal problems".[205] This approach aims at 'identifying legal solutions from foreign legal systems that are deemed to be better enough to be incorporated into the domestic law'.[206] The approach resonates with the doctrine of legal transplantation[207] which essentially means transmission of a rule, set of rules and or a legal system from one jurisdiction to be integrated into the legal system of another jurisdiction.[208] Direct legal transplants have been heavily criticised because of incompatibility of socioeconomic and cultural structures of different jurisdictions.[209] Legal transplants have also been criticised because they can undermine the coherence of the conceptual scheme of the domestic law through the introduction of a single

[203] ibid.

[204] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) Oxford Journal of Legal Studies 396, 397.

[205] ibid.

[206] ibid; AW Brian Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 Law Quarterly Review 247-278.

[207] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

[208] ibid.

[209] Collins, 'Methods and Aims of Comparative Contract Law' (n 204) 396.

foreign concept therein.[210] Rather than direct legal transplants, this study utilises adaptive and integrated legal transplantation which focuses on making use of only foreign rules that are suitable for the domestic legal system and aspirations.[211]

In the light of the above, the comparative analysis was conducted on selected petroleum E&P jurisdictions including Ghana, Angola and Nigeria as well as UK and Norway. The jurisdictions selected helped the study to establish the general character and pattern of current petroleum legal frames in SSA in order to make a germane case for possible reforms. This by no means completely represent the specific situations and dynamics in all petroleum legal regimes of SSA. Rather, it depicts a reasonably representative characterisation of SSA.[212]

The general character of petroleum legal frameworks in SSA was then comparatively measured on the radar of best practises which have been showcased by developed countries such as Norway and the UK. The established general 'best practise' is not in any way a validation or endorsement of such practises as the ultimate best examples for SSA.[213] It merely provides an opportunity to establish the teething gaps of and solutions for petroleum legal frameworks as used to harness socioeconomic rights of SSA. Further analysis, by

[210] ibid.

[211] Jean-Frederic Morin and Edward Richard Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58 International Studies Quarterly 781.

[212] Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburg University Press 2007) 87; Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006); Randall Peerenboom, Carole J Petersen and Albert H Y Chen, *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA* (Routledge 2006).

[213] Wilson, 'Comparative Legal Scholarship' in McConville and Chui (eds), *Research Methods for Law* (n 212).

way of extrapolation, was then carried out to contextualise the general architecture of the said best practise and associated inadequacies in petroleum laws.[214] The country-specific and international practises would, therefore, act as a useful experiential guide to generate original propositions that sustainably resonate with the local conditions of SSA countries.[215]

2.3.3.1 The case study method

Case study method in a comparative perspective was employed in the study. Noor has provided that case study is 'an event, entity, individual or even a unit of analysis, whereby the researcher investigates about a contemporary phenomenon of real-life context while applying multidimensional evidential sources'.[216] Similarly, in the eyes of Anderson, case study addresses[217] the issue of "how and why things happen, allowing the investigation of contextual realities and the differences between what was planned and what actually occurred".[218]

Strategically, the case studies in this study were drawn into three categories, namely: Primary case study which makes use of Ghana; secondary case study which makes use of Nigeria and Angola; and tertiary case study which makes use

[214] Michael Quinn Patton, *How to Use Qualitative Methods in Evaluation* (Sage Publication 1987).

[215] Wilson, 'Comparative Legal Scholarship' (n 212); see also Clinch, with Hart, *Using a Law Library: A Student's Guide to Legal Research Skills* (n 170); Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law* (n 212); Peerenboom, Petersen and Chen, *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA* (n 212).

[216] Robert K Yin, *Case Study Research: Design and Methods* (2nd edn, Sage Publication 1989).

[217] Gary Anderson, *Fundamentals of Educational Research* (Falmer Press 1993).

[218] Khairul Baharein Mohd Noor, 'Case study: A strategic research methodology' (2008) 5(11) American Journal of Applied Sciences 1602.

of UK, and Norway.[219] The primary case study is the main case being studied to substantively illustrate the nature of the legal issues that confront the petroleum law and socioeconomic rights in SSA. Secondary case studies are specially varied examples which share peculiar features with Ghana, and which can be used to substantiate the nature of legal issues confronting petroleum legal regimes in SSA. Tertiary case studies refer to case studies which are illustrated as examples of best practices in the light of interrelating petroleum law with ROL, justice and socioeconomic rights.[220] Each of the countries selected has, at least, fallen into four (4) or more of the following six (6) common characteristics:

i. Member of the World Bank.
ii. SSA country with petroleum resources.
iii. Country with high poverty rate or has track record of fighting poverty.
iv. Country that provides access to or has the relevant data for the study.
v. Country that has experience with operations of MNPCs and/or has NOC.
vi. Country with remarkable or weak petroleum E&P systems.

For Noor, the intention of case studies cannot be about studying a whole entity or area. Instead, it aims at emphasising on 'a given issue, feature or unit of analysis'.[221] Patton goes to corroborate this by positing that the richness of case studies is demonstrated by the fact that 'a lot can be appropriated or learned from a few examples of the phenomenon under study'.[222] Therefore, to determine the

[219] ibid.

[220] ibid.

[221] ibid.

[222] Michael Quinn Patton, *Purposeful Sampling: Qualitative Evaluation and Research Methods* (2nd edn, Sage 1990).

legislative and contractual lacunas in the petroleum industry in SSA, few legislations and contracts were selected and analysed.[223] These afforded the researcher the opportunity to effectively comprehend about the justice and ROL concerns that bedevil SSA vis-à-vis the complicated contractual arrangements MNPCs have had with SSA countries.[224]

2.4 Research Types and Data Sources

The study has been more inclined to doctrinal and socio-legal methodologies – and to some extent the comparative methodology. These legal research methodologies engage both primary research and secondary methods.[225] The primary data, generated by primary research methods (thus, first-hand research processes), entails raw or unanalysed information from entities including treaties and other legislations, as well as constitutions, court cases and contracts. Secondary data, generated from secondary research methods (thus, second-hand research processes), does constitute analysed or referenced data from entities including treaties, cases, and legislations, as well as scholarly works found in books, journals, reputable institutional websites, credible newspapers, law reports, dictionaries and encyclopaedias.[226]

Hoecke avers that the doctrinal research uses empirical data from "(a) normative sources, such as statutory texts, treaties, general principles of law, customary law, binding precedents, and the like; and (b) authoritative sources, such as case

[223] Noor, 'Case study: A strategic research methodology' (n 218) 1602.

[224] ibid.

[225] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburg University Press 2007).

[226] ibid; O'Leary, *The essential guide to doing your research project* (n 173).

law, if they are not binding precedents, and scholarly legal writings". Although there can be a disagreement on the qualification 'scholarly legal writings' as a source of doctrinal methodology, in varying degrees, all these sources can legitimately be relied upon by the doctrinal legal scholar.[227] The socio-legal research (law in action) and comparative legal research also draw inspiration from these sources, *albeit* in an interdisciplinary fashion and relative form, respectively. Case study technique has been applied in the comparative methodology which has compared the petroleum regimes in Ghana, Nigeria, Angola, UK and Norway.

The primary and secondary data were sourced via online and offline. Both qualitative (text-based) and quantitative (number-based) data types have been utilised to generate "a complete picture".[228] It should be noted that the thesis is heavily dependent on qualitative data design.[229] Denzin and Lincoln aver that qualitative research supports the researcher to 'make sense of or interpret phenomenon in the light of the meanings other people bring to the phenomenon'.[230] Accordingly, the study has used these techniques to unveil the sense that is made out of the legal framework of petroleum E&P in SSA.[231]

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[227] Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 179) 11.

[228] Bryman, Becker and Sempik, 'Quality criteria for quantitative, qualitative and mixed methods research: A view from social policy' (n 157) 261.

[229] David Scott, *Legal Research* (2nd edn, Cavendish Publishing 1999).

[230] Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research Hardcover* (2nd edn, Sage 2000) 2.

[231] Putman and Albright, *Legal Research, Analysis, and Writing* (n 184).

2.5 Research Doctrines

The study has utilised all the above three legal research methodologies within the interplay of the following legal research imperatives or doctrines: Hermeneutic, explanatory, and explorative research designs.[232] The explorative research design was used to navigate through the critical issues that affect the research questions, with the task of finding out different pathways for contentious legal issues in petroleum and socioeconomic rights while generating new perspectives thereof.[233]

Hermeneutic imperative is a legal doctrine that engages the researcher to critically interpret legal texts and advance arguments as to which interpretations are persuasive and valid.[234] Schwandt observes that, in general terms, hermeneutics describes 'the art, theory and philosophy of giving interpretation to the meaning of objects such as texts (including legal texts), art works and social actions, as well as the views of someone'.[235] In this regard, the study used this design to substantiate the propositions advanced in the study through interpretation of applicable texts - under the perspective of the researcher.[236] Explanatory inquiry attempts to expatiate on the nature and instruments of the law in question. This

[232] Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30); Phil Johnson, 'Analytic Induction' in Gillian Symon and Catherine Cassell (eds), *Qualitative Methods and Analysis in Organizational Research* (Sage 1998) 28-50.

[233] Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30); Williams, *Learning the Law* (n 150).

[234] Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Hoecke and Ost (eds), *Methodologies of Legal Research* (n 179) 4.

[235] Thomas A Schwandt, *Dictionary of Qualitative Inquiry* (4th edn, Sage 2001) 115.

[236] Glenn A Bowen, 'Document analysis as a qualitative research method' (2009) 9(2) Qualitative Research Journal 27; Putman and Albright, *Legal Research, Analysis, and Writing* (n 184).

type of inquiry was used to explain the various legal dispositions and imperatives in the study.[237]

2.6 Why the methodologies used?

The above approaches were adopted for this study because they presented the appropriate instruments that effectively provide relevant answers to the research questions. Specifically, the values and inspiration propelling this research do lend attraction more to both 'research in law or doctrinal research and research about law or socio-legal research'.[238] So multidimensional or mixed methods[239] became the obvious choice despite the fact that this study has been overwhelmingly centred on 'research about law' or law in action.[240]

Socio-legal methodology not only serves as a source of new theory formulation or enactment of new legislations, but also makes it possible for social reforms to be broad-based or comprehensive. The socio-legal methodology and comparative approach were for the purposes of interdisciplinary relationship building and creative legal postulations.[241]

The research is more inclined to qualitative desk research owing to the nature of the research questions and propositions which did not require any field work or interviews. Morgan and Smircich and others have averred that the decision to

[237] Hoecke and Ost (eds), *Methodologies of Legal Research: Which kind of Method for what kind of discipline?* (n 30); Williams, *Learning the Law* (n 150).

[238] ibid.

[239] Bryman, Becker and Sempik, 'Quality criteria for quantitative, qualitative and mixed methods research: A view from social policy' (n 157) 261.

[240] ibid.

[241] Dobinson and Johns, 'Qualitative Legal Research' (n 225).

select a research method and the suitability thereof depend on the nature of the phenomenon being explored, the research problem and the question.[242]

2.7 Conclusion

This chapter demonstrated the array of legal methodologies which were adopted as a multidimensional necessity[243] for the research questions in this thesis. It demonstrated how data (including primary and secondary literature)[244] were collected and how data were critically reviewed, analysed, synthesised and presented. The next chapter articulates the analysis of the relevant aspects of primary and secondary data on selected issues that were required to reinforce the dimensions of the general legal framework and necessity of the thesis.

[242] Gareth Morgan and Linda Smircich, 'The Case for Qualitative Research' (1980) 5(4) Academy of Management Review 491-500; Noor, 'Case study: A strategic research methodology' (n 218); Graham Nuthall and Adrienne Alton-Lee, 'Research on Teaching and Learning: Thirty Years of Change' (1990) 90(5) The Elementary School Journal 547.

[243] Bryman, Becker and Sempik, 'Quality criteria for quantitative, qualitative and mixed methods research: A view from social policy' (n 157).

[244] Hoecke and Ost (eds), *Methodologies of Legal Research* (n 30); McConville and Chui (eds), *Research Methods for Law* (n 164); Morris and Murphy, *Getting a PhD in Law* (n 150); Putman and Albright, *Legal Research, Analysis, and Writing* (n 184).

CHAPTER THREE

LITERATURE REVIEW

3.1 Introduction

Literature review provides the necessary foundation and motivation to ensure that the research is novel, substantial, meaningful and useful.[245] Essentially, it enables the researcher to unravel the intricacies of the subject matter and knowledge gaps required to be filled by the study.[246] In this chapter, the perspectives that underpin the general legal framework of the thesis are examined to unleash the gaps that characterise the need for the study. The chapter provides the underpinnings of the theoretical and conceptual framework of the thesis. Accordingly, the literature review has been devised into specific areas of inquiry which have informed this thesis: Law and Development, International Investment Law, International Development Law, the World Bank and the MNCs.

3.2 Law and Development

Law and development are interrelated from the way they are each defined. On the one hand, development has been recognised[247] as 'any form of comprehensive economic, social, cultural and political process' that has the aim of constantly improving the socioeconomic wellbeing[248] or adequate standard of living of

[245] David N Boote and Penny Beile, 'Scholars before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation' (2005) 34(6) Educational Researcher 3; David R Thomas and Ian Hodges, *Designing and managing your research project: core skills for social and health research* (Sage 2010)105.

[246] ibid.

[247] DRTD, Preamble, recital 2.

[248] Socioeconomic wellbeing is made up of elements of both social and economic wellbeing. Poor socioeconomic wellbeing is characterised by development impediments such as high level of

everyone in a given society, both individually and collectively, based on 'their active, free and meaningful participation in socioeconomic activities, as well as in the fair distribution of benefits that have derived from such activities'.[249] On the other hand, law is 'the system of principles, rules and regulations that have been recognised and applied by the state in administering justice and ensuring order in a given society'.[250] This lays down procedures, rights and obligations as well as compliance and enforcement measures on socioeconomic activities, participation and sharing of benefits therefrom. This disposition of law is captured by the essential elements that characterise the functionality of socioeconomic development. Socioeconomic development characterises factors such as economic growth, poverty alleviation and improvement of standard of living in a country.[251] The HDI has become a key measuring instrument that captures most of the

poverty, high level of inequality, high rate of unemployment, high rate of mortality caused by preventable diseases, weak institutions, poor infrastructure, low technological development, poor environmental conditions, low quality of life, and low level of happiness; see Marton Medgyesi, Erhan Özdemir and Terry Ward, 'Regional indicators of socioeconomic wellbeing' (Research note no. 9/2016, European Commission March 2017); for social wellbeing, see Callaghan, 'Social Well-Being in Extra Care Housing: An Overview of the Literature' (n 126); for economic wellbeing, see Office for National Statistics, 'Economic well-being - Framework and indicators' (27 November 2014) <www.ons.gov.uk/ons/dcp171766_387245.pdf>accessed 16 June 2017.

[249] DRTD, Preamble, recital 2.

[250] John William Almond, *Jurisprudence or the theory of the law* (Stevens and Haynes 1902)11.

[251] ibid.

parameters of socioeconomic development.[252] HDI is low in SSA.[253] By its nature, socioeconomic development can, thus, have impact on socioeconomic rights, as well as on legal imperatives such as ROL and justice – and the *vice versa*.[254]

According to Shihata, 'The role of law may be reactionary, progressive or neutral depending on how it is used, the interests it aims to serve and how it interacts with the entire range of other factors that affect the choices of individuals. Laws usually reflect the prevailing realities of any nation. It can also be employed as a proactive instrument to promote development and, thus, influence and change the very realities it is supposed to reflect'.[255] The caveat is that, because law is an instrument of political choices, it is only when law is properly devised or formulated can it be a good instrument for and play an effective constitutive or mobilising role in enhancing socioeconomic development[256] which would harness socioeconomic rights.[257]

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[252] Adam Szirmai, *Socio-Economic Development* (2nd edn, Cambridge University Press 2015); Hakikur Rahman, 'Network Deployment for Social Benefits in Developing Countries' (Encyclopedia of Multimedia Technology and Networking, 2nd edn, IGI Global 2009) 1048; Udhir Anand and Amartya Sen, 'Human Development and Economic Sustainability' (2000) 28(12) World Development 2029.

[253] UNDP, 'Human Development Indices and Indicators' (n 31); Bill & Melinda Gates Foundation, 'Goalkeepers: The Stories behind the Data' (n 32).

[254] Shihata, 'Legal Framework for Development (n 28).

[255] Shihata, 'The Role of Law in Business Development' (n 149); Lawrence M Friedman, 'Legal Rules and the Process of Social Change' (1967) 19 Stanford Law Review 786, 791 < www.socio-legal.sjtu.edu.cn/uploads/papers/2011/kqw110511105236180.pdf > accessed 1 March 2017.

[256] Sharyn L Roach Anleu, *Law and Social Change* (2nd edn, Sage Publishing 2010); Duncan French and Louis J Kotzé, 'Introduction' in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation (*Edward Elgar Publishing 2018) 1.

[257] French and Kotzé, 'Introduction' in French and Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation (*n 256); For criticisms about the synergy between human rights and development, see Malcolm Langford, Andy Sumner, Alicia Ely Yamin (eds), *The*

Any law, regardless of opposing interests,[258] be it national law or international law or integrated law such as petroleum law or human rights law should ordinarily seek to complement and facilitate the process of socioeconomic development.[259] Whereas law can be used as a positive instrument for harnessing development and making the entitlement of people therewith more formalised and enforceable, there are and have been times when law is employed by both natural and legal persons to perpetuate their interest against the established legal rules and against the collective interest of the society.[260] The relationship between disfigured petroleum legal framework and poor socioeconomic development in SSA presents a glaring example. In most SSA countries such as Ghana, Nigeria and Angola, the positive contribution of law to effectively help in unlocking the socioeconomic wealth to benefit the citizens has, in many ways, been a far cry from reasonable appreciation.[261] Thus, the interconnection between law and development could not be more emphasised.[262] But how this interrelationship is procured in the petroleum legal architecture of SSA relative to the NAS has not been effectively established in literature.

Millennium Development Goals and Human Rights: Past, Present and Future (Cambridge University Press 2013).

[258] Langford, Sumner and Yamin (eds), *The Millennium Development Goals and Human Rights: Past, Present and Future* (n 257).

[259] Anleu, *Law and Social Change* (n 256).

[260] Langford, Sumner and Yamin (eds), *The Millennium Development Goals and Human Rights: Past, Present and Future* (n 257).

[261] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[262] Denis J Galligan, *Law in Modern Society* (Clarendon Law Series, Oxford University Press 2006); see also H L A Hart, *The Concept of Law* (Clarendon Law Series, 3rd edn, Oxford University Press 2012).

Essentially, the nature of petroleum legislation and contracts and other regulatory mechanisms boils down to addressing concerns such as:

- Petroleum contracts that disproportionately allocate oil and gas income in favour of petroleum investors such as the MNPCs.
- Petroleum legislation that does not or minimally ensure effective and efficient management and allocation of oil and gas income to harness socioeconomic rights the citizens.
- Petroleum legislation that does not or minimally disincentivises financial crimes such as tax evasion and corruption[263] in the petroleum industry.
- Petroleum legislation that does not promote sustainable development.[264]

3.3 International Investment Law

International investment law is a discipline of international economic law that deals with investment activities involving international actors such as MNPCs and states. Investment law has often been understood as a private legal domain which generates binding imperatives to harness and protect the interests of investors. Garcia and others refer to these imperatives as "private ordering system to protect capital, with roots in contract law and commercial arbitration".[265] Fundamentally,

[263] See Costantino Grasso, 'The Dark Side of Power: Corruption and Bribery within the Energy Industry' in Rafael Leal-Arcas and Jan Wouters (eds), *Research Handbook on EU Energy Law and Policy* (Edward Elgar 2017) 237; Lorenzo Pasculli and Nicholas Ryder (eds), *Corruption in the global era: Causes, sources and forms of manifestation* (1st edn, Routledge 2019).

[264] Sustainable development is development that takes care of the needs of both present and future generations; see UN, *Achieving Sustainable Development and Promoting Development Cooperation* (Department of Economic and Social Affairs 2008); Tom Waas and others, 'Sustainable Development: A Bird's Eye View' (2011) 3(10) Sustainability 1637.

[265] Frank J Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 (4) Journal of International Economic Law 861<

this disposition is cultured on bilateral and multilateral investment treaties that establish an enabling architecture for private capital to move across international borders into economic operations such as the petroleum E&P.

According to Gordon and Pohl, investment law that is characterised by treaties is an investment treaty law that represents "a permanent tension between stability and flexibility".[266] Whereas 'stability fosters and guarantees a sense of predictability in the investment environment, 'flexibility' enables legal systems to remain aligned with dynamic circumstances and evolving needs of investors, clients and governments'.[267] In the study on changing investment treaty law over a period, Gordon and Pohl obtained 'evidence to demonstrate that exit and voice provisions in investment treaties' were more inclined to ensuring that there is 'stability' instead of 'flexibility' in the investment landscape. Most of the investment treaties that were concluded a few decades ago and even the recent ones are overly protective of the 'stability' aspect.[268]

Overconcentration on the legal mechanisms that protect stability in the investment landscape could bring about some certainty. For instance, the stabilisation clauses

https://academic.oup.com/jiel/article/18/4/861/2357932/Reforming-the-International-Investment-Regime > accessed 5 May 2017.

[266] Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (2015/2 OECD Working Papers on International Investment, OECD Publishing, 2015) < http://dx.doi.org/10.1787/5js7rhd8sq7h-en > accessed 11 December 2018.

[267] ibid.

[268] John Linarelli, Margot E Solomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (1st edn, Oxford University Press 2018).

in petroleum contracts in most SSA countries,[269] to some extent, provide a safety net for petroleum investors that will want to be sure that their investments are protected regardless of any government or political situation in the country.[270] Worryingly, however, it would also adversely affect the needed flexibility of legal systems to be relevantly aligned with the essentials of the society.[271]

By appropriately aligning the contours of 'stability and flexibility' within a transparent framework that is protected by justice and the ROL, an international legal framework that has much integrity and legitimacy[272] could be secured for international investment law.[273] It must be noted that international legal framework has long been struggling to gain legitimacy due to its fluid enactment processes, recognition gap, and limited institutions, as well as weak accountability and enforcement mechanisms. These issues are increasingly being addressed but

[269] Peter Cameron, 'In Search of Investment Stability' in Kim Talus (ed), *Research Handbook on International Energy Law* (Research Handbooks in International Law, Edward Elgar, Cheltenham 2014) 124.

[270] Jola Gjuzi, *Stabilization Clauses in International Investment Law: A Sustainable Development Approach* (Springer 2018).

[271] Thomas W Wälde, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law' (2008) 1(1) Journal of World Energy Law and Business 55-97; Peter D Cameron, 'Investment Cycles and the Rule of Law in the International Oil and Gas Industry: Some Reflections on Changing Investor-State Relationships' (2016) 38 (3) Houston Journal of International Law 755.

[272] Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (n 44); Wolfrum and Roeben (eds), *Legitimacy in International Law* (n 44).

[273] Gordon and Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (n 266); Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (n 265) 861.

may still take time to be effectively addressed.[274] This effort must be strengthened. With more confidence and legitimacy in the rules that govern the international investment system, the frontier markets in SSA, for instance, are likely to respond positively to investments into sectors such as the petroleum industry.[275]

Investment law has been going through a noticeable transformation in the light of the dynamism of global investment structures and interests of stakeholders or participants thereof, as well as structural and substantive weaknesses therewith.[276] Making a case for the need to procure a shift in paradigm of the evolving investment legal framework, Garcia and others have made a parallel comparison of apparent crises experienced by international trade law in the 1990s with that of the ensuing 'legitimacy crisis' of investment law. Legitimacy crisis in terms of institutional frame of current outlook of investment law missing out on ROL measurement standards such as, according to Garcia and others, 'accountability, coherence, neutrality or fairness and predictability', as well as its failure to integrate concerns for meeting 'pressing needs of society'.[277]

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[274] Boyle and Chinkin, *The Making of International Law* (n 54); Parish, 'An Essay on the Accountability of International Organizations' (n 51); Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (n 48).

[275] ibid.

[276] Asif H Qureshi and Andreas R Ziegler, *International Economic Law* (3rd edn, Sweet & Maxwell 2011) ix, 489 -542; Wälde, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law' (n 271)55; Cameron, 'Investment Cycles and the Rule of Law in the International Oil and Gas Industry' (n 271) 755.

[277] Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (n 265).

As Garcia and others look forward to a much better comprehension of the existing investment architecture and appropriate reforms thereof so as to address the said 'legitimacy crisis',[278] they propose that international investment law ought to be understood not only as legal arrangements that guard investment capital and facilitate investment flows – all too well protected by the stability disposition articulated by Gordon and Pohl.[279] It also has to be 'part of a comprehensive global economic governance system that seeks to ensure justice and the ROL in the allocation of investment capital, which is just one aspect of international economic relations'.[280]

In fact, this paradigm-shift in understanding and reforming international investment law, which Garcia and others have put forward for consideration,[281] is in tandem with the disposition of this thesis as it advocates for the institutionalisation of ROL and justice in petroleum legal architecture to achieve socioeconomic rights in SSA. However, as it will become evident in Chapter four and thereafter, this thesis is more specific than the framework provided by Garcia and others.

3.4 International Development Law

International development law (IDL) is a form of international economic law which lends itself to rules, regulations and norms that underpin and regulate common

[278] Kumm, 'The Legitimacy of International Law' (n 50).

[279] Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (n 265).

[280] ibid.

[281] ibid; see also Cameron, 'In Search of Investment Stability' in Talus (ed), *Research Handbook on International Energy Law* (n 269); Gordon and Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (n 266).

development concerns crisscrossing international borders or jurisdictions of states, particularly in developing countries such as those in SSA. This area of law has a multipolar framework which incorporates both 'law and political theory' whereby it considers legal imperatives across international development frontiers as well as public policy issues and choices. As a result, this field of law is not only the subject matter of environment and human rights but also 'sociology, economics, finance and history'.[282]

Sarkar provides a broad definition[283] of IDL as:

- Laws that are applied to finding solutions for common but difficult problems facing every human being in the world - such as those trying to find remedies to the injustices in the petroleum industry of SSA; [284]
- Laws that generally provide a common platform to effect essential changes in the universe – such as the NAS to help address the imbalances in SSA;[285]
- Laws that specifically seek to provide an envelope within which relevant legal changes in the globe can be realised – such as a possible treaty regime for petroleum law to create a consolidated *lex petrolea*.[286]

The idea of IDL dissociating itself from imperatives such as right to development does collapse even before it begins to stand because in modern times, DRTD has

[282] Rumu Sarkar, *International Development Law: Rule of Law, Human Rights & Global Finance* (Oxford University Press 2009); Linarelli, Solomon and Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (n 268).

[283] Sarkar, *International Development Law: Rule of Law, Human Rights & Global Finance* (n 282) 77-78.

[284] ibid.

[285] ibid.

[286] Qureshi and Ziegler, *International Economic Law* (n 276).

been established to be "an inalienable human right"[287] and should reasonably be integral to the framework of IDL. Development stakeholders such as the World Bank and MNPCs should be invited to significantly contribute to the endeavour of harnessing ROL and justice in petroleum law to enhance socioeconomic rights. This imperative ought to be a crucial component of IDL. But it has not been clearly highlighted by existing literature on IDL.

3.5 The World Bank, MNCs, Law and Development

Empirical evidence adduced by the World Bank reveals that, from just 1999 to 2010, more than 30 countries got their petroleum contracts revised significantly, sometimes in apparent aberration of the good faith principle enshrined in *pacta sunt servanda*[288] doctrine of international law. Some of the countries in question are said to have even come out with a completely new petroleum legal framework to respond to the socioeconomic dynamics of the HS.[289] This suggests that the petroleum legal regime continues to need improvements in order to enhance socioeconomic development, as argued in this thesis.

One of the prominent scholars whose works dominate in the area of connecting law, World Bank and development in SSA is Shihata. This is especially so with respect to that which comes from the practitioner's lenses. For instance, he has presented an elaborate narrative about the relationship between the World Bank,

[287] DRTD, Art 1(1).

[288] Vienna Convention on the Law of Treaties [1969]1155 UNTS 331, Art 26.

[289] Paul Stevens and others, 'Conflict and Coexistence in the Extractive Industries' (A Chatham House Report, November 2013) < www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%2C%20Environment%20and%20Development/chr_coc1113.pdf > accessed 4 April 2017.

development and law.[290] He posits that World Bank's role in harnessing development of developing countries is phenomenal and that its legal framework on development nonetheless has some limitations which has to be overcome in future. According to Shihata, the issue of using law to "achieve economic revival in the short run and sustainable development in the long run addresses the key concept of the legal framework both on national and international level".[291] How World Bank deliberately uses its activities to effectively enhance legal imperatives in ways that promote development is a limitedly addressed concern which runs through Shihata's writings.

A number of interesting publications have also been made on the nature[292] of MNCs and how operations of MNCs are regulated to strike a balance between their 'rights and duties' as well as their impact on development in the light of international law. Bakan[293] and Stiglitz[294] have extensively commented on how MNCs are exploitative and, therefore, are required to be subjected to accountability mechanisms.[295] Muchlinski[296] is especially renowned for having

[290] Shihata, 'The Role of Law in Business Development' (n 149).

[291] ibid.

[292] For the extent of character and personality of MNCs, see Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (Grotius 1987); Detlev F Vagts, 'The Multinational Enterprise: A New Challenge for International Law' (1969) 83 Harvard Law Review 739.

[293] Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press 2004).

[294] Stiglitz E Joseph, 'Multinational Corporations: Balancing Rights and Responsibilities' (2007)101 Proceedings of the American Society of International Law 3-60.

[295] Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (n 293); Joseph, 'Multinational Corporations: Balancing Rights and Responsibilities' (n 294) 3.

[296] Muchlinski, 'Corporations in International Law' in Rudiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (n 53); Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007).

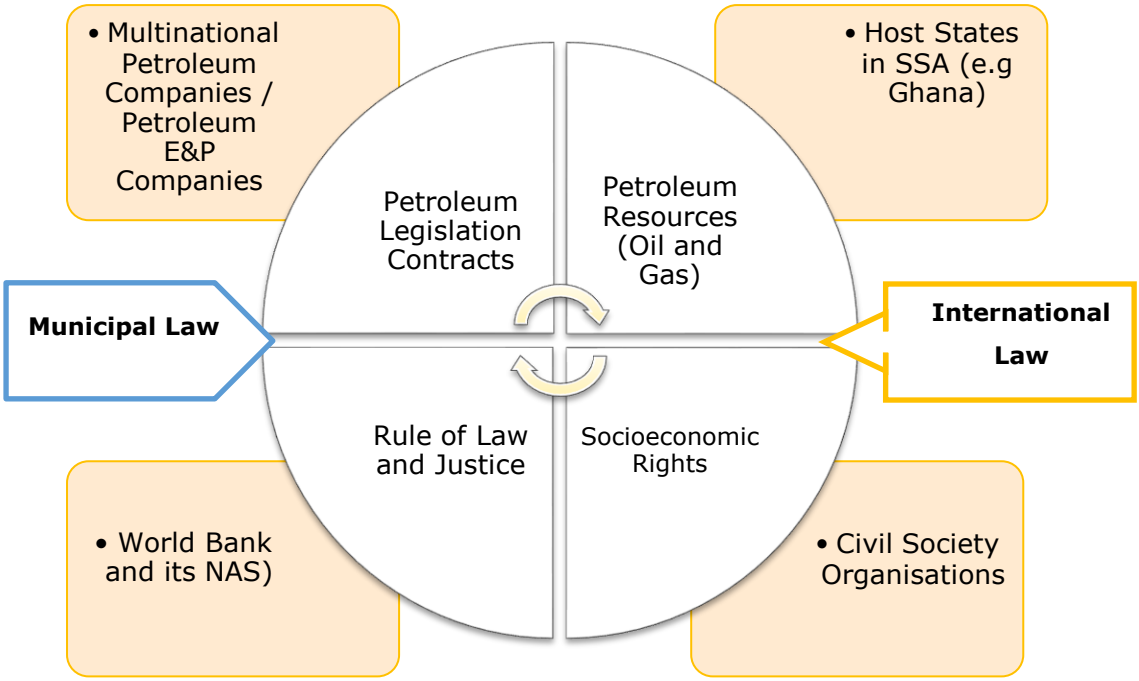
given the most elaborate evaluation of regulating MNCs and synchronising their rights and duties with regards to international legal imperatives. MNCs are international entities with private interests which can be dynamically extortive and, therefore, needs continuous rulemaking to safeguard the interests of the public.[297]

This thesis comes out uniquely with regards to its examination of how development law (with focus on petroleum law, ROL, justice and socioeconomic rights) should interrelate with strategies of IGOs, CSOs/Non-Governmental Organisations (NGOs) and MNPCs in order to procure the needed socioeconomic development in SSA. As typically presented by the contribution of the thesis, therefore, the diagram in Figure 1 below illustrates the conceptual framework relationship between:

- The HS, MNPCs, IGOs (e.g. World Bank and its NAS) and CSOs/NGOs as key stakeholders in the socioeconomic development frame, on one hand, and
- Petroleum legislation, contracts, petroleum resources, socioeconomic rights (e.g. DRTD), ROL and justice as imperative issues, on the other hand.

[297] Menno T Kamminga, 'Multinational Corporations in International Law' (Oxford Bibliographies, 13 January 2014) < www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0049.xml > accessed 20 January 2017.

Figure 1: Conceptual Framework showing interaction of key players with Key Concepts



3.6 Conclusion

The literature review has shown that there is very scant literature on the beneficial relationship between petroleum law, the ROL, justice and socioeconomic rights in the light of the NAS. The next chapter analyses the harmonious but sometimes paradoxical relationships between the ROL and justice in the context of petroleum E&P in SSA.

CHAPTER FOUR

THE PARADOX OF RULE OF LAW AND JUSTICE

4.1 Introduction

The ROL and justice complement each other.[298] The following evaluations highlight various perspectives on the relationships between the above concepts - which are fundamental to any effective functioning of the law in any socioeconomic sphere including petroleum E&P where several private and public interests do compete for space to claim one right or the other.

4.2 The Rule of Law

The original idea behind the ROL was said[299] to have been mooted or invented by Aristotle when he was translated to have averred that, "it is better for the law to rule than one of the citizens … so even the guardians of the laws are obeying the laws".[300] After Aristotle, people such as Justice Blackburn were said[301] to have observed that law is supreme and should be exercised without prejudice and arbitrariness or the opportunity for that. Justice Blackburn had, for instance, intimated in 1866 that 'general ROL frowns upon someone to be made a judge in

[298] Rawls, *A theory of Justice* (n 24); Rawls, *Justice as Fairness: A Restatement* (n 24); Hooker, 'Fairness' (n 66); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

[299] Brian Z Tamanaha, *On the Rule of Law* (Cambridge University Press 2004) 8-9.

[300] ibid.

[301] JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press 2007).

his own cause'. It was, however, in 1885 that ROL was effectively coined[302] and stimulated by Professor A V Dicey. For Dicey, the ROL could mean three things:

Firstly, punishment of anyone should be based only on that person's "distinct breach of law established in the ordinary legal manner before the ordinary courts of the land".[303]

Secondly, no one is ever above the law and that everyone, without exclusion, "is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".[304]

Dicey's third meaning of ROL which is based on comparisons of foreign constitutions have been largely vitiated by the potent criticisms against it, especially labelling it as misleading.[305] There is no basis to consider this third point in this thesis.

Therefore, ROL is fundamentally referred to a situation in which the use of arbitrary power is curtailed by laws and regulations that have been 'clearly defined and established'.[306] It advocates that every nation should be governed by legitimate laws and that individual decisions by officials of state outside democratic laws established by the people must not be allowed. Based on the foregoing

[302] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan 1945) 188.

[303] ibid; Bingham, *The Rule of Law* (n 23) 3.

[304] Dicey*, An Introduction to the Study of the Law of the Constitution* (n 302); Bingham, *The Rule of Law* (n 23) 4.

[305] Bingham, *The Rule of Law* (n 23) 4.

[306] English Living Oxford Dictionaries, 'Definition of rule of law in English: Rule of Law' (Oxford University Press 2017) < https://en.oxforddictionaries.com/definition/rule_of_law > accessed 4 June 2017.

dispositions, the ROL can be used in different but complementing contexts; "rule according to law, rule under the law and rule according to a higher law".[307]

4.2.1 Rule according to the law (RAL)

This context is usually applied to state actors who enforce the law or deliver public goods to the citizens whose rights must be respected at all material times. So, here, ROL mandates state authorities to ensure that they exercise the power vested in them by the state much in accord "with well-established and clearly written rules, regulations, and legal principles"[308] so recognised by the laws of the state. In this, law is contextually distinguished from 'will, power and force'. Under the circumstance, state authorities will be deemed to be acting within ROL when their conduct or actions are carried out based on "the express provision of a written law" or, to some extent, recognised customary law or principle. However, government functionaries that act outside the authority of any law are deemed to do "so by the sheer force of personal will and power" or by whims and caprices of those officials, for that matter.[309]

Ex post facto (i.e. after the fact) laws that retroactively apply the law is a conduct that is not in pursuant to the tenet of RAL. *Ex post facto* laws are prohibited in the

[307] Gale Group, 'West's Encyclopaedia of American Law' (2nd edn, 2008); Farlex, 'Rule of Law' (The Free Dictionary, Legal Dictionary, 2017) < http://legal-dictionary.thefreedictionary.com/rule+of+law > accessed 15 May 2017.

[308] ibid.

[309] Ronald A Cass, *The Rule of Law in America* (Johns Hopkins University Press 2001).

US,[310] for example. In Ghana,[311] Nigeria[312] and Angola,[313] retroactive or retrospective application of the law is equally prohibited sometimes with exceptions when the retroactivity is favourable[314] to the defendant. The constitution of Ghana, for instance, states that no law shall be passed to operate:

> … retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 or 182 of this Constitution.[315]

Many democratic states that respect ROL have these principles enshrined in their laws or are expected to do so. In particular, countries that have written constitutions usually prohibit *ex post facto* laws or permit such laws with limitations favourable to past convicted offenders. There are few exceptions where democracies especially the parliamentary systems such as in the UK, there is the possibility for the parliament to pass *ex post facto* laws because they can claim that they are masters of their own rules, are supreme[316] and can legislate on anything within their remit as long as it is deemed to be appropriate, proper and

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[310] The U.S. Constitution [1787] Art I, s 10, clause 1 (for US state laws) and Art 1, s 9, Clause 3 (for US federal laws).

[311] The Constitution of the Republic of Ghana [1992], Art 107 (b).

[312] The Constitution of the Federal Republic of Nigeria [1999], Art 4(9).

[313] The Constitution of the Republic of Angola [2010], Art 57(2).

[314] For example, the Constitution of the Republic of Angola [2010] Art 65(4), 102(2); see Flávio Inocêncio, 'The Constitutional Transformations in Angola: The Constitutional Court as the "Guardian of the Constitution"' (2015) 5 ReDiLP - Portuguese Language Law Journal 65, 78.

[315] The Constitution of the Republic of Ghana [1992], Art 107 (b).

[316] This resonates with the parliamentary supremacy doctrine.

fit to do so to protect the interest of their constituents – and by extension, the whole country.[317]

Many non-pseudo democratic countries in SSA have their constitutions or legal orders prohibiting retroactive legislation, of course, with some exceptional situations being applied. They mimic the European versions of *ex post facto* dynamic. For instance, in Ghana, exceptions are granted in Articles 178 or 182 of the Constitution[318] which address issues of consolidated fund, appropriation and public debt management which can permit such a retroactivity.[319]

In SSA, there is ensuing debate as to whether *ex post facto* laws run against the principles of ROL and legality which obviously underlie the nerve of many democratic constitutions and legal systems around the world. In the *Pienaar Bros case,*[320] for instance, even though the court ruled that there was no provision in the South African Constitution prohibiting *ex post facto* laws in cases related to the nature of taxes and also ruled against the Serurubele Trading 15 (Pty) Ltd (Taxpayer's) argument that favoured prohibition of retrospectivity based on Article 35 of South African Constitution,[321] the Court clarified that, overall, retroactive

[317] Cass, *The Rule of Law in America* (n 309).

[318] The Constitution of the Republic of Ghana [1992].

[319] Cass, *The Rule of Law in America* (n 309).

[320] *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue and GNP* [unreported case no 87760/2014 of 29 May 2017 (Pienaar Bros)]; see Jerome Brink and Emil Brincker, 'Important judgment on the constitutionality of retrospective legislation' (CDH, Tax and Exchange Control Alert, 9 June 2017) < www.cliffedekkerhofmeyr.com/en/news/publications/2017/Tax/tax-alert-9-june-Important-judgment-on-the-constitutionality-of-retrospective-legislation.html > Accessed 15 December 2018.

[321] The Constitution of the Republic of South Africa [1996] s 35(3).

application of laws in South Africa should be looked at on a case by case basis as the facts avail themselves to reasonableness and rationality test as prescribed by ROL on which South Africa is deemed to be built upon besides the supremacy of the country's Constitution.[322]

In fact, on the face of s35 of the South African Constitution, retroactive laws are prohibited. The exception given therein concerns, "acts which violated international law at the time they were committed may be prosecuted even if they were not illegal under national law at the time".[323] However, the rejection of the prohibition provision was based largely on the context and the lack of clear jurisprudence in that area in South Africa. Although the constitution clearly prohibits retroactivity in criminal law, judge Fabricius averred that context "is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it".[324]

What *Pienaar Bros case*[325] exemplifies here is that there are instances where the *ex post facto* rule is not stipulated by the constitution and thereby could fail the constitutional test on the grounds of the letter of the constitution but when subjected to the general legal environment and ROL, the facts of the case would determine whether or not retroactive application of the law is permissible. Usually, even with the controversies surrounding *ex post facto* law in the light of RAL, most of the jurisdictions consider this principle in criminal law but not in civil law. In a

[322] The Constitution of the Republic of South Africa [1996] s 1(c).

[323] The Constitution of the Republic of South Africa [1996] s 35(3).

[324] *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue and GNP* [unreported case no 87760/2014 of 29 May 2017 (Pienaar Bros)].

[325] ibid.

country such as Norway, *ex post facto* legislation is expressly prohibited in both civil and criminal cases. However, the constitution[326] permits retrospectivity in civil cases only when it is reasonable to do so as in the case of *Bergshav Tankers*[327] in respect of legality of tax assessment with retroactive effect to some oil companies.

The difficulty here is that what if the law specifically permits retroactive application of the law and state authorities accordingly apply it to cases, would the government officials be running against ROL? This concern highlights a limitation of ROL under RAL since the legal order of a country may permit certain retroactivity which undermines the rights of persons.[328]

Aside the issue of *ex post facto* laws, the principle of the need for clarity of laws comes to play. This may be controversial because the meaning of clarity may differ from one person to the other while some people will intentionally abuse this subjectivity to their favour.[329] For instance, in the petroleum industry where exploitative interests compete with unwavering dispositions, it is unsurprising that some oil legislation and contracts are vaguely drafted in order to afford some of the stakeholders, such as the government officials and petroleum companies, the

[326] The Constitution of Norway [1814], Art 97.

[327] Appeal Case 2009/1575, *Bergshav Tankers AS v The Ministry of Finance on behalf of the State* [Norwegian Supreme Court].

[328] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Gale Group, 'West's Encyclopaedia of American Law' (n 307); see Bingham, *The Rule of Law* (n 23)

[329] Neil K Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge University Press 2001); Bingham, *The Rule of Law* (n 23); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Gale Group, 'West's Encyclopaedia of American Law' (n 307); Farlex, 'Rule of Law' (n 307).

opportunity to selfishly interpret the vague provisions in their favour and serve their agenda.[330]

However, it is a standing principle of RAL that it is against the tenets of ROL when state authorities make efforts to punish or have punished people for breaching "a vague or poorly worded law".[331] Personal discretion of law enforcement agencies (LEAs) is granted an unbridled reasoning space to operate if the words of the legal rules are not clear enough. The remedy lies in the established criteria for determining legal clarity which is provided by Article 31 of VCLT, 1969.[332] When legal rules are precise and clear in a substantial and sufficient degree, it is expected that not only will it check unbridled personal discretion and abuse of the law by LEAs, as well as push them to apply the law non-arbitrarily or non-discriminatorily, but also, such a move will enable anyone with 'ordinary intelligence or basic rationality' to know or ascertain, without predictable ambivalence, what is defined as an unlawful behaviour.[333]

The judiciary, which is mandated to administer justice through interpretation of legal rules, imposition of sanctions and granting of awards, are always faced with contentious cases requiring the use of standard interpretative procedures of law. That is, the courts are called upon to reasonably give interpretation to both legal

[330] Peter D Cameron and Michael Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (World Bank 2017); EISB, Good-fit practice activities in the international oil, gas & mining industries (Extractive Industries Source Book, 16 May 2016) <www.eisourcebook.org/ > accessed 24 September 2017.

[331] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56(4) University of Chicago Law Review 1175.

[332] VCLT, Art 31, General rule of interpretation.

[333] Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Barnett, 'Can Justice and the Rule of Law Be Reconciled? (n 23).

terms and legal principles that sometimes defy clearest exposition. This challenge is also faced by judges and magistrates when it comes to the application of unclear legal terms such as reasonable care, due process, and undue influence.[334] Arguably, as long as the wording of the legal rules are ambiguous or imprecise, the standards required even in Article 31 of VCLT, 1969 may be left stranded in the dungeons of personal idiosyncrasies.[335]

It is highly imperative that the judges and magistrates retain the integrity of the judicial system by ensuring that ROL, in the light of RAL, is respected through conscious effort of having not only open-minded judges and magistrates but also a principled approach to defining, interpreting and applying legal principles and norms - be they contractual, legislative, constitutional, common-law, civil-law or the synthesis thereof.[336]

The bottom-line of the discussion on RAL, this far, is that petroleum laws need to be very clear to avoid controversy and misapplication. In addition, where application of petroleum laws by government officials can be left to the privilege territory of whims and caprices of state authorities, it can produce questionable petroleum legislation and contracts as well as breed corruption and bribery in the petroleum industry.[337] At the same time, when the law is retroactively applied, it

[334] Scalia, 'The Rule of Law as a Law of Rules' (n 331); Cass, *The Rule of Law in America* (n 309).

[335] Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Farlex, 'Rule of Law' (n 307).

[336] ibid; Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329).

[337] Kim Talus (ed), *Research Handbook on International Energy Law* (Research Handbooks in International Law, Edward Elgar, Cheltenham 2014); Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Bingham,

can generate benefits for the state but creates disincentive for investors. For instance, with respect to stabilisation clauses in petroleum agreements that have, for long, been argued to be skewed towards the exploitative interests of MNPCs, a retroactive law can be able to denounce or modify unfavourable provision of a petroleum contract that was entered years back, yet which is still applicable in the present time with its unfavourable terms.[338]

Particular provisions such as unfair benefit-sharing formula and long contract duration could be mitigated with retroactive laws by, at least, reasonably asking that the contractual terms can no longer move into the future with any clearly unfavourable terms for SSA. This may not have to seek for any retribution from the petroleum companies. The challenge is that some MNPCs may find such a retroactive provision problematic since it will have an effect on their expected returns and the guarantee provided by stabilisation clauses. These sometimes discourage investors from investing into the petroleum sector but at the same time, they can serve as a safe haven for HS to redress the balance on highly unfair contractual terms executed by past opaque governments of the HS.[339]

4.2.2 Rule under the law (RUL)

With RUL, the underlying imperative is usually that in exercising the authority on behalf of the state, government officials, no matter who they are, are not and cannot be above the law,[340] thus "no one is above the law". Everyone is equal

The Rule of Law (n 23); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Gale Group, 'West's Encyclopaedia of American Law' (n 307).

[338] ibid.

[339] Talus (ed), *Research Handbook on International Energy Law* (n 337) 3-17.

[340] ACHPR, Art 3.

before the law.[341] In reality, this can be arguable since some people are granted certain privileges that may make them appear to be above other people.[342] But with established checks and balances, even the president, prime minister or monarch of a democratic state can be subjected to the same measures of legal rules as anybody else in the state.[343]

Despite the inconsistency between the theory and reality of RUL, it is still a valued proposition that in a proper context of ROL, everyone, no matter their status, colour, religion, age, sexual orientation, power or wealth, should be subjected to the same legal rules, in the same measure, without fear or favour, at all material times.[344] Even if this notion appears arguably superficial, it stands to reason that petroleum-rich countries that reasonably pursue this imperative are more likely to have a welcoming environment for MNPCs. Essentially, petroleum legislation should be formulated in a way that does not make any petroleum company or any state official fronting for them to be treated differently than any other person.[345]

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[341] Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329).

[342] UDHR, Art 7; ACHPR, Art 19; Christian Fleck, 'The Rule of Law: A Message from LexisNexis Managing Director Christian Fleck' (LexisNexis, 2017) < www.lexisnexis.co.uk/en-uk/about-us/rule-of-law.page > accessed 3 June 2017.

[343] ibid; Gale Group, 'West's Encyclopaedia of American Law' (n 307).

[344] OHCHR, 'International Covenant on Economic, Social and Cultural Rights (ICESCR)' (Adopted on 16 December 1966 by General Assembly resolution 2200A (XXI), entered into force on 3 January 1976, in accordance with article 27) < www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx > accessed 15 December 2016.

[345] Christian Fleck, 'The Rule of Law: A Message from LexisNexis Managing Director Christian Fleck' (n 342); Farlex, 'Rule of Law' (n 307).

4.2.3 Rule according to higher law (RAHL)

With the inherent uncertainties surrounding RAL and RUL, it is very possible that strict compliance with the dictates of these rules may yield outcomes which may be considered as unfair or unjust.[346] For instance, in the petroleum industry of SSA, there are instances where RAL and RUL are applied resulting in contractual arrangements that can be considered as unjust based on the unfair benefit-sharing in favour of the MNPCs against HS and its citizens.[347]

These situations resonate with a school of thought that there is 'no substantive content' in the ROL. It avers that depending on the disposition of a government, citizens may be deprived of enjoying some of their fundamental socioeconomic rights by the government under the ROL as far as this deprivation is carried out according to a law that has been duly enacted.[348] This position, of course, radiates with RAL and RUL imperatives. Arguably, however, they come without the whole essence of justice, which is where the RAHL becomes a more appealing regime that ushers in another school of thought. This school of thought argues that not only should every written legal rule conform to well-established standards of RAL and RUL, but also, and even more importantly, legal rules must be drafted according to the dictates of universal principles of fairness, justice, and, to some extent, morality.[349]

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[346] Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Gale Group, 'West's Encyclopaedia of American Law' (n 307).

[347] Desta, 'Competition for Natural Resources and International Investment Law (n 15); Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66).

[348] Cass (n 309).

[349] ibid.

RAHL essentially contend that, the popular notion of RUL that 'no one is ever above the law' is only made more meaningful when state authorities desist from outright refusal of at least a minimum standard of dignity and respect as well as independence that is deserving of anyone as a human being. This is because the right enshrined in the principle of equal treatment for everyone is destroyed or undermined when these natural entitlements of dignity, respect and autonomy have not been reasonably granted to individuals.[350]

In effect, this narrative constitutes principles that surpass the ordinary written and customarily adopted laws at the behest of the government. It is usually described as essential constituents of the theory of higher law or the natural law.[351] This has had a popular appeal amongst classical scholars. But philosophical scholars such as Bentham are critical of this proposition of natural law that embodies natural rights. Rights ordinarily are not automatic. For Bentham, they are established by enacted laws.[352]

This is an arguable point of view. Take the trial issues at Nuremberg, for instance. Had it not been that natural principles were invoked by the World War 2 Allies (or Allied powers) in the trials, it would have been very difficult if not impossible to have disempowered the potent defence that was forcefully advanced by the Nazi Germany's leaders using the enacted laws at the time as their safe haven.[353]

It can be argued that some of the contestable petroleum contract cases in SSA could almost too easily pass the test of RAL and RUL. This is because governments

[350] ibid.

[351] ibid.

[352] ibid.

[353] Norbert Ehrenfreund, *The Nuremberg Legacy* (Palgrave Macmillan 2007).

in SSA have enacted not only petroleum laws that they follow on petroleum issues but also, they may well endeavour to follow due process to enter into petroleum contracts. One cannot discount the fact that the governments are sometimes influenced to pursue a direction that ultimately would be deemed as unfair and unjust. However, this may not necessarily undermine RAL or RUL. To make cases of this nature succeed in courts, it is important that the tenets of RAHL are applied.[354]

This is partly because of the new legal paradigm that these natural principles are complementary to enacted legal rules, at the same time they serve as the source of inspiration for enacting certain legal rules. In any case, the principles that underpin natural rights have, over the years, been legislated upon by governments and have increasingly become integral to the foundation of most written and unwritten constitutional principles. [355]

Embracing the three contexts, RAL, RUL and RAHL, the World Justice Project provides the applied and comprehensive rendition of ROL as that which characterises "four universal principles".[356] These are:

- 'Government, its officials and agents on one hand and individuals and private entities are all equally accountable under the law; [357]

[354] Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Farlex, 'Rule of Law' (n 307).

[355] ibid.

[356] WJP, 'The Four Universal Principles' (n 35).

[357] ibid.

- The laws must be clear, publicised, stable and just, they must be evenly applied, and must protect fundamental rights, including the security of persons and property and certain core human rights;[358]
- Enactment, administrative and enforcement processes of the laws must be accessible, fair and efficient;[359] and
- Delivery of justice is timeously done by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources and reflect the makeup or diversity of the communities they serve'.[360]

In the context of petroleum E&P, and as instrument for social and economic progress, the ROL can be used as a legal principle to effectively provide a guide for the formulation and implementation of legislation and contracts that govern the relations between MNPCs and petroleum-rich countries in SSA. Turksen has observed that people ought to be 'resilient in fighting for the ROL since it is part and parcel of human rights' such as 'economic rights,[361] and social rights[362] of the people.[363]

It is crucial that the ROL is applied in the petroleum industry of SSA since it equips the citizenry of oil-rich countries with the necessary legal capacity to 'seek legal redress and invoke their rights' particularly in the transactional exchanges

[358] ibid.

[359] ibid.

[360] ibid.

[361] ICESCR, Arts 1(2), 11.

[362] ICESCR, Arts 12, 13, 14; ACHPR [1981], Art 16, 17(1).

[363] OHCHR, 'ICESCR' (n 344).

between their host governments and MNPCs. A further interesting perspective is that with the application of ROL, society is offered the opportunity to serve as instrument for 'checks and balances against power that is concentrated in the hands of one person, or a selected group of people'.[364] The ROL, when appropriately applied, is one of the best ways people can strive to guarantee justice in the petroleum industry of SSA.[365] The AU obliges and encourages its member states to integrate ROL into their governance institutions because of the significant value it carries.[366]

4.3 The Snapshot of Justice

As discussed under RAHL, justice is a principal organ of law. It appeals to natural or higher law, modern law and morality from both categorical and consequential persuasions. RAHL is categorical in terms of its focus on respecting the rights and duties of parties contained in the justice delivery processes; and consequential in regard of focus on realising better outcomes[367] from the conduct of parties embroiled in the justice delivery processes.[368]

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[364] Kingston University London, 'Kingston University academic lays down the law at inaugural professorial lecture' (News articles, 11 November 2016) < www.kingston.ac.uk/news/article/1752/11-nov-2016-kingston-university-academic-lays-down-the-law-at-inaugural-professorial-lecture/ > accessed 13 March 2017.

[365] Michael J Trebilcock and Ron Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar2008).

[366] Constitutive Act of the African Union (Done at Lome, Togo, this 11th day of July 2000), Arts 3 and 4; African Charter on Democracy, Elections and Governance (Adopted by the Eighth Ordinary Session of the Assembly, held In Addis Ababa, Ethiopia, 30 January 2007) Arts 3(2), 4(1), 32(8).

[367] Better outcomes measured in terms of more benefit or greater good for more people.

[368] Sandel, *Justice: What's the Right Thing to Do?* (n 24).

In basic terms, justice, on one hand, characterises the humanity's consensual rules or 'universal rules of conduct' which are common to and are largely accepted by human beings as superior to the modern legal system that governs their social and economic exchanges. In this regard, justice is a kind of natural law steeped in morality, social norms and conscience requiring that inherent or intrinsic rights of human beings should be observed by everyone. It is the main source of inspiration for most legal systems in the world.[369]

On the other hand, justice is presented as conduct or action required to comply with a legal regime that protects the rights and obligations of people in a given jurisdiction. The cause of action available to individuals or groups to seek appropriate redress and remedies is hugely reliant upon fairness which the society's legal system must avail to everyone in order to ensure not only socioeconomic wellbeing of the individuals but also stability, harmony and peacefulness of society.[370] Depending on the kind of remedies that are being sought for, justice, in this instance, can be conceptualised as either procedural, substantive, distributive, restorative or retributive. The first three typologies tend to resonate well with petroleum E&P in SSA. Thus, procedural, substantive, distributive justice types do imbibe 'significant implications for socioeconomic justice in national and international spheres.[371]

Appropriated to be primarily anchored on fairness, justice focuses on ensuring that everyone's interest or endowment is duly protected and enhanced in any social

[369] Maiese, 'Principles of Justice and Fairness' (n 24).

[370] ibid.

[371] ibid.

interaction so as to secure their dignity and inalienable rights.[372] The foundation of justice is established on the disposition that at all material times there is the need to 'recognise the inherent dignity, equal and inalienable rights of all members of the human family'.[373] The ACHPR proclaims that 'justice is one of the essential objectives that will enable African people to achieve their legitimate aspirations'.[374] Furthermore, one of the directive principles of state policy in Ghana's constitution is commitment to 'the realisation of justice'.[375] The constitutions of Nigeria[376] and Angola[377] are also primed on achieving justice.

However, this endeavour has to be procured within a given context such as transactions on petroleum E&P between MNPCs and governments in SSA. In this context, governments, IGOs and MNPCS together with their partners are required to ensure that best possible normative and legal framework is not only mutually activated and pursued but also that substantial justice is procured for each to have their due and equitable share.[378] However, although there appears to be

[372] ACHPR, Art 5.

[373] UDHR, Preamble, recital 1; ICCPR, Preamble, recital 1; ICESCR, Preamble, recital 1.

[374] ACHPR, Preamble, recital 2.

[375] The Constitution of the Republic of Ghana [1992], Art 35(1).

[376] The Constitution of the Republic of Nigeria [1999], Art 14.

[377] The Constitution of the Republic of Angola [2010], Art 89.

[378] Maiese, 'Principles of Justice and Fairness' (n 24).

'increasing presence' of criminal justice in Africa,[379] socioeconomic justice struggles to attract the needed attention.[380]

4.4 Relating Rule of Law with Justice in Petroleum Exploitation

The arguments about the relationship between ROL and justice have been centred on if and to what degree they contradict each other, they augment each other and ultimately about how one is a preferred value than the other.[381] On the one hand, Frank has, for instance, indicated his rejection for "rule of law values of generality and uniformity in legal precepts in favour of justice".[382] He has argued, in essence, that 'ROL formal requirements in the light of justice can either be said to be redundant or pernicious. A situation where justice and ROL interact with each other in a corresponding manner, ROL effectively becomes redundant. But where justice in a given case and that of ROL interact in a divergent fashion, then ROL is considered to be pernicious to the extent that it detracts from achieving justice'.[383]

What this means is that, justice swallows or absorbs ROL when the two concepts seek to achieve the same purpose but as long as ROL aims at achieving a different outcome from justice, then ROL is considered detractively malicious. This view is

[379] Eric Jeanpierre, 'Reflections on the intricate relationship between international justice and Africa' in David A Frenkel (ed), *International Law, Conventions and Justice* (Institute for Education and Research 2011) 209.

[380] Paul O'Connell, 'The Death of Socio-Economic Rights' (2011)74(4) The Modern Law Review 532; WJP, *World Justice Project Rule of Law Index* (n 41).

[381] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

[382] Jerome Frank with Brian H Bix, *Law and the Modern Mind* (Transaction edn, Routledge 2017) 159-171.

[383] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

favour of justice as the preferred value of law.[384] On the other hand, Bork is characterised as one of the scholars that tend to have preference for ROL over that of justice, primarily owing to the fact that any ethical value and morals that have not been recognised by enacted laws are inapplicable and those that have been recognised as law do not leave any space for the courts to interpret the provisions of the constitution and statutes using any criteria other than using ROL tenets such as fairness and impartiality.[385]

Whereas justice is often understood from substantive terms, that of ROL is conceived in procedural terms. The former focuses on how 'correct' an outcome of an individual case is. The latter considers and prioritises how fair the legal process of addressing an individual case. The bone of contention between the legal precepts dovetails into a conflictual realm in a situation where "the outcome of a "fair" legal system is deemed to be unjust; or when the effort by the legal system to be "just" is deemed by critics to be unfair".[386] It is arguably fair to see these two varied legal precepts almost tending to achieve similar results but with different means to assess and value the nature of the achievement.[387]

At what point the value of one is seen favoured to be an end while the value of the other is deemed to be subservient to the other is at the heart of the debate. Each of these standpoints about which is the most favoured or not may well have

[384] ibid.

[385] Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1 <https://pdfs.semanticscholar.org/2a1e/1003ab0ef0ca732cac1bae43d02f35e6f0e8.pdf > accessed 15 October 2018.

[386] ibid.

[387] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

been unable to appreciate the real purpose of justice and ROL.[388] For instance, despite the fact that these two legal precepts can be said to be favoured values which "are "ends" for certain analytic purposes, both are also "means" of dealing with a set of fundamental and pervasive social problems"[389] including unfair contractual arrangements in the petroleum industry.

It is argued by Barnett that ROL and justice could "be conceived as solutions to particular fundamental social problems that are unavoidable features of human social life"[390] such as the need for petroleum-rich states to have contracts with MNPCs which invariably comes with social concerns such as lack of contractual fairness in petroleum agreements.[391] For Barnett, the prospect that social conflict that may occur between persons will "give rise to a need for justice and rule of law" is virtually a truism.[392]

The challenge to 'preserve and harness the pursuit of happiness by individuals in a social context is, arguably that which justice and ROL have been developed to address' - to a large extent.[393] The social functions performed by ROL and justice are indispensable. These controversial twins in the hood of social order, have been

[388] ibid.

[389] ibid, 599.

[390] ibid.

[391] Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66).

[392] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

[393] ibid.

presented by Barnett as instruments for "coping with, if not solving, the pervasive social problems of knowledge, interest, and power"[394] in the social context.[395]

It is reasonable to argue that ROL and justice would, at first, appear to contradict or compete with each other in achieving the common goal of social order. And, at certain point, ROL is deemed as kind of "a second-best approximation of true justice".[396] Whatever imperfections that might have characterised their evolution and still are, in the final analysis, it remains to be the case that ROL facilitates the understanding and enforcement of justice in a social context.[397] They are fused well to address social imbalances when their basic tenets and aims are strategically reconciled.[398]

There is the need to be opened to evolving ideas that can further reform and harness the way in which the two legal precepts work together for not only understanding and appreciating social problems and social functions of justice and ROL for the betterment of society, but also, this disposition will be instrumental in the efforts to resist the machinations of "extremists" from "the right" and "the left" that may have the propensity to "deprecate one value in pursuit of the other".[399]

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[394] ibid, 622.

[395] Randy E Barnett, 'Pursuing Justice in a Free Society: Part Two-Crime Prevention and the Legal Order' (1986) 5(1) Criminal Justice Ethics 30.

[396] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23) 623.

[397] ibid.

[398] Randy E Barnett, 'Pursuing Justice in a Free Society: Part One-Power vs. Liberty' (1985) 4(2) Criminal Justice Ethics 50.

[399] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23) 624.

The commonalities of these legal principles have to be harnessed and the respect for them adequately preserved while keeping analytic eyes on reasonable reforms that evade the reach of the distorted propositions of the "extremists". Essentially, ROL and justice are bedfellows and neither of them should be applied to socioeconomic issues without the other – an attempt to do so may well produce a disturbing nightmare with serious real-life implications for socioeconomic rights.[400]

A great way forward is to approach the two legal principles from two interconnecting spectra of analytical taxonomy: (i) the reactive and proactive spectrum; and (ii) the process and content spectrum.[401] The former articulates the need for stakeholders to be very proactive in establishing effective measures for enforcing the principles and be reactive in ensuring that the measures are properly applied to addressing any disputations. The latter considers the need to ensure that the process of ROL and justice are streamlined or formalised with benchmarks and with content that is rich in sound reasoning which substantially protects and promotes entitlements of individuals.[402]

The thesis articulated by Barnett is to the effect that when ROL and justice are conceived properly, it would see them to be dependent "on neither undue optimism, nor undue pessimism about human nature and the human condition, but a proper mixture of the two".[403] Therefore, justice and ROL are, to a large extent, comfortable and complementary bedfellows that should seek to

[400] ibid.

[401] Jerald Greenberg, 'A Taxonomy of Organizational Justice Theories' (1987) 12(1) Academy of Management Review 9.

[402] Barnett, 'Pursuing Justice in a Free Society (n 398) 50.

[403] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23) 616.

synchronise or harmonise the divergent interests, needs and powers that have been embedded in institutions, procedures and other structures of society so much so that no one in society is capriciously denied the right to own and benefit from the society's petroleum resources, for instance.[404]

In the field of petroleum E&P, legal disputations are daily occurrences due to the high stakes involved.[405] Similarly, even when there are no legal disputations in a particular transactional relationship, there is always the need to apply ROL and justice. In SSA, especially, the beginning of concerns that attract justice and ROL has been the disfigured nature of a number of legal frameworks which draw down to unjustifiable contractual terms that tend to make MNPCs better off than that of the HS. For instance, it is difficult to fathom why and how the contract between Ghana and petroleum companies in Ghana's Jubilee oil fields gives only about 18.64% share for Ghana as the HS.[406] Under normal circumstances, this should immediately raise questions of injustice and controversy.[407] However, this has not attracted the needed attention partly because it not only appeals more to the petroleum market and investors but also the arrangement is in line with the RAL since the partners followed due process before arriving at this share. This arrangement would not meet the requirements of RAHL and justice.[408]

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[404] Amartya Sen, *The Idea of Justice* (Belknap Press 2011); Sandel, *Justice: What's the Right Thing to Do?* (n 24).

[405] A Timothy Martin, 'Dispute Resolution in the International Energy Sector: An Overview' (2011) 4(4) Journal of World Energy Law & Business 332.

[406] PIAC, 'Annual Report on Management of Petroleum Revenues for year 2016' (n 128).

[407] Sen, *The Idea of Justice* (n 404); Sandel, *Justice: What's the Right Thing to Do?* (n 24).

[408] ibid; Cass, *The Rule of Law in America* (n 309)*;* Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Farlex*,* 'Rule of Law' (n 307).

4.5 Conclusion

The broad definition given to ROL by the UN is that it is:

> … a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[409]

The UN avers, in this regard, that the ROL demands that appropriate measures are put in place to ensure that 'the principles of supremacy of law, fairness in the application of the law, equality before the law, legal certainty, avoidance of arbitrariness, accountability to the law, procedural and legal transparency, separation of powers, and participation in decision-making are adhered to by all'.[410] In the same vein, justice - whether distributive, procedural, substantive, retributive or restorative justice - is essentially about "the quality of being fair and right"[411] to all natural and legal persons. In this light, the defining features of UN's definition of ROL do capture the three formations of ROL, thus: RAL, RUL, and RAHL. It can be drawn that fairness and rightfulness resonate in both ROL and justice.[412]

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[409] UNGA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels* (Report of the Secretary-General, Sixty-sixth session, A/66/749, 16 March 2012) < www.un.org/en/ga/search/view_doc.asp?symbol=A/66/749 > accessed 11 December 2016.

[410] ibid.

[411] Cambridge Dictionary, 'Justice' (Cambridge University Press).

[412] Bingham, *The Rule of Law* (n 23); Sen, *The Idea of Justice* (n 404); Sandel, *Justice: What's the Right Thing to Do?* (n 24); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23);

Laws and regulations and their uniform and consistent application thereof, as dictated by the ROL, should aim at achieving justice - ultimately. The ROL, therefore, serves as a legal foundation of justice. This foundation can sometimes be shaken if the ROL carries limited goals. When there is too much emphasis on the letter of the law without considering the spirit and higher demand of the law that appeals to the recognition of legitimacy,[413] 'the inherent dignity, equal and inalienable rights of all members of the human family',[414] then the ROL could clash with justice. This must be avoided to achieve a society wherein there is harmony and tranquillity that is conducive for the attainment of adequate standard of living for everyone. This understanding can be applied in many fields of life including how these two principles interact in courts and outside of courts.

Outside the courts, one of the areas that have attracted the need to have a useful interaction between the ROL and justice is petroleum E&P. For example, in SSA, the nature of petroleum legislation and contracts and the enforcement thereof do leave, in its wake, some inadequacies of ROL and justice in the petroleum industry.[415] This is especially so when viewed from the perspective of fair share of petroleum revenues between MNPCs and the HS and,[416] therefore, the needed

UNGA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels* (n 409).

[413] Wolfrum and Roeben (eds), *Legitimacy in International Law* (n 44).

[414] UDHR, Preamble, recital 1; ICCPR, Preamble, recital 1; ICESCR, Preamble, recital 1.

[415] UNGA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels* (n 409).

[416] Desta, 'Competition for Natural Resources and International Investment Law (n 15); Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66); Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System' (n 34); Don Hubert, 'Many Ways to Lose a Billion: How Governments Fail to Secure a Fair Share of Natural Resource Wealth' (Publish What You Pay, Partnership Africa Canada, 2017) < www.publishwhatyoupay.org/wp-

adequate standard of living[417] which countries in SSA should have derived from their petroleum wealth but have not.[418]

The next chapter explores the nature and dimensions of adequate standard of living in the light of petroleum exploitation in SSA. It demonstrates just how poor the socioeconomic wellbeing of petroleum-rich countries in SSA has been despite their rich petroleum resources. This situation does not look good in the face of justice.

content/uploads/2017/07/PWYP-Report-ManyWaysToLoseABillion-WEB.pdf > accessed 17 October 2017.

[417] UDHR, Art 25; ICESCR, 11.

[418] ibid.

CHAPTER FIVE

SOCIOECONOMIC RIGHTS - ADEQUATE STANDARD OF LIVING

5.1 Introduction

Socioeconomic rights are inadequately protected in SSA.[419] Adequate standard of living imperative that was launched by Article 25 of the UDHR is a good starting point to examine socioeconomic rights and related legal precepts.[420] This chapter evaluates the contours of socioeconomic rights in the light of adequate standard of living. The chapter looks at not only the legal foundations/provisions of socioeconomic rights but also the development of the concepts of wellbeing, better life and happiness.

5.2 Standard of Living as a Legal Right

Standard of living (SOL) is generally characterised by 'the state of wealth, comfort, material goods, capabilities and other necessities that can be accessed by people in a given country'.[421] It encapsulates elements such as 'employment and income,

[419] UNDP, 'Human Development Index (HDI)' (United Nations Development Programme Human Development Reports) < http://hdr.undp.org/en/content/human-development-index-hdi > accessed 16 June 2017; UNDP, 'Human Development Report 2016: Human Development for Everyone' (2016) < http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf > accessed 16 June 2017.

[420] Mohammed Mesbahi, *Heralding Article 25: A people's strategy for world transformation* (Matador 2016).

[421] John Muellbauer, 'Professor Sen on the Standard of Living' in Geoffrey Hawthorn (ed), *Standard of Living* (Tanner Lectures in Human Values, revised edn, Cambridge University Press 1987) 39; Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011); Martha Nussbaum, 'Capabilities as fundamental entitlements: Sen and social justice' (2003) 9 (2-3) Feminist Economics 33; Investopedia, 'Standard of Living' < www.investopedia.com/terms/s/standard-of-living.asp > accessed 5 January 2018.

national economic growth, GDP,[422] economic and political stability, equality, access to affordable quality healthcare and education, quality of environment, freedom of religion, climate and safety.'[423]

The above defining characteristics resonate with the law. For instance, the provisions of legal instruments such as UDHR,[424] ICESCR[425] and DRTD,[426] SOL can be defined as adequate health and wellbeing that include: everyone's right and adequate access to 'food, employment and income, clothing, basic resources, water, education, housing, health services, security, social protection, and other necessary social services, as well as continuous improvement of living conditions of the people through deliberate policies and strategies of states'.[427] An important feature in this legal definition is that states are urged to harness the capabilities of everyone to obtain the needed quality of life (QOL)[428] that is anchored on

[422] Diane Coyle, *GDP: A Brief but Affectionate History* (Princeton University Press 2014).

[423] Muellbauer, 'Professor Sen on the Standard of Living' (n 421) 39; Nussbaum, *Creating Capabilities: The Human Development Approach* (n 421); Nussbaum, 'Capabilities as fundamental entitlements: Sen and social justice' (n 421) 33; Investopedia, 'Standard of Living' (n 421).

[424] Art 25.

[425] Art 11.

[426] Art 8.

[427] UDHR, Art 25; ICESCR, Art 11; DRTD, Art 8.

[428] QOL is "the degree to which an individual is healthy, comfortable, and able to participate in or enjoy life events"; see Crispin Jenkinson, 'Quality of life' (Encyclopaedia Britannica, 15 July 2019) < www.britannica.com/topic/quality-of-life > accessed 24 July 2019; Elements of QOL are that which traditionally focus on the intangibles and outcomes of SOL, including: 'security, safety, leisure, long life span, freedom of expression, quality physical health, good social life, quality environment, access to resources, human rights, justice, ROL, fairness and so on'; Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (1st edn, Oxford University Press 1993); David Phillips, *Quality of Life: Concept, Policy and Practice* (1st edn, Routledge 2006).

comfort, dignity and wellbeing of citizens.[429] In the same vein, it is incumbent on citizens to also discharge their duties and obligations to complement the efforts of the state in harnessing the capabilities of the individuals to make a better choice of life for themselves.

Muellbauer makes a point that presents some specificity on choices of life whereof he strikes the relationship "between preferences and constraints and between preferences themselves"[430] in the light of the capabilities available to individuals. The important factor here is to the effect that, *mutatis mutandis,* in the choice of petroleum contractual terms by the HS. For instance, their preferences can only be actualised over and above some constraints - put up by MNPCs, lack of capital and limited knowledge - only when the HS have been clothed with the reasonable bargaining power by the law and the capacity to reasonably contribute to the E&P activities.[431] In fact, preferences regarding choice of contractual terms for petroleum E&P are protected by a number of legal instruments. For example, Article 21 of the ACHPR states, in part, that:

> All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.[432]

[429] Nussbaum and Sen (eds), *The Quality of Life* (n 428); Phillips, *Quality of Life: Concept, Policy and Practice* (n 428).

[430] Muellbauer, 'Professor Sen on the Standard of Living' (n 421) 39.

[431] Kobena T Hanson, Cristina D'Alessandro and Francis Owusu (eds), *Managing Africa's Natural Resources: Capacities for Development* (International Political Economy Series, Palgrave Macmillan 2014).

[432] ACHPR, Art 21.

What this provision of ACHPR implores is that, with contractual terms, for instance, it would be unconscionable for freedom of choice of the HS in SSA to be denied, undermined or frustrated in any shape or form. Indeed, Article 21(2) thereof even makes a higher demand on resource constraints and preferences as it requires that petroleum as a natural resource that has been plundered must be adequately compensated for by the plunderer. This freedom is also somewhat advanced in DRTD[433] and ICESCR.[434]

But because there are inevitable constraints, HS and non-state actors such as the World Bank and the UN are expected to do more in order to get these legal instruments enabled beyond the rhetorical dishabille of entitlement for freedom of preference over petroleum resources that enhance SOL. With respect to petroleum resources, therefore, it is imperative that necessary capabilities of governments of HS are first built in order to harness the resource towards securing adequate standard of living.[435] In building capabilities to harness petroleum resources for enhancing socioeconomic rights, it is worth noting the importance of the principle of sustainability/ sustainable development which should inform the right to exploit and dispose the natural resources.[436] This demonstrates the interrelation of legal

[433] DRTD, Art 8.

[434] ICESCR, Art 11.

[435] Nussbaum, 'Capabilities as fundamental entitlements: Sen and social justice' (n 421); Amartya Sen, 'Human rights and capabilities' (2005) 6(2) Journal of Human Development 151; Paul James, 'Creating Capacities for Human Flourishing: An Alternative Approach to Human Development' in Paola Spinozzi and Mazzanti Massimiliano, *Cultures of Sustainability and Wellbeing: Theories, Histories, Policies* (Routledge 2018) 28.

[436] See Chapter 10 of the thesis for the details on sustainability and sustainable development.

rights and the checks and balances placed on them in the parameters of the functioning of the ROL.[437]

5.3 Parameters of Adequate Standard of Living

5.3.1 Human Development Index, poverty and socioeconomic rights

HDI basically calibrates how high or low, long or short the following three factors are: quality education, per capita income of GDP and life expectancy at birth.[438] HDI is principled on the imperative logic that everyone is expected to possess or access and participate in or 'do' things that are desirable by all or most human beings in order to harness their wellbeing and dignity.[439] HDI measures basic SOL using GDP and goes to include some elements of adequate standard of living as defined by UDHR[440] and ICESCR[441] such as rights to education and health. The Human Development Report (HDR) has classified human development of states into four main categories based on the level of HDI, namely: 'very high human development, high human development, medium human development, and low human development'.[442]

[437] Michael G Faure and Willemien Du Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Law Press 2011); Jordi Jaria i Manzano, Nathalie Chalifour and Louis J Kotzé (eds), *Energy, Governance and Sustainability* (Edward Elgar 2016).

[438] UNDP, 'Human Development Indices and Indicators' (n 31).

[439] UNDP, *The Real Wealth of Nations: Pathways to Human Development* (20th Anniversary edn, Human Development Report, Palgrave Macmillan 2010); Anand and Sen, 'Human Development and Economic Sustainability' (n 252).

[440] Art 25.

[441] Art 11.

[442] UNDP, 'Human Development Indices and Indicators' (n 31).

The crux of the argument is that, even with its huge natural resource endowments, most of SSA countries that were part of the 189 country HDI report in 2018 were assessed to be under the low human development category. A few SSA countries, namely, Namibia, Republic of the Congo, Ghana, Equatorial Guinea, Kenya, São Tomé and Príncipe, Swaziland, Zambia, Angola and Cameroon were classified under the bottom 15[443] of the medium human development category.[444] Only Seychelles, Mauritius, Botswana and Gabon were featured in the high development category while none of the SSA countries were featured in the very high human development class. The pattern of the 2018 HDI does not have any significant departure from the rankings/assessments from previous years. These demonstrate how utterly bizarre and worrying the living conditions of majority of the citizens in the sub-region have been.[445]

Having said that, there are some exceptions: Seychelles, Mauritius, Botswana and Gabon, for instance, have had a relatively impressive ranking on the HDI. Curiously, these are all very small countries with less than four million people each.[446] Using them as an example must, therefore, be treated carefully in order not to discount the significance of huge population relative to quantity of resources. However, just for a minimal illustration to make careful extrapolation, Gabon's situation can be exemplified with regards to petroleum resources. Gabon was the only petroleum-rich nation that was classified under the high development

[443] Except South Africa and Namibia which came under the first 20 of the medium human development.

[444] UNDP, 'Human Development Indices and Indicators' (n 31).

[445] ibid.

[446] UN, *World Population Prospects: The 2017 Revision* (DVD edn, Department of Economic and Social Affairs, Population Division, 2017) < https://population.un.org/wpp/Download/Standard/Population/ > accessed 6 July 2018.

category of the HDI. Indeed, petroleum has long been a dominant feature of the economy of Gabon.[447] However, Gabon's petroleum and other natural resource endowments such as 'manganese and gold'[448] far exceed the actual social progress of the country. For instance, not only that about 40% of Gabonese were said to be unemployed but also about 60% to 70% of Gabonese were under the poverty line in about a decade ago.[449] Maximum economic and social returns are, therefore, not adequately achieved with the huge petroleum resource deposits – even with the small population.

This is a narrative that demonstrates that something is fundamentally missing in the framework used to explore, produce and utilise or distribute the petroleum and other natural resources of Gabon.[450] The loopholes are even more pronounced in hugely petroleum-rich countries in SSA such as Angola and Nigeria. Nigeria, for instance, is the biggest producer of petroleum in SSA.[451] There has been competition between the Dutch disease and resource curse or the paradox of plenty in these countries. The former characterises the over concentration of socioeconomic development fortunes on the petroleum sector to the neglect of other sectors of the economy, while the latter denotes plenty petroleum wealth

[447] Jacques Vidal, 'Geology of Grondin Field, 1980' in Michel T Halbouty (ed), *Giant Oil and Gas Fields of the Decade: 1968-1978 (AAPG Memoir 30)* (Tulsa OK, American Association of Petroleum Geologists 1 February 1981) 577.

[448] IRIN, 'Poverty amid plenty as unemployment booms' (Politics and Economics News, Libreville: 18 September 2006) < www.irinnews.org/report/61103/gabon-poverty-amid-plenty-unemployment-booms > accessed 13 May 2017.

[449] ibid.

[450] ibid.

[451] Augustine Ikein, DSP Alamieyeseigha and Steve Azaiki, *Oil, Democracy and the Promise of True Federalism* (University Press of America 2008) 42.

that does not commiserate with the pace of economic growth and SOL in these countries.[452]

Nigeria is particularly a worrying example since it is very notorious for the paradox of plenty with respect to its huge petroleum wealth.[453] According to the World Bank, in spite of its huge petroleum wealth, Nigeria continues to retain high levels of poverty and high inequality especially relating to income whereby poverty rate[454] rose from about 36% in 1970 to about 70% in 2000. With respect to income inequality that denotes the gap between rich people and everyone else in a country, as of the year 2000, Nigeria is said to have widened the income gap wherein about the top 2% of Nigerians earned an income that was equal to the income earned by the bottom 55% of the citizens.[455]

The poverty situation has continued to deteriorate because as of June 2018, it was reported that Nigeria was leading the world in extreme poverty, having about 87 million Nigerians being extremely poor that live below US$1.90 per day. Almost

[452] African Development Bank and the African Union, *Oil and Gas in Africa* (n 13).

[453] Augustine Ikein, *The Impact of Oil on a Developing Country: The Case of Nigeria* (Praeger 1990); Augustine Ikein, DSP Alamieyeseigha and Steve Azaiki, *Oil, Democracy and the Promise of True Federalism* (n 451).

[454] Poverty rate describes the ratio of a country's cohort population that has income falling below the poverty line. Poverty line used to be US$1 before 2008 and graduated to US$1.90 per day in 2015, depicting minimum income level of a person that is assessed to be sufficient for subsistence in a given country; see Jeffrey D Sachs, *The End of Poverty: Economic Possibilities for Our Time* (The Penguin Press 2005) 20; The World Bank, 'World Bank Forecasts Global Poverty to Fall Below 10% for First Time; Major Hurdles Remain in Goal to End Poverty by 2030' (Washington, Press Release, 4 October 2015) < www.worldbank.org/en/news/press-release/2015/10/04/world-bank-forecasts-global-poverty-to-fall-below-10-for-first-time-major-hurdles-remain-in-goal-to-end-poverty-by-2030 > accessed 12 October 2018; see Alan Gillie, 'The Origin of the Poverty Line' (1996) XLIX (4) Economic History Review 715-730.

[455] The World Bank, 'Nigeria: Country Brief' (Last modified: April 2012) < http://go.worldbank.org/FIIOT240K0 > accessed 4 November 2017.

half of the Nigeria's 180 million population are, thus, said to live in extreme poverty.[456] This is in sharp contrast to the effort towards achieving Sustainable Development Goal (SDG) 1[457] and endangers right to adequate standard of living in Article 11 of ICESCR. Being the largest economy in SSA, Nigeria's lack of achievement against the SDG 1 and protection of socioeconomic rights should send worrying signals across the whole SSA.[458]

Law appears to have unsuccessfully tried to rescue Nigeria from the doldrums of resource scarce. In effect, therefore, many petroleum laws have been passed, diverse contracts have been awarded and a number of regulations have been passed, over many decades.[459] These laws and regulations could have been better positioned than they otherwise have been in terms of drafting and implementation. At the same time, significant revenues have been generated, although could have been better with more suitable contractual arrangements between the government and the petroleum companies. Nigeria is even compliant to Extractive Industries Transparency Initiative (EITI) since the country passed the Nigeria EITI law in 2007.[460] Yet, with all such legal interventions, it has been to no avail, because the poverty situation in Nigeria is so high.

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[456] Bukola Adebayo, 'Nigeria overtakes India in extreme poverty ranking' *CNN* (26 June 2018) < https://edition.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html > accessed 13 November 2018.

[457] French and Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation (*n 154).

[458] Adebayo, 'Nigeria overtakes India in extreme poverty ranking' *CNN* (n 456).

[459] See chapter eight of the thesis for details of petroleum law in Nigeria.

[460] World Bank, 'Nigeria: Country Brief' (n 455).

In fact, only very few[461] of the 46 SSA countries[462] are not affected by the resource curse and Dutch disease in the course of exploiting the rich natural resources most of them have been endowed with. Ghana has also been affected by the paradox of plenty and Dutch disease with the gold, diamonds and other mineral resources it has been exploiting for many years. Ghana is never without insidious vestiges of these missing links, going into the exploitation of its newly found petroleum wealth.[463]

According to World Poverty Clock, as of 2017, about 3.1 million people or 10.6% of Ghana's total population fell under the line of extreme poverty. Poverty situation in Ghana can still be said to be precarious relative to its rich natural resource base. But the country's poverty condition is not as precarious as many countries in the sub-region, since Ghana may well be "on track to eradicate poverty" should "things remain stable".[464] This is, undeniably, a bridled optimism which must be treated with delicate care.

As reported by Brookings Institute, out of the over 643 million people in the world that live in extreme poverty, African countries (particularly in SSA) account for about two-thirds of this total population below US$1.90 per day. And for all it is

[461] These few countries include Rwanda, Namibia, South Africa, Botswana and Mauritius (they have natural resources such as gold, diamond, uranium, copper, fish and lime but little or no quantity of petroleum); see African Development Bank and the African Union, *Oil and Gas in Africa* (n 13).

[462] UNDP Africa (n 12).

[463] African Development Bank and the African Union, *Oil and Gas in Africa* (n 13); Jasmin Baier and Kristofer Hame, 'Africa: The last frontier for eradicating extreme poverty' (2018) < www.brookings.edu/blog/future-development/2018/10/17/africa-the-last-frontier-for-eradicating-extreme-poverty/ > accessed 5 December 2018.

[464] World Data Lab, 'Poverty Reduction in Ghana: A Golden Experience' (World Poverty Clock Blog, 2018) < https://worldpoverty.io/blog/index.php?r=24 > accessed 4 December 2018.

worth, the consequences of this situation on SOL and socioeconomic rights are palpably evinced across Nigeria and other SSA countries such as Ghana, Angola, South Sudan, Uganda, Ethiopia and Kenya.[465] It has been estimated that by 2030, about 88% or 414 million people of total world's poorest population would be living in SSA.[466]

Botswana surely is one of the few countries in SSA that have relatively fared well – for its exemplary exploitation of its diamond resources. Botswana has a relatively sound petroleum legal framework which has effectively appropriated significant benefits both for the citizens and petroleum companies. Mineral rents have been well appropriated and petroleum investors have had 'sufficient return to compensate for cost of capital and risk'.[467] The nature of ownership stakes, royalty regime and variable rate of taxes appear to have been schemed in a robust legal framework that makes the fiscal successes possible.[468] The legal framework of Botswana gives:

> … little scope for project-by-project negotiation [which] has contributed to the predictability and objectivity of the fiscal regime.[469] … The effectiveness of Botswana's fiscal framework in appropriating mineral rents [lends credence to the notion that it is

[465] Adebayo, 'Nigeria overtakes India in extreme poverty ranking' *CNN* (n 456).

[466] Baier and Hame, 'Africa: The last frontier for eradicating extreme poverty' (n 463).

[467] African Development Bank, 'Botswana's Mineral Revenues, Expenditure and Savings Policy African Natural Resources: A Case Study' (African Natural Resources Centre, 2016) < www.europarl.europa.eu/intcoop/acp/2016_botswana/pdf/study-en.pdf > accessed 17 November 2018.

[468] ibid.

[469] ibid*, 25*.

> ever rewarding to limit] as far as possible scope for negotiations, while using a combination of fiscal mechanisms [within a robust legal frame].[470]

But the Dutch disease appears to be staring at the face of Botswana if it does not intensify its diversification programme while its untapped coal and other minerals are not able to compensate for the diamond revenues when the diamond runs out[471] in the near future.[472] In addition, according to the United Nations Development Programme (UNDP), Botswana's efforts to diversify its economy "away from the dominance of extractive industries and going beyond limited import substitution are becoming exceedingly desirable".[473] The Dutch disease may not be encountered in Botswana if the trajectory in policy norms are not changed soon.[474]

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[470] ibid.

[471] It appears, however, that the prospects for more mineral resources such as uranium are high in Botswana, and their exploitation is in the offing; see Harold R Newman, 'The Mineral Industry of Botswana' (2012 Minerals Yearbook, USGS, May 2015) < https://minerals.usgs.gov/minerals/pubs/country/2012/myb3-2012-bc.pdf > accessed 13 September 2017; The Telegraph Reporter, 'Botswana's Mineral Wealth could Propel it to become Africa's Mining Centre' (Sunday Standard, 14 July 2016) < www.sundaystandard.info/botswana%E2%80%99s-mineral-wealth-could-propel-it-become-africa%E2%80%99s-mining-centre# > accessed 8 December 2018.

[472] Newman, 'The Mineral Industry of Botswana' (n 471); The Telegraph Reporter, 'Botswana's Mineral Wealth could propel it to become Africa's Mining Centre' (n 471).

[473] UNDP-UNEP, 'Natural resources and poverty in Botswana: development linkages and economic valuation' (UNDP-UNEP Poverty Environment Initiative, Policy Brief, 2013) < www.unpei.org/sites/default/files/e_library_documents/Botswana_Policy_Brief_NR_Poverty_In_Botswana_development_linkages_and_economic_valuation.pdf > accessed 11 December 2017.

[474] Jeffrey D Sachs and Andrew M Warner, 'Natural Resource Abundance and Economic Growth' (NBER Working Paper W5392, National Bureau of Economic Research, 1995); James A Robinson, Daron Acemoglu and Simon Johnson, 'An African Success Story: Botswana' in Dani Rodrik (ed*),*

The HDI performance of SSA appears more in tandem with the low SOL and dire poverty situation which undermines socioeconomic rights in the sub-region. HDI is undoubtedly renowned for measuring SOL and it is the oldest widely embraced measure of wellbeing. But many factors associated with human comfort, safety and wellbeing are not expressly considered by HDI.[475] For instance, elements of socioeconomic rights such as security, housing, environment and social protection have not been effectively addressed by HDI. This can sometimes give an incomplete or unmerited coverage of human wellbeing. The HDI has also been criticised for not considering development of technology in its frame. There are also concerns about measurement errors associated with the indices.[476]

It would be fair to state that legal tenets such as socioeconomic rights, ROL and justice have,[477] for instance, not been substantially captured by HDI. In large part, they appear to be on the side lines of consideration.[478] It is unconscionable that, with huge petroleum resources, most SSA countries have had this poor showing of basic SOL and poverty as measured by the HDI.[479] When the higher quality

In Search of Prosperity: Analytic Narratives on Economic Growth (Princeton University Press 2003) 80-119; Michael Lewin, 'Botswana's Success: Good Governance, Good Policies and Good Luck' < http://siteresources.worldbank.org/AFRICAEXT/Resources/Botswana_success.pdf > accessed 13 November 2018.

[475] UNDP, *The Real Wealth of Nations: Pathways to Human Development* (n 439).

[476] Sen and others in Hawthorn (ed), *Standard of Living* (Cambridge University Press 1987).

[477] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University 1989); Lee Anne Fennell and Richard H McAdams, *Fairness in Law and Economics* (Edward Elgar 2013).

[478] UNDP, *The Real Wealth of Nations: Pathways to Human Development* (n 439).

[479] Anand and Sen, 'Human Development and Economic Sustainability' (n 252).

scenario of SOL such as happiness is measured, a much gloomier picture is even expected to be exhibited in SSA.

5.3.2 Happiness, adequate standard of living and better life

In order to establish a holistic emblem for understanding and appreciating the level of satisfaction of people about the most desirable situation of their lives, it is imperative to adopt a coordinated approach that utilises both SOL and QOL as a unifying instrument for the realisation of socioeconomic rights. In this respect, SOL and QOL can be said to be cohabiting bedfellows that ultimately seek to harness the socioeconomic rights of everyone in society. Socioeconomic rights can interconnect with ROL and justice provided by QOL to achieve higher expectations of better life – happiness since they have common paths and purposes. According to Aristotle, "happiness turns out to be an activity of the soul in accordance with [complete] virtue",[480] which constitutes the achievement of 'all the goods such as wealth, health, knowledge, and justice that result in the perfection of human nature and to the enrichment of human life'.[481] The effort towards this achievement requires that critical choices are made as posited by Muellbauer.[482] Whereas the choices with lesser good tend to promise 'immediate pleasure, which is more prone to temptation',[483] the choices that promise greater good is characterised by painful experiences and needs a reasonable sacrifice to achieve.[484]

[480] Hugh Treddenick (ed), *Aristotle, the Nicomachean Ethics* (Penguin 2004) 254.

[481] ibid.

[482] Muellbauer, 'Professor Sen on the Standard of Living' (n 421).

[483] Treddenick (ed), *Aristotle, the Nicomachean Ethics* (n 480).

[484] ibid.

In striking a delicate balance through the challenges involved in making the necessary choice, Aristotle brought up *akrasia* (i.e. the soul's weakness). He averred that often, due to the soul's weaknesses, 'great pleasure obfuscates that which is perceived to be truly good'. The fortunate thing is that training can cure this natural disposition of human beings to fall for 'immediate pleasure' in pursuit of happiness. Aristotle refers to this training as 'education and the constant aim to pursue perfect virtue'.[485] The notion of education that is canvassed by Aristotle is reasonably in sync with the capability approach that has been advanced by Sen.[486]

Petroleum countries in SSA must, therefore, have their capacity built to generate the needed manpower and willingness to confront the constraints of petroleum legislation and contracts that hinder the achievement of happiness.[487] The significance of happiness cannot, indeed, be overstated.[488] Happiness is centripetal to the 'purpose of human life'. Petroleum exploitation must be geared towards achieving this happiness for all citizens of the HS and for businesses to also have their due. Despite its relatively higher requirements to mark human wellbeing and dignity that radiate adequate protection of fundamental human

[485] ibid.

[486] Anand and Sen, 'Human Development and Economic Sustainability' (n 252).

[487] ibid; Treddenick (ed), *Aristotle, the Nicomachean Ethics* (n 480) 254; Ayee, 'The Status of Natural Resource Management in Africa: Capacity Development Challenges and Opportunities' (n 113)15; Lewin, 'Botswana's Success: Good Governance, Good Policies and Good Luck' (n 474).

[488] Treddenick (ed), *Aristotle, the Nicomachean Ethics* (n 480); JK Ackrill, *Aristotle the Philosopher* (Oxford University Press 1981); Mortimer Jerome Adler, *Aristotle for Everybody: Difficult Thought Made Easy* (Collier Books 1991); Terence H Irwin (translator), *Aristotle, The Nicomachean Ethics* (2nd edn, Hackett Publishing 1999)1; Gerard J Hughes, *Routledge Philosophy Guidebook to Aristotle on Ethics* (Routledge 2001)21.

rights, in the final analysis, happiness depends on each and everyone's evaluation of themselves in the HS.[489]

Happiness is, therefore, a subjective phenomenon like QOL, justice and ROL which are important levers for achieving happiness.[490] Higher level of happiness articulates the most desirable state of wellbeing. According to the 2019 World Happiness Report,[491] happiness is measured by the following six main indices: GDP per capita, social support, healthy life expectancy, freedom to make life choices, trust and generosity, and perceptions of corruption.[492] These constitute the World Happiness Index (WHI). The last two indices (trust and generosity, and perceptions of corruption) harness the existing parameters of enhanced SOL in a more foundational form of adequate standard of life and what it is that influences subjective evaluation of better life[493] of individuals in society.[494] Comparing the 2019 WHI and 2019 ROL index,[495] it can be observed that, largely, the better the WHI, the more effective the ROL index. [496]

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[489] ibid.

[490] Jan-Emmanuel De Neve and others, 'The objective benefits of subjective well-being' in John F Helliwell, Richard Layard and Jeffrey D Sachs (eds), *World Happiness Report 2013* (UN Sustainable Development Solutions Network 2013) 54-79.

[491] Report covers the period between 2016 and 2018.

[492] John F Helliwell, Richard Layard and Jeffrey D Sachs (eds), *World Happiness Report 2019* (Sustainable Development Solutions Network 2019)79 < https://s3.amazonaws.com/happiness-report/2019/WHR19.pdf > accessed 24 September 2019.

[493] OECD, 'How's life?' < www.oecdbetterlifeindex.org/ > accessed 6 August 2018.

[494] ibid.

[495] World Justice Project, *World Justice Project Rule of Law Index* (n 41).

[496] Among the five countries, Norway scored better both in WHI and ROL index respectively with a score of 7.554 ranked 3rd position and a score of 0.89 ranked 2nd position globally. UK was second best amongst the five countries with WHI and ROL index scores 7.054 (15th global rank) and 0.80 (12th global rank) respectively. Angola was not featured in the WHI index but was

OECD provides a broad spectrum of eleven topical areas in which better life could be evaluated. These are: Education, income, jobs, housing, health, community, environment, civic engagement, safety, work-life balance, and life satisfaction.[497] All of these are captured by the QOL indices and the WHI,[498] except that 'trust and generosity, and perceptions of corruption' prominently stand out in the WHI as unique labels.[499] Furthermore, in the OECD's better life index (BLI), 'life satisfaction' is clearly designed as an independent measure which enables individuals to evaluate their overall satisfaction about their socioeconomic wellbeing.[500] SSA has performed poorly on the WHI.[501] SSA has not been featured in the OECD's BLI but is more likely to perform poorly thereof given its poor performance on the HDI and WHI.

When WHI and BLI are carefully harmonised on account of the orientation of SOL and QOL, fourteen index areas for evaluation of socioeconomic rights can be

placed last amongst the five countries for ROL index with a score of 0.41 and global rank of 111. Ironically, while Nigeria performed better than Ghana in WHI with a score of 5.265 with a global rank of 85 for Nigeria, and a score of 4.996 with a global rank of 98 for Ghana, Ghana scored better than Nigeria in the ROL index with a score of 0.58 ranked 48th position for Ghana and a score of 0.43 ranked 106th position for Nigeria. For the WHI, see Helliwell, Layard and Sachs (eds), *World Happiness Report 2019* (n 492)79; For the ROL index, see World Justice Project, *World Justice Project Rule of Law Index* (n 41).

[497] ibid.

[498] Officially refers to as 'Ranking of Happiness 2015-2017'.

[499] John F Helliwell and others, 'International Migration and World Happiness' in John F Helliwell, Richard Layard and Jeffrey D Sachs (eds), *World happiness report 2018* (UN Sustainable Development Solutions Network 2018) 12-43.

[500] OECD, 'How's life?' (n 493); Medgyesi, Özdemir and Ward, 'Regional indicators of socioeconomic wellbeing' (n 248); Callaghan, 'Social Well-Being in Extra Care Housing: An Overview of the Literature' (n 126); Office for National Statistics, 'Economic well-being - Framework and indicators' (n 248).

[501] Helliwell, Layard and Sachs (eds), *World Happiness Report 2019* (n 492).

articulated. These are: 'Education; income; jobs; housing; health; community; environment; civic engagement; safety; work-life balance; life satisfaction'; 'trust and generosity; perceptions of corruption'; the ROL; and justice.[502] These constitute a bundle of norms that harness socioeconomic rights, which are expected to be promoted and protected by states. WHI and BLI appear to provide sufficient indices for the protection of adequate standard of living as a right.[503] When harmonised, they provide a higher version of HDI. Since SSA is already at the bottom of the HDI, it stands to reason that SSA will perform poorly in this higher version of enhancing of socioeconomic rights.[504]

5.4 Chequered Nature of Socioeconomic Rights

Most countries in SSA are obvious victims of 'being that rich and this poor' where social and economic rights such as contained in IBHR,[505] DRTD,[506] and ACHPR,[507] are brazenly trampled upon.[508] While socioeconomic rights, on many fronts, are protected by domestic, regional and international legal instruments, domestic

[502] Helliwell and others, 'International Migration and World Happiness' (n 499) 12; Helliwell, Layard and Sachs (eds), *World Happiness Report 2019* (n 492); OECD, 'How's life?' (n 493).

[503] Helliwell and others, 'International Migration and World Happiness' (n 499) 12; OECD, 'How's life?' (n 493).

[504] O'Connell, 'The Death of Socio-Economic Rights' (n 380) 532; Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause, Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoi 2001) 9.

[505] IBHR includes UDHR, ICCPR, ICESCR, with their Protocols; See OHCHR, 'Fact Sheet No.2 (Rev.1), The International Bill of Human Rights' < www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf > accessed 18 April 2017.

[506] UNGA, 'Declaration on the Right to Development' (4 December 1986, A/RES/41/128, 97th plenary meeting) < www.un.org/documents/ga/res/41/a41r128.htm > accessed 12 February 2017.

[507] African (Banjul) Charter on Human and Peoples' Rights (n 20).

[508] Hanson, Owusu and D'Alessandro (eds), *Managing Africa's Natural Resources* (n 431).

courts and international courts have had unsettled posture towards enforcing certain social and economic rights. This is partly due to the softness or weakness of the constitutional and legislative provisions upon which juridical decisions on socioeconomic rights are based.[509]

For instance, although African countries are obliged by the ACHPR to ensure that all forms of foreign economic exploitation are eliminated in order to "enable their peoples to fully benefit from the advantages derived from their national resources",[510] this provision is not adequately transposed into domestic laws by many African states to allow citizens to seek for appropriate remedies in national courts when their socioeconomic rights are breached. The African Court on Human and Peoples' Rights, as the foremost continental court for protection of human rights, is also struggling to complement the mandate of the quasi-judicial institution, the African Commission on Human and Peoples' Rights, that is equally struggling to adjudicate on violations of individual human rights' cases and to ensure that state parties comply with the provisions of the ACHPR.[511]

In fact, in the last three decades or so, there have been ensuing arguments over the constitutional entrenchment and judicial enforcement of socioeconomic rights. The constructive ambiguity towards this realisation could never be more unsettled.

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[509] O'Connell, 'The Death of Socio-Economic Rights' (n 380) 532, 533; see Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012).

[510] ACHPR, Art 21(5).

[511] Charles C Jalloh, Kamari M Clarke and Vincent O Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges (*1st edn, Cambridge University Press 2019); Aljazeera, 'Africa's human rights court and the limits of justice' (Talk to Aljazeera, 7 January 2017) < www.aljazeera.com/programmes/talktojazeera/2017/01/africa-human-rights-court-limits-justice-170107092107153.html > accessed 25 July 2017.

A few of the scholars who are at the forefront of keeping alive the socioeconomic rights' debate include: Michelman,[512] Schwartz,[513] Fabre,[514] Eide,[515] Dennis and Stewart,[516] and Neier.[517]

The debate has been centred on whether these rights could be recognised as real invokable rights such as provided in ICCPR. So far, most of the controversies associated thereof have been substantially resolved, in the estimation of Langford.[518] At the same time, most of the scholars have broadly continued to reach a consensual understanding that social and economic rights are considered as rights that can be said to be real and judicially enforceable.[519] And that, these rights ought to be justiciable in a similar fashion characterised by civil and political rights conferred by ICCPR. This disposition of scholarly consent is supported "by developments at the international level, where the adoption of the Optional

[512] Frank I Michelman, 'Welfare Rights in a Constitutional Democracy' (1979) (3) Washington University Law Quarterly 659.

[513] Herman Schwartz, 'Do Economic and Social Rights Belong in a Constitution?' (1995) 10 American University Journal of International Law and Policy 1233.

[514] Cécile Fabre, *Social Rights Under the Constitution* (Oxford University Press 2000).

[515] Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 504) 9.

[516] Michael J Dennis and David P Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 American Journal of International Law 462.

[517] Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1.

[518] Malcolm Langford, 'The Justiciability of Social Rights' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 3.

[519] Kristin Henrard, 'Introduction: The Justiciability of ESC Rights and the Interdependence of All Fundamental Rights' (2009) 2 Erasmus Law Review 373.

Protocol to the ICESCR (OP-ICESCR) seems to signal the coming of age for socio-economic rights"[520] on a global scale.[521]

OP-ICESCR is a socioeconomic rights' treaty that establishes ICESCR's mechanisms on complaint and inquiry for any possible abuses of applicable human rights of individuals. At the same time, socioeconomic rights have been deliberately entrenched in some states' constitutions. For instance, in Ghana, right to socioeconomic rights such as rights to education[522] and employment[523] are recognised. The recognition of socioeconomic rights in domestic constitutions and jurisprudence can be seen in many other countries. These include Angola,[524] Nigeria,[525] South Africa[526] and some countries in Latin America.[527] But these are

[520] O'Connell, 'The Death of Socio-Economic Rights' (n 380)533; see O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (n 509).

[521] Claire Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8(4) Human Rights Law Review 617; see also Jan Kratochvil, 'Realizing a Promise: A Case for Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights' (2009) 16(3) The Human Rights Brief 30-35.

[522] The Constitution of the Republic of Ghana [1992], Art 25.

[523] The Constitution of the Republic of Ghana [1992], Art 24.

[524] The Constitution of the Republic of Angola [2010], 'Chapter III: Economic, Social and Cultural Rights and Duties'.

[525] The Constitution of the Federal Republic of Nigeria [1999], 'Chapter IV: Fundamental Rights'.

[526] Sandra Liebenberg, 'South Africa: Adjudicating Social Rights under a Transformative Constitution' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 75.

[527] Flavia Piovesan, 'Brazil: Impact and Challenges of Social Rights in the Courts' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 182; Magdalena Sepulveda, 'Colombia: The Constitutional Court's Role in Addressing Social Justice' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 144.

hardly enforceable and truly realised partly because of resource constraints. Subsequently, some citizens that have been found at the mercy of state's inaction to protect and enforce these rights are, thus, left in a delicate quandary.[528]

Additionally, some jurisdictions have had "a bourgeoning socio-economic right" in courts. The growth of recognition is not without ambivalences and setbacks.[529] Scholars such as Barak-Erez and Gross have argued on a contrary position regarding the growth of socioeconomic rights' entrenchment and consensus. Even though they agree that there is some sense of "renewed consensus"[530] on the reality of socioeconomic rights and how interdependent human rights are, they are still of the conviction that the persistence of the "debates over the similarities and differences between the two sets of rights, and the frequent relegation of social rights to second-class status"[531] is still evident.[532] In the face of competing forces of globalisation, the penchant to subjugate the value of socioeconomic rights goes to threaten the propensity of socioeconomic rights to be formally entrenched as entitlements.[533]

O'Connell sees the prevailing conventional understanding of the relationship between globalisation and the legal dimension of human rights as a

[528] Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 504) 9; Schwartz, 'Do Economic and Social Rights Belong in a Constitution?' (n 513) 1233.

[529] O'Connell, 'The Death of Socio-Economic Rights' (n 380) 533.

[530] ibid.

[531] Daphne Barak-Erez and Aeyal Gross, 'Introduction: Do We Need Social Rights' in Daphne Barak-Erez and Aeyal Gross (eds*), Exploring Social Rights* (Oxford: Hart Publishing, 2007) 1.

[532] O'Connell, 'The Death of Socio-Economic Rights' (n 380)532.

[533] ibid.

'misunderstood discourse about the real nature of globalisation'.[534] For O'Connell, neoliberal globalisation can be the best description of the current perspective of globalisation[535] under which the socioeconomic rights' protection and enforcement regime is being fought. He tends to strike a delicate balance between neoliberal global order and human rights' protection.[536] O'Connell essentially argues that it is impossible to have a situation where there is commitment to protect basic human rights alongside being compliant to neoliberal global order which he refers to as "the dominant model of globalisation".[537] This prevailing model is hostile to the protection of socioeconomic rights. In the light of the daring peculiarity associated with this model, O'Connell avers that it is imperative that human rights' advocates do "take a strong stance against prevailing orthodoxies [such as the neoliberal globalisation] in order to genuinely advance and entrench a culture of human rights protection"[538] in areas such as SSA.

The delicacy of neoliberal globalisation is demonstrated in the dilemma faced by advocates of human rights as to how to "take the strong stance". They face a choice "between acquiescence in a process which is inherently inimical to the protection of human rights or utilising human rights to challenge and overcome

[534] ibid.

[535] Greg Albo, Sam Gindin and Leo Panitch, *In and Out of Crisis: The Global Financial Meltdown and Left Alternatives* (PM Press 2010) 27.

[536] O'Connell, 'The Death of Socio-Economic Rights' (n 380) 532.

[537] ibid.

[538] Paul O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) Human Rights Law Review 483.

the dominant model of globalisation".[539] These are, obviously, hard choices for advocates but even harder for ordinary citizens.

The relegation of these rights by those that argue against making socioeconomic rights as an entrenched entitlement does connect with the intruding arsenals of neoliberal global order or neoliberal legality[540] in which MNCs hold an important stake.[541] Whereas neoliberal order is more inclined to politics, economics and private interests, the neoliberal legality is "the juridical thrust of neoliberalism" [542] which strikes a compromised balance between law, economics and politics. Legal scholars with entrenched passion for private interests more than public interests would use law to promote these private interests in a convoluted and unfair manner.[543]

Under the circumstance, there are some economists and legal scholars who virtually would become the mouthpiece of the actors of the neoliberal order to unleash what they have hatched in the boardrooms onto the natural entitlements of unsuspecting citizens. This may be described as irresponsible pursuit of capitalism with disfigured legality that has unapologetic disregard for public-centred socioeconomic rights rather than that of private-centred ones.[544] This revs

[539] ibid.

[540] Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (1st edn, Routledge 2017).

[541] O'Connell, 'The Death of Socio-Economic Rights' (n 380)533.

[542] ibid.

[543] Desta, 'Competition for Natural Resources and International Investment Law (n 15); Shihata, 'The Role of Law in Business Development' (n 149); Friedman, 'Legal Rules and the Process of Social Change' (n 255).

[544] ibid.

up the issue of both horizontal and vertical application of economic and social rights to private entities or non-state actors such as MNPCs.[545]

According to O'Connell, socioeconomic rights "are being fundamentally undermined and rendered nugatory by a pincer movement involving both the discursive and material negation of the value of such rights".[546] The argument that has been forwarded by Pieterse to this debate is that socioeconomic rights can be vitiated by neoliberalism "both on [a] discursive and structural level. Discursively it delegitimises social rights . . . [and the] concrete elements and structural implications of economic globalisation and neo-liberal reform programmes further complicate the realisation of social rights".[547]

O'Connell cites Tomasevski[548] as having intimated years back that all socioeconomic rights are needed to be defended "against distortions, not only denials and violations".[549] In modern times, the distortions that are directed towards socioeconomic rights are characterised by the conduct of:

[545] Aoife Nolan, *Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland* (Oxford University Press 2014) 61-93.

[546] O'Connell, 'The Death of Socio-Economic Rights' (n 380)533.

[547] Marius Pieterse, 'Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa' (2003) 14 Stellenbosch Law Review 3; see O'Connell, 'The Death of Socio-Economic Rights' (n 380) 533.

[548] Katarina Tomasevski, 'Unasked Questions about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson' (2005) 27(2) Human Rights Quarterly 709, 710.

[549] O'Connell, 'The Death of Socio-Economic Rights' (n 380) 533.

> Recasting socio-economic rights into 'market friendly', consumerist norms and, among other things, the reduction of entrenched socio-economic rights to formal, procedural guarantees, rather than substantive material entitlements.[550]

In terms of the material subversion or negation of socioeconomic rights, it has been observed that because neoliberal global order emphasizes "commodification, commercialisation and privatisation", it frustrates citizens from enjoying their basic socioeconomic rights.[551] In many ways, this is facilitated by the neoliberal legality which harbours forces that undermine the formal entrenchment and enjoyment of socioeconomic rights in the domestic and international legal provisions.[552]

For instance, even though ICESCR has been in force since 03 January 1976, the UN General Assembly only adopted[553] its optional protocol on 10 of December 2008.[554] It was not until 05 May 2013 that the protocol came into force and with just 49 signatories by 23 September 2019 after it had been opened for signature

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[550] ibid.

[551] O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (n 538) 483; Louise Bernier, 'International Socio-Economic Human Rights: The Key to Global Health Improvement?' (2010) 14(2) International Journal of Human Rights 246.

[552] Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (n 540); O'Connell, 'The Death of Socio-Economic Rights' (n 380) 532-554.

[553] UNGA, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (The General Assembly adopted resolution A/RES/63/117, on 10 December 2008).

[554] OHCHR, '"Economic, social and cultural rights: legal entitlements rather than charity" say UN Human Rights Experts' (United Nations, 10 December 2008) < https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9216&LangID=E > accessed 14 November 2018.

on the 24th of September 2009.[555] The Committee on Economic, Social and Cultural Rights (CESCR) established by United Nations Economic and Social Council (ECOSOC) and responsible for monitoring states' implementation of ICESCR on behalf of ECOSOC, appears to have made little progress in producing remarkable results since its establishment[556] on the 28 May 1985. The body of 18 independent experts, that constitutes CESCR, only make "concluding observations", at best. Thus, the CESCR does examine any report submitted to it and addresses the "concerns and recommendations"[557] of the Committee, which it characterises as the "concluding observations".[558]

Beyond its observations, CESCR mainly provides three mandates:

- Having the competence in receiving and considering 'communications from individuals that claim of violation of their rights enshrined in the ICESCR'.[559]
- CESCR could, "under certain circumstances, undertake inquiries on grave or systematic violations of any of the economic, social and cultural rights set forth in the Covenant, and consider inter-state complaints".[560]

[555] UNTC, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (United Nations, 10 December 2008) < https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en > accessed 4 December 2018.

[556] United Nation's ECOSOC Resolution 1985/17 of 28 May 1985.

[557] OHCHR, 'Committee on Economic, Social and Cultural Right: Monitoring the economic, social and cultural rights' < www.ohchr.org/en/hrbodies/cescr/pages/cescrintro.aspx > accessed 3 November 2018.

[558] ibid.

[559] ibid.

[560] ibid.

- CESCR undertakes the activity of publishing "its interpretation of the provisions of the Covenant, known as general comments".[561]

Of course, states parties have an obligation to ensure that they do "submit regular reports to the committee" on ESCR on how they are implementing the rights.[562] States parties are obliged to submit implementation reports to the committee - initially done within two years upon having accepted ICESCR and every five years after the initial reporting.[563] At best, it shows some level of transparency but the CESCR is hardly able to hold countries accountable for any breaches of socioeconomic rights or sanction any violations.

Although the above positive obligations of the Committee are unable to stand the test of full force of structured accountability measures expected of states parties, the presence of CESCR and its normative functions do represent one of the key milestones of efforts at enforcing and protecting socioeconomic rights at the international level. Some forces must have been working against this international mechanism, but CESCR has, at least, provided individuals with the opportunity to complain, investigations to be conducted and some form of remedies provided to victims.[564]

However, regardless of the forces that may be challenging the formalisation and enjoyment of socioeconomic rights in neoliberal globalisation and neoliberal legal order, efforts have been made in some domestic courts to harmonise constitutional law, statutes and the over-imposing neoliberal ideals. Traditionally,

[561] ibid.

[562] ibid.

[563] ibid.

[564] ibid.

supreme courts in countries such as South Africa,[565] India[566] and Canada[567] have been friendly to socioeconomic rights in their judgements.[568] In spite of their perceived pro-socioeconomic rights' stance, judgements of apex courts of these countries have appeared to be "at variance with the meaningful protection of socioeconomic rights".[569]

The irony in the jurisprudence is inspired by the '*de facto* harmonisation of the protection of constitutional rights on account of the neoliberal global order'.[570] The jurisdiction of these cases is founded under individual domestic constitutional systems, but they tend to pronounce:

> Analogous conceptions of fundamental rights which are atomistic, 'market friendly' and, more broadly, congruent with the narrow neoliberal conception of rights, and consequently antithetical to the protection of socioeconomic rights.[571]

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[565] *Soobramoney v Minister for Health (KwaZulu-Natal)* (1997) (12) BCLR 1696 (27 November) (CC*); Khosa v Minister of Social Development* (2004) (6) BCLR 569 (CC) (4 March).

[566] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press 1999); S Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 102; *MohiniJain v State of Karnataka* [1992] INSC 184 (30 July); *Krishnan v State of Andhra Pradesh* [1993] INSC 60 (4 February).

[567] *Eldridge v British Columbia* (Attorney General) [1997] 3 SCR 624; *Auton (Guardian ad litem of) v British Columbia (Attorney General)* [2004] 3 SCR 657; *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791.

[568] O'Connell, 'The Death of Socio-Economic Rights' (n 380) 532.

[569] ibid.

[570] Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (n 75) 1020.

[571] O'Connell, 'The Death of Socio-Economic Rights' (n 380)532.

The judiciary's implicit endorsements of the supremacy of neoliberal order in relation to legal dimension of human rights especially as related to socioeconomic rights is a harbinger to "the end, in substantive terms, for the prospect of meaningful protection of socio-economic rights".[572] In the famous *Grootboom* case[573] on housing rights, for example, controversies were stirred amongst scholars who, on different standpoints, argued that the decision of the apex court thereof was extraordinary on one hand and un-extraordinary on the other. Whereas Sunstein had highly commended the court's decision as "extraordinary" since, for him, the court made a reasonable decision by applying 'reasonableness review' in its order that required that housing policies that were challenged could be modified in the future, instead of issuing "a direct injunction providing housing for the plaintiffs in *Grootboom* who were facing eviction".[574] For him, the court's decision was creating "a novel and promising approach to judicial protection . . . for each person whose socio-economic needs are at risk".[575] He had earlier held a contrary view, nonetheless.[576]

However, Roux argued that the remedy that was provided by the court in *Grootboom* did not appear to be "extraordinary enough".[577] Those that subscribe

[572] ibid.

[573] *Government of the Republic of South Africa v Grootboom* [2000] (11) BCLR 1169 (CC) ('Grootboom').

[574] Brian Ray, 'Sandra Liebenberg, Socio-Economic Rights, Adjudication under a Transformative Constitution' (2013) 24(2) European Journal of International Law 739-744.

[575] ibid.

[576] Cass R Sunstein, 'Social and Economic Rights? Lessons from South Africa' (1999) 11 Constitutional Forum 123.

[577] Ray, 'Sandra Liebenberg, Socio-Economic Rights, Adjudication under a Transformative Constitution' (n 574) 739.

to the position of Roux contend that the court's ruling had failed "to give social rights the teeth necessary to live up to their transformative potential, and in the process ignoring the harsh realities"[578] of South Africans. The arguable case made by Liebenberg as cited by Ray, in this regard, is instructive.[579]

Ray articulates that constitutional provisions on social rights form a 'part of an enabling legal framework that can be used to redress injustices of the past and to create a transformed society'.[580] In order to attain this imperative, the courts must be interested in developing 'a jurisprudence that will open a sustained and serious engagement with the normative purposes and values which socio-economic rights should advance within the historical and social context of the country'.[581] Another significant case on socioeconomic rights is *Mazibuko v City of Johannesburg* which was adjudicated in the South African constitutional court. It was in respect of the right of access to sufficient water wherein the decision of the court also stirred controversies amongst scholars.[582]

What is clear is that, socioeconomic rights emanating from owning and benefiting from petroleum resources as citizens have hardly been tested in any courts in

[578] ibid; Murray Wesson, 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in Mazibuko v City of Johannesburg' (2011) 11(2) Human Rights Law Review 390; Danie Brand, 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' (2011) 3 Stellenbosch Law Review 614.

[579] ibid.

[580] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146; see Ray, 'Sandra Liebenberg, Socio-Economic Rights, Adjudication under a Transformative Constitution' (n 574).

[581] Ray, 'Sandra Liebenberg, Socio-Economic Rights, Adjudication under a Transformative Constitution' (n 574).

[582] Murray Wesson, 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg* (n 578) 390.

SSA. The economic right for citizens to be given the opportunity to benefit from natural resource wealth of states[583] has been approached with ambivalence and rejection by governments and the courts. The lingering fault line can directly be drawn to the neoliberal global order as described by O'Connell, Pieterse and others. Under the current state of affairs, there is the need to weave alternative narrative that attempts to harmonise the disconnection between responsible capitalism in a globalised setting and social justice in a legal fashion.[584]

5.5 Conclusion

Poverty continues to be a serious problem in SSA despite the abundance of petroleum resources.[585] Most SSA countries are victims of 'being that rich and this poor' where socioeconomic rights such as contained in IBHR,[586] DRTD,[587] and ACHPR,[588] are brazenly trampled upon.[589] With persistent poverty, it is inevitable to have poor SOL. This undermines socioeconomic rights such as adequate standard of living just as it does to ROL and justice.[590] Although human rights such as rights to education, food, water, health, employment and natural resources are easy targets for measuring socioeconomic rights, they all aim at ensuring that the

[583] Hanson, D'Alessandro and Owusu (eds), *Managing Africa's Natural Resources* (n 431).

[584] O'Connell, 'The Death of Socio-Economic Rights' (n 380)532; Pieterse, 'Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa' (n 547).

[585] Bill & Melinda Gates Foundation, 'Goalkeepers: The Stories Behind the Data' (n 32).

[586] IBHR includes UDHR, ICCPR, ICESCR with their Protocols; See OHCHR, 'Fact Sheet No.2 (Rev.1), The International Bill of Human Rights' (n 505).

[587] UNGA, 'Declaration on the Right to Development' (n 504).

[588] African (Banjul) Charter on Human and Peoples' Rights (n 20).

[589] Hanson, Owusu and D'Alessandro (eds), *Managing Africa's Natural Resources* (n 431).

[590] Shihata, 'Legal Framework for Development' (n 28).

residents of a country or region have adequate standard of living. Legal instruments such as UDHR,[591] ICESCR[592] and DRTD,[593] define standard of living as adequate health and wellbeing that include: everyone's right and adequate access to 'food; employment and income; clothing; basic resources; water, education, housing, health services, security, social protection, and other necessary social services, as well as continuous improvement of living conditions of the people through deliberate policies and strategies of States'.[594]

Socioeconomic measures such as the HDI, WHI and BLI provide outputs that give a sense of adequate standard of living. The limits of socioeconomic rights in law have still not been effectively defined. This chapter explored these limits in the light of the economic measures. Enforceability of these rights in courts have been a challenge, not because of lack of recognition but mainly because of the difficulty in enforcing them due to limited financial resources of states.[595] That is why efforts must be made to ensure that maximum use is made of the petroleum resources that can significantly improve the revenue inflows so that governments in SSA can have the needed capacity to fulfil their obligations on socioeconomic rights. One major instrument that can be used to ensure that maximum economic recovery is

[591] Art 25.

[592] Art 11.

[593] Art 8.

[594] UDHR, Art 25; ICESCR, Art 11; DRTD, Art 8.

[595] Davis, 'Socio-Economic Rights' (n 76); Ewing, 'Economic rights' in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (n 77); O'Connell, 'The Death of Socio-Economic Rights' (n 380); see also Marks, 'Emerging Human Rights: A New Generation for the 1980s' (n 78); Fabre, 'Constituting Social Rights' (n 78); Sen, 'Elements of the Theory of Human Rights' (n 78).

generated from the petroleum resources in SSA is petroleum law.[596] In Chapter six below, the theories and sources of petroleum law are examined to inform technical decisions on how best to formulate and enact petroleum legislation and contracts.

[596] Talus (ed), *Research Handbook on International Energy Law* (n 337).

CHAPTER SIX

SOURCES AND THEORIES OF PETROLEUM LAW

6.1 Introduction

This chapter evaluates the key sources of petroleum law, especially as they relate to international petroleum law. It also explores theories of ownerships of petroleum. These set a comfortable stage for analysing the global petroleum legal regimes in chapter seven. It establishes the dimensions of petroleum law and ownership scenarios which can be applied in SSA to enhance socioeconomic rights.

6.2 International Petroleum Law and National Petroleum Law

At the heart of regulation, management and utilisation of petroleum resources is petroleum law. It is a key enabler for building relations between the HS, the citizens, MNPCs, private and public domestic companies, IGOs, and such other stakeholders in the oil and gas industry. The relationships established by petroleum law could be extortive or just. It starts from when the petroleum resource is going to be explored to when it is being explored, developed, produced, marketed, utilised and accounted for. These relationships can be captured under two closely interrelated legal regimes: international petroleum law and national petroleum law.[597]

[597] Naseem and Naseem, 'World Petroleum Regimes' in Talus (ed), *Research Handbook on International Energy Law* (n 84); Ikenna, "International Petroleum Law" (n 33); Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84).

International petroleum law is a unique area of international energy law which is largely sourced from general international legal imperatives.[598] It primarily attempts to reconcile requirements of international law relating to petroleum activities with that of the demands of national laws on investment, sovereignty protection and foreign engagement in the petroleum industry.[599]

In this regard, international petroleum law is effectively conditioned as a specialised component of natural resources law which principally consists of the principles and rules of conduct recognised by states, petroleum companies and related participants in the petroleum industry as sacrosanct to be respected and abided by in their relations with each other.[600] International petroleum law is, by this disposition, primed to establish "an ordered, balanced, and just system of transacting petroleum business at [national] and international levels".[601]

International Petroleum law does not necessarily have to be exclusive to "petroleum perspectives" but to also encapsulate 'any rules and laws' that are germane to petroleum businesses and associated factors.[602] This position is persuasive because petroleum is a resource which is linked with many facets of

[598] Kim Talus, 'Internationalization of energy law' in Kim Talus (ed), *Research Handbook on International Energy Law* (Research Handbooks in International Law, Edward Elgar, Cheltenham 2014) 3.

[599] Hans Kelsen and Stanley L Paulson, 'The Concept of the Legal Order' (1982) 27 (1) The American Journal of Jurisprudence 64-84 < https://academic.oup.com/ajj/article-lookup/doi/10.1093/ajj/27.1.64 > accessed 25 April 2017; Ikenna, "International Petroleum Law" (n 33); Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84).

[600] Ikenna, "International Petroleum Law" (n 33).

[601] Ikenna, "International Petroleum Law" (n 33) 431.

[602] ibid.

human existence and, therefore, the laws concerning it should be embracing enough to cover both forward and backward linkages in its spheres of influence.[603] National petroleum law is of the same character as international petroleum law, but the former is focused on domestic petroleum regulations. Either way, they are both under the banner, 'petroleum law'. The difference between international petroleum law and national petroleum law is marginal. But while the former has more structured form of enforcement powers and mechanisms, the latter has limited enforcement legal infrastructure.[604]

6.3 Key Sources of Petroleum Law

The following sections present explorative analysis of the nine main sources of international petroleum law:[605] 'Contracts on petroleum; legislation by the state; customary practices; treaties; international law; general principles of law; decisions of tribunals; juristic works; determinations of the organs of international institutions.[606]

[603] ibid; Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84).

[604] Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011); Ikenna, "International Petroleum Law" (n 33); Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84); Nathaniel Burney, 'International Law: a brief primer' (*The Burney Law Firm LLC*, 2007) < www.burneylawfirm.com/international_law_primer.htm > accessed 5 February 2018; Robert Kolb, 'Sources of International Law' (*Baripedia*, last updated, 13 February 2018) < https://baripedia.org/wiki/Sources_of_International_Law > accessed 9 January 2019.

[605] Christopher Greenwood, 'Sources of International Law: An Introduction' <http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf >accessed 27 April 2017.

[606] Dixon, McCorquodale and Williams*, Cases & Materials on International Law* (n 53); Ikenna, "International Petroleum Law" (n 33); Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84); Burney, 'International Law: a brief primer' (n 604); Kolb, 'Sources of International Law' (n 604).

6.3.1 Contracts on petroleum

Contracts and agreements are sometimes used interchangeably or differently. They are both a mutual understanding reached between or amongst parties to observe certain duties in order to achieve mutually beneficial aims for themselves as parties and/or for third parties whose legitimate interests are expected to be protected by the main parties thereof.[607] This could assume a written or non-written form. But in formal circles, it is more creditable to put this mutual understanding into writing, especially when it is graduating to a status of a contract. Essentially, for an agreement to be reached between or amongst parties, the parties are required to have a mutual or common understanding regarding the relative rights and obligations or responsibilities they have. Thus, the parties are required to have a 'meeting of the minds' in order to sustain the relationships being established between or amongst them. In the basic form of an agreement, it can be considered as that with terms and elements that have informal or less formal establishment of obligations between or amongst parties to be discharged in a mutually beneficial manner.[608]

At this basic level, agreement has an offer, acceptance, mutual consent/understanding and legal purpose. These are loose arrangements that are highly dependent on the honour and benevolence or good faith of the parties and not necessarily reliant on exterior enforcement body for any redress. They are likely to form the initial context of petroleum contract negotiations where parties,

[607] Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2012); Maria Hook, *The Choice of Law Contract* (Hart Publishing 2016); Steven J Burton and Melvin A Eisenberg (eds), *Contract Law, Selected Source Materials Annotated* (West Academic Publishing 2019).

[608] ibid.

at this stage, may still be unsure about what is at stake, in terms of obligations and possibility of existence and quantum of the petroleum in a given area.[609]

On the other hand, contracts are mutual agreements between or amongst parties that have more rigid and formalised terms which cover and meet all the essential elements of substantial protection of rights and duties of all parties and rigorous enforcement in a court of law. A contract is, therefore, a legally binding agreement that has been reached between or amongst interested parties whereby they can seek enforcement of the terms in a court of law. The following requirements of a valid contract distinguish it from a basic or simple agreement.[610]

6.3.1.1 Offer and acceptance

The offer is what one party is presented to the other as the instrument upon which the relationships, in terms of the rights and obligations, are created or established. It must be stated in a specific form and not tainted in any ambiguity. The clarity requirement of an offer is aligned to the clarity principle of the ROL. An offer is, therefore, deemed to be made when the offeror has clearly written or presented the terms and have indicated their preparation or readiness to abide by the course of action so proposed upon the acceptance of the offer by the offeree or to whom the offer has been made.[611] Acceptance, as had been exemplified in the case of

[609] ibid.

[610] William R Anson with Maurice L Gwyer, *Principles of the English law of contract and of agency in its relation to contract* (16th edn, Claredon Press 1923) < https://archive.org/stream/principlesofengl00ansouoft/principlesofengl00ansouoft_djvu.txt > accessed 5 February 2019; Sarah Field, *Introduction to the Law of Contract: Formation of a Contract* (1st edn, Sarah Field & bookboon.com 2016) < www.kolegji-juridica.org/new_web/wp-content/uploads/2017/04/Introduction-to-the-Law-of-Contract.pdf > accessed 5 February 2019.

[611] McKendrick, *Contract Law: Text, Cases, and Materials* (n 607).

Manchester CC,[612] is the expression of the offeree that they consent to the proposal presented by the offeror and that they are bound by the rights and responsibilities that have been occasioned by the terms of the engagement between or amongst the parties. Not until an offeree accepts an offeror's offer in the required form, a contract cannot be said to exist at all.[613]

In the petroleum industry where risk-loving petroleum investors can begin exploration or construction activities even before formal agreements are entered into, in some instances due to bureaucracies especially in developing countries, it is possible for acceptance to take the shape of the conduct or performance as the first step before formal contract is agreed upon.[614] For instance, when the premier gas infrastructure was going to be constructed in Ghana, SINOPEC as the contractor had started construction even before the agreement between government of Ghana through the Ghana National Gas Company Ltd and the contractor fully took effect because it was dependent on a Chinese loan facility

[612] *Gibson v Manchester City Council* [1979] 1 All ER 972 UKHL; this case is valid and recognised in the SSA countries examined. As common law countries (with the exception of Angola) these countries have adopted the contract law principles from the UK. Even in a civil law country such as Angola, acceptance is a core component of a contract; see Leon E Trakman, 'Contracts: Legal Perspectives' in James D Wright, *International Encyclopedia of the Social & Behavioral Sciences* (2nd edn, Elsevier 2015); Duncan Fairgrieve, *Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction* (Hart Studies in Private Law, Hart Publishing 2016); Claire-Michelle Smyth and Marcus Gatto, *Contract Law: A Comparison of Civil Law and Common Law Jurisdictions* (Business Expert Press 2018); Giuditta Cordero Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith' (2007) 7(1) Global Jurist (Advances) Art 3.

[613] *Felthouse v Bindley* [1863]142 ER 1037.

[614] Ghanaweb, 'Alarm blow over $850m gas project' (*General News*, 18 September 2012) < www.ghanaweb.com/GhanaHomePage/NewsArchive/Alarm-blow-over-850m-gas-project-250746 > accessed 15 January 2019.

which had delayed in disbursement to the Ghanaian government.[615] This arrangement appeared to be legally questionable because it was as if putting the cart before the horse, which was not, for the critical reader, acceptable under Article 181(5) of the 1992 Ghana's constitution which requires parliamentary approval of a loan agreement or business transaction of international nature before projects associated therewith are rolled out.

The master facility agreement (MFA) between China Development Bank and government of Ghana for the multipurpose Chinese loan was passed by the Ghanaian legislature. But the subsidiary agreement which Ghana Gas Company Ltd entered with SINOPEC to pre-finance and carry out engineering, procurement, construction and commissioning (EPCC) of the Ghana gas infrastructure project appeared not to have had parliamentary approval. The New Patriotic Party had protested in the media and parliament.[616] The National Democratic Congress government took a different position and argued that since the EPCC agreement was a component of the MFA, it was needless to bring it to parliament for approval again.[617]

The latter position appears problematic because if each subsidiary agreement was not brought to parliament for approval, how could parliament effectively account for those other components of the MFA that did not see the light of the day in relation to those that got materialised such as the gas project built by SINOPEC? The reasonable thing to do, at least by the inner spirit of Article 181(5), was to bring every subsidiary agreement to parliament according to when the greenlight

[615] ibid.

[616] ibid.

[617] ibid.

that would have been given by the Chinese bank to disburse a part of the total of about US$3 billion earmarked for the targeted projects outlined in the MFA. This would facilitate proper accountability and transparency in accord with ROL and justice. The crucial point here is that the initial acceptance of the EPCC contract by SINOPEC appeared to be by conduct or performance. Government of Ghana through Ghana Gas Company Ltd could not have withdrawn the offer it made to SINOPEC at the time that the company moved capital and machinery to Ghana and began construction of the Ghana gas infrastructure.

The complex nature of the petroleum industry and for purposes of competition to take shape in delivering the best results for both the HS and petroleum companies, invitation to tender (ITT) is a contractual instrument used by some petroleum-rich countries to initiate engagements with best E&P companies.[618] ITT is an expression of the willingness of a public authority to engage with or enter into contractual arrangement with a company that can provide the required services and/or products for the best price and delivery as specified in the formal expression.[619]

Usually, public authorities in many countries are legally mandated to ensure that services which they require private companies to provide them are subjected to tender invitation processes. This ensures not only healthy competition in procurement but also accountability, effectiveness and efficiency in the transaction process - if handled with integrity and according to the ROL. In this case, offer is usually expressed in the tender by the participating companies when they are

[618] Oil & Gas UK, 'Tender Efficiency Framework' (Issue 1, December 2016) < http://oilandgasuk.co.uk/wp-content/uploads/2016/12/Efficiency-Task-Force-Tender-Efficiency-Framework.pdf > accessed 15 January 2019.

[619] ibid; Cinzia Talamo and Nazly Atta*, Invitations to Tender for Facility Management Services: Process Mapping, Service Specifications and Innovative Scenarios* (Springer 2019).

responding to the invitation made by the public authority to tender. Suitable tender is eventually selected and accepted by the public authority that issued the invitation to tender. There could be open invitation to tender or selective invitation to tender, with their different configurations.[620]

In the case of *Blackpool BC*,[621] for instance, the court rejected the defendant's argument that the tender submitted by the plaintiff was merely an offer made to the offeree or invitee subject to acceptance or rejection. The appeal court held that an 'implied collateral warranty' was occasioned by the nature of the tender invitation process. The court observed that the defendant was the one that chose the parties and sent them invitations to tender. This implied that the defendant knew all the selected parties.[622] Additionally, the ITT had detailed the due procedure. Any element that did not form part of the procedures to comply with by the invitees could not, therefore, form the basis for disqualification of any of the invitees. Clerical errors, upon which the tender was rejected, were not part of qualification criteria and so the plaintiff had the entitlement to have their tender duly considered as any other invitee that conformed to the laid down procedures in the ITT.[623]

This position of the court suggests a legal standard that, factors that are external to procedures spelled out in an ITT should not, unless reasonably avowable, be used as a reason not to consider examining offers made in the tenders put forward

[620] ibid.

[621] *Blackpool & Fylde Aero Club v Blackpool Borough Council* [1990] 3 All ER 25 UKCA.

[622] ibid.

[623] ibid.

by invitees.[624] In the petroleum industry, controversies can easily be stirred,[625] and so ITT must be comprehensive, detailed and tailored in a way that leaves no room for doubt as to the kind of tenders that will be considered for examination to be accepted or rejected. Tenets of ROL and justice must be integral to the qualification procedures. Offers from petroleum companies must carefully be examined to select the best possible tender that would inure to the benefit of the HS and the service providers within the precincts of ROL and justice.[626]

6.3.1.2 Consideration

Contracts that have not been entered under seal are required to be made with consideration. It is presented as anything considered by the parties as valuable which the parties exchange with each other or amongst themselves so as to achieve what they each are looking for in that legal arrangement.[627] Things of value usually exchanged between or amongst parties can range from services such as engineering works in an oil floating vessel, money or capital such as cash and credit to goods or commodities such as oil and gas.[628]

In the same vein, if things of value being exchanged are not reasonably matched in value or equitably valued, for that matter, then there is an element of unfair

[624] ibid.

[625] Desta, 'Competition for Natural Resources and International Investment Law (n 15); Cotula, *Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments* (n 125).

[626] WJP, 'The Four Universal Principles' (n 35); Friedman, 'Legal Rules and the Process of Social Change' (n 255); Shihata, 'Legal Framework for Development (n 28); Oil & Gas UK, 'Tender Efficiency Framework' (n 618).

[627] Field, *Introduction to the Law of Contract: Formation of a Contract* (n 610); Anson with Gwyer, *Principles of the English law of contract and of agency in its relation to contract* (n 610).

[628] ibid.

consideration. This is so because the consideration that would form the agreement will end up disadvantaging one party against the other.[629] This kind of consideration is evident in the petroleum industry of SSA where petroleum E&P capabilities of MNPCs are exchanged for lower petroleum income.

6.3.1.3 Mutual consent/understanding

Mutual consent is critical for the other factors to form shape or gain their recognition especially with respect to offer and acceptance. The consent must be freely procured without any sense of coercion by the parties. Mutuality also finds expression in the fact that every term in the contract must be the same that has been agreed upon by the parties and that anyone that is party to the contract is aware of the binding nature of the terms. They are willing and able to abide by the agreement.[630]

6.3.1.4 Intention to create legal relations

There must be an express intention of parties to be bound by the terms of the engagement they are entering. Their promises must demonstrate this clear legal intention. This is a key ingredient following the mutual understanding and consent.[631] In petroleum investment contracts, in particular, this is crucial because it leaves out any ambiguity in the not unusual contestations that characterise the petroleum industry. The case of (*Wheeler) v Office of Prime Minister* comes to the fore – readily. A prime minister of UK in 2004 made a promise to the effect that

[629] ibid.

[630] ibid.

[631] ibid.

the government was not going to ratify the Constitutional Treaty of the EU without its approval in a referendum.[632]

However, when Netherlands and France rejected the proposed constitutional treaty, the treaty was aborted. Later in 2007, the Treaty of Lisbon, which had several provisions that looked like the abandoned Constitutional Treaty, was consequently agreed upon by the EU. This was presented to be ratified in 2008.[633] When the plaintiff challenged the UK government's ratification of the Lisbon Treaty without the approval of the citizens in a referendum as earlier promised by the prime minister for the constitutional treaty in the administrative court, the court rejected the applicant's claims essentially on the grounds that the issue at stake was political instead of legal – the contours of such a promise was political and could not be of the courts nor could legitimate expectation be drawn from the promise.[634]

In the petroleum industry where controversies are not uncommon, the case of *Esso Petroleum v Customs & Excise* just showed how the court was divided in reaching a verdict whether there was a contract or there was no contract between Esso Petroleum and motorist that purchased petrol. Nonetheless, the appeal court dismissed the tax authority's claims and held that the offer of coins were free gifts, were not sold and could not attract or liable to taxes. Arguably, even if there was a contract as averred by Lord Simon and Lord Wilberforce, this offer by the petroleum company was more of social nature and may not have created strong

[632] *R (on the application of Wheeler) v Office of the Prime Minister & Anor* [2008] EWHC 1409 (Admin).

[633] ibid.

[634] ibid.

basis for legal relations to be created as also argued by Viscount Dilhorne and Lord Russell.[635]

6.3.1.5 The requirement for certainty

Somewhat related to establishment of the intention to create legal relations is the need to have certainty in the terms that govern the contractual relationship. It is mandatory that every contractual arrangement must be sufficiently clear, unambiguous and complete with details that are more direct and specific.[636] Basic agreements just do not have this feature as well. In fact, contracts without this greater level of certainty are more likely not to be enforceable by the courts. In the case of *Lynn,*[637] for instance, the court held that the promise of the defendant to purchase a horse at £63 with an additional promise to give £5 extra amount to the plaintiff 'if the horse was lucky' was, for Lord Tenterden CJ, just too vague and could not, therefore, be a contract that was legally enforceable.[638] In the petroleum industry and such other commercial sectors, for instance, there is a lot of competition, underhand dealings and insincerity which can only be cured by terms that have been well articulated and deposited in writing to avoid any denials and uncertainties of different dimensions on commitments made by the parties.[639]

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[635] *Esso Petroleum v Customs & Excise* [1976] 1 All ER 117 HL.

[636] Field, *Introduction to the Law of Contract: Formation of a Contract* (n 610); Anson with Gwyer, *Principles of the English law of contract and of agency in its relation to contract* (n 610).

[637] *Gunthing v Lynn* [1831] 2 B7 Ad 232.

[638] ibid.

[639] Yinka Omorogbe, *The Oil and Gas Industry: Exploration and Production Contracts* (Malthouse Press 1997); EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14); NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

6.3.1.6 Competence

All parties must be of sound mind with the ability to understand and appreciate contractual situation and details of terms. One may also, for instance, consider whether the designated official for a petroleum company has been duly authorised to act on behalf of the company in the contractual arrangements.[640]

6.3.1.7 Legal purpose/aim/conduct

Every contract has a purpose or what it intends to achieve. The purpose and accompanying duties of every contract must be within the strict boundaries of a conduct that is considered lawful by the applicable law of the jurisdiction in question.[641] So, for instance, a petroleum contract cannot be lawful in Ghana if it is contrary to the provisions of Petroleum (Exploration and Production) Act, 2016 (Act 919).[642]

In the context of this study, petroleum contracts and agreements are the same and used interchangeably but are examined under the legal parameters of contracts.[643] Petroleum transactions in SSA are constantly confronted with different dimensions of high-risk factors.[644] At the same time, petroleum E&P particularly requires huge financial injection while facing these risks. There are

[640] Field, *Introduction to the Law of Contract: Formation of a Contract* (n 610); Anson with Gwyer, *Principles of the English law of contract and of agency in its relation to contract* (n 610).

[641] E Farnsworth and others, *Contracts: Cases and Materials* (8th edn, University Casebook Series, Foundation Press 2013).

[642] Field, *Introduction to the Law of Contract: Formation of a Contract* (n 610); Anson with Gwyer, *Principles of the English law of contract and of agency in its relation to contract* (n 610).

[643] Naseem and Naseem, 'World Petroleum Regimes' in Talus (ed), *Research Handbook on International Energy Law* (n 84); Ikenna, "International Petroleum Law" (n 33).

[644] Adelman, 'Economics of exploration for petroleum and other minerals' (n 97)131.

also several players with varying interests from diverse backgrounds on the international plane.[645] It is, therefore, imperative that petroleum contracts continue to help in balancing the varying interests of all the actors in the petroleum industry especially that of the competing interests of HS and petroleum companies.[646]

6.3.2 Legislation by the state

Petroleum-rich countries enact specific laws and such other regulatory instruments that provide general legal framework within which petroleum resources can be explored, produced, traded, taxed and utilised. The state legislation provides a legal bedrock on which petroleum contracts are drafted, concluded and executed both at the national and international levels.[647]

6.3.3 Customary practices

In the petroleum transaction chain, there are certain unseen rules that are manifested in the engagement process. These unseen normative rules have both historical and cultural underpinnings.[648] Custom as a source of petroleum law characterises unwritten customary rules that regulate the transactions in the

[645] Luke Patey and Ricardo Soares de Oliveira, 'Introduction' in The Oxford Institute for Energy Studies, 'Africa's Oil & Gas Scene after the Boom: What Lies Ahead' (2019) 117 Oxford Energy Forum 1 < www.oxfordenergy.org/wpcms/wp-content/uploads/2019/01/OEF-117.pdf?v=7516fd43adaa > accessed 13 May 2019.

[646] Campbell, Campbell and Campbell, *Analysis and Management of Petroleum Investments: Risk, Taxes and Time* (n 98); Taylor, 'Methods of Exploration and Production of Petroleum Resources' (n 87); Deffeyes, *Hubbert's Peak, The Impending World Oil Shortage* (n 96).

[647] Ikenna, "International Petroleum Law" (n 33); Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (n 604).

[648] Anthony A D'Amato, *The concept of custom in international law* (Cornell University Press 1971).

petroleum value chain. These rules have been time tested and recognised by the comity of nations as that which have legal force in helping to govern petroleum transactions'.[649] The following five circumstances provide avenues for development and operationalisation of customary practices:

i. The kind of relationship built between petroleum companies and the HS in the practise of engaging with each other over time.[650]

ii. The kind of relationship petroleum companies have built with each other over time.[651]

iii. The kind of relationship HS have built amongst themselves - petroleum-rich states do cooperate amongst themselves in addressing issues of common interest.[652]

iv. The kind of relationship HS have developed amongst themselves and 'petroleum companies on one hand, and between petroleum consuming states and petroleum trading or business companies on the other hand'.[653]

v. The practices of lawyers and legal scholars or jurists that have reasonably resonated with the stakeholders over time.[654]

[649] Ikenna, "International Petroleum Law" (n 33).

[650] ibid.

[651] ibid.

[652] Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' in Blake and others (eds), *Boundaries and Energy* (n 34).

[653] Ikenna, "International Petroleum Law" (n 33).

[654] ibid.

6.3.4 Treaties

A treaty is an agreement that has been formally entered and concluded between or amongst sovereign jurisdictions.[655] Treaties – whether bilateral or multilateral - are the primary and critical source of any international law-making process.[656] Multilateral treaties amongst states have been championed by the UN through its treaty depository system.[657] Some multilateral treaties provide 'legal rules of general application such as UN Law of the Sea Convention 1982 (UNCLOS),[658] Vienna Convention on the Law of Treaties 1969 (VCLT)[659] and United Nations Charter 1945 (UNC).[660] Other multilateral treaties establish legal rules that regulate more specific areas of collective interest such as control of pollution and maritime navigation of carriers of petroleum like the UN Convention on the Continental Shelf 1958 (UNCCS).[661]

There are also multilateral treaties that regulate energy issues amongst states such as the Energy Charter Treaty of 1994.[662] However, there is still no multilateral petroleum treaty that effectively champion universal or international petroleum

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[655] Gordon and Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (n 266).

[656] Dixon, *Textbook on International Law* (n 53) 55.

[657] See Office of Legal Affairs, *Treaty Handbook* (Revised edn, Treaty Section, United Nations 2012) < https://treaties.un.org/doc/source/publications/THB/English.pdf > accessed 15 December 2018; see also Office of Legal Affairs, 'Multilateral Treaties Deposited with the Secretary-General' (United Nations, Treaty Collection) < https://treaties.un.org/pages/ParticipationStatus.aspx > accessed 19 January 2019.

[658] United Nations Convention on the Law of the Sea [1982] 1833 UNTS 3.

[659] VCLT 1155 UNTS 331.

[660] United Nations Charter [1945] 1 UNTS XVI.

[661] Convention on the Continental Shelf [1958] 499 UNTS 311.

[662] Turksen, *EU Energy Relations with Russia* (n 45).

law. The bilateral treaties between states have also established legal rules that govern the relations between petroleum-rich states including contractual treaties such as joint petroleum development bilateral treaties.[663] There are several bilateral and multilateral treaties, the mentioning of which goes beyond the scope of this exploration. These variously contribute to the consolidation of petroleum law – internationally and nationally.[664]

6.3.5 International law as a source of petroleum law

International law as a source of petroleum law constitutes the overarching framework in which petroleum issues that transcend domestic frontiers are regulated and addressed. For instance, international investment agreements (IIAs) and other legal rules of public international law that govern expropriation, protection, liberalisation and promotion of investments of cross-border nature do characterise elements of petroleum law.[665] The legal regime of international investment law that is championed by international centre for the settlement of

[663] See a Bilateral Treaty like the 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands relating to the Delimitation of the Continental Shelf under the North Sea between the Two Countries, done at London on 6 October 1965, as amended by the Protocol of 25 November 1971, the Exchange of Notes of January and June 2004, as well as by the Exchange of Notes of 19 April 2013 and 3 July 2013'; the 'Agreement between the Kingdom of Saudi Arabia and the State of Kuwait concerning the submerged area adjacent to the divided zone done on 2 July 2000'.

[664] Alvik, *Contracting with Sovereignty* (n 604); Ikenna, "International Petroleum Law" (n 33).

[665] Gordon and Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (n 266); Burney, 'International Law: a brief primer' (n 604); Kolb, 'Sources of International Law' (n 604).

investment disputes (ICSID) also acts as an international legal source for petroleum law.[666]

6.3.6 General principles of law as a source of petroleum law

General principles of law espouse the values, philosophies and rules that underpin the reasoning for legal situations. Article 38(1) of ICJ Statute has articulated some common principles of law that largely resonate across many municipal or national legal systems.[667]

In particular, Article 38(1) (c) of the ICJ Statute makes reference to 'general principles which states have recognised'.[668] It does exhibit material intersection between national law and international law. This is because the principles that have been recognised by states in the precincts of international law have largely been directly or indirectly applied in the respective jurisdictions, and often, the vice versa.[669]

This interrelationship, based on the shared principles, used to exhibit itself in how diplomats and employees of IOs had utilised municipal legal approaches while also

[666] ibid.

[667] ICJ, 'The Statute of the International Court of Justice' < http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf > accessed 13 December 2017.

[668] ibid.

[669] C F Amerasinghe, *The Law of the International Civil Service: As applied by International Administrative Tribunals* (2nd revised edn, vol II, Clarendon Press 1994).

being directly subject to international law.[670] A few of the shared principles include equity,[671] estoppel[672] and good faith.[673]

These principles contribute to a framework from which construction of legal engagements such as petroleum contracts and legislation draws their source of rules and legal reasoning – both at the international and national levels. They have been used in petroleum agreements and dispute adjudication. Equity is used in terms of the benefit allocation each party in petroleum is deserving of while good faith is used in the context of each party keeping trust and confidence in the terms of a contract and discharging their responsibilities. Estoppel is used in the context of the things parties in petroleum contract should not do in the performance of their obligations.[674]

6.3.7 Decisions of judicial or arbitral tribunals

While in common law jurisdictions the decisions of judges serve as binding or persuasive precedent on subsequent court decisions and significantly contribute

[670] ibid.

[671] Generally, equity is characterised by "the spirit and the habit [or the quality] of fairness, justness, and right dealing" which regulate interrelations between persons; see the law dictionary, 'What is equity? < https://thelawdictionary.org/equity/ > accessed 23 June 2019.

[672] Estoppel is largely referred to as a "bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law"; see The law dictionary, 'What is estoppel' < https://thelawdictionary.org/estoppel/ > accessed 23 June 2019.

[673] Good faith refers to as "honest dealing" requiring "an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent"; see Legal Information Institute, 'Bad Faith' (Cornell Law School) < www.law.cornell.edu/wex/good_faith > accessed 23 June 2019.

[674] The law dictionary (n 671); The law dictionary (n 672); Legal Information Institute (n 673); H W A Thirlway, *International Customary Law and its Codification* (Springer 1972).

to law-making, this is the reverse with respect to civil law jurisdictions.[675] In this regard, whereas petroleum legislations and contracts in common law jurisdictions are expected to be highly accommodative of judicial decisions, petroleum laws in civil law countries are theoretically inclined not to pay obligated attention to judicial decisions.[676]

With international law, however, although there is no binding or normatively persuasive effect of preceding juridical decisions on subsequent court decisions, the decisions of judicial or arbitral tribunals have normative effect in the formulation of international customary law. International law, indeed, does not have consolidated rule of *stare decisis* or precedent-based decision-making. In issuing judgments, ICJ is, however, fond of making references to its judgements in preceding cases to support the value of its reading of the law.[677] These arbitral and judicial decisions include international judicial decisions reached from courts such the ICJ, for instance, regarding delimitation of offshore territorial boundaries between states that have implications for petroleum E&P,[678] and International

[675] John William Salmond, *Jurisprudence: Or the Theory of the Law* (2nd edn, Stevens and Haynes 1907); John H Langbein, Renée Lettow Lerner and Bruce P Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen Publishers 2009); Bryan A Garner, *A Dictionary of Modern Legal Usage* (3rd edn, Oxford University Press 2011); Bryan A Garner, *Black's Law Dictionary* (10th edn, Thomson West 2014) 334; H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, Oxford University Press 2014); Harry Potter, *Law, Liberty and the Constitution: a Brief History of the Common Law* (NED, new edn, Boydell and Brewer 2015).

[676] Trakman, 'Contracts: Legal Perspectives' in Wright, *International Encyclopedia of the Social & Behavioral Sciences* (n 612); Fairgrieve, *Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction* (n 612); Smyth and Gatto, *Contract Law: A Comparison of Civil Law and Common Law Jurisdictions* (n 612).

[677] Dixon, *Textbook on International Law* (n 53); Thirlway, *International Customary Law and its Codification* (n 674).

[678] See, for instance, *The North Sea Continental Shelf Case* [1969] ICJ Report 3.

Criminal Court (ICC) adjudication on crimes arising out of conflict on ownership of petroleum resources that have been considered as precedents of weighty disposition;[679] as well as arbitral awards of international tribunals such as from the Permanent Court of Arbitration (PCA) and those from other independent arbitration bodies.[680] In drafting petroleum legislation and contracts, it makes both common and legal sense to be aware of previous decisions of courts and ensure that provisions thereof are likely receptive to and enforceable by the courts in any given legal situation that involves disputations. This disposition, in varying degrees, is tenable in both common law and civil law jurisdictions.[681]

6.3.8 Juristic works

The works of eminent legal scholars such as academic texts authored by prominent jurists and others of such specialised nature are attracted to both legislative and judicial reasoning.[682] Legislatures usually consult works of legal scholars when they are enacting laws in order to get deeper insight into the legality, quality and

[679] See, for instance, *Earl of Lonsdale v Attorney-General* [1982] I, WLR 887 - regarding what constitute the interests of HS in Petroleum Resources.

[680] See, for example, *Libyan American Oil Co (Liamco) v The Government of the Libyan Arab Republic* [1981] 20 ILM 1-87; *Aminoil v Kuwait Arbitration, Award* [1982] 21 ILM 976-1005 – regarding HS right to unilaterally abrogate a Petroleum Concession Contract and expropriate assets of Petroleum Companies; as well as, *Earl of Lonsdale v Attorney-General* [1982] I WLR 887 - regarding what constitute the interests of HS in Petroleum Resources.

[681] Alvik, *Contracting with Sovereignty* (n 604); Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015).

[682] ICJ, 'The Statute of the International Court of Justice' (n 667) Art 38(1) (d).

effectiveness of the law to be promulgated. In reaching judicial decisions, judges also consult juristic works.[683]

In fact, juristic works essentially assist judges in giving a well-informed interpretation of these other sources. It is a worthy source of petroleum law in the scheme of galvanising robust petroleum legal frameworks that are more credible and that which 'facilitate the uniform application and assimilation of customary rules of petroleum law'.[684]

6.3.9 Decisions, resolutions or determinations of the organs of international institutions or international conferences

International institutions such as the UN, World Bank, OPEC, IMF, EU and AU have historically positioned themselves as powerful actors in the global rule-making regimes/platforms. Their decisions, resolutions or determinations have been leveraged into state practice and customary law. This is essentially so because, IOs mostly represent the interests of powerful member states in various situations of human endeavour at the global level – and as translated into the national level by the operations of these IOs.[685]

In particular, UN goes beyond institutional actions of its various organs to organise international conferences that culminate into treaties with legal force.[686] For instance, the conferences that led to the UNCLOS in 1982 was one of landmark

[683] Greenwood, 'Sources of International Law: An Introduction' (n 605); Bentham, 'The International Legal Structure of Petroleum Exploration' (n 84); Burney, 'International Law: a brief primer' (n 604); Kolb, 'Sources of International Law' (n 604).

[684] Ikenna, "International Petroleum Law" (n 33).

[685] J G Starke, *Introduction to International Law* (10th edn, Butterworths-Heinemann 1989).

[686] ibid.

actions that resulted in generating the legal framework for activities in the sea including upstream petroleum E&P.[687] However, UNCLOS does not significantly cover all substantive areas of petroleum transactions. For example, onshore petroleum activities have not been captured by UNCLOS. Even in the upstream sector, contractual arrangements between the HS and MNPCs have not been addressed by UNCLOS.[688] Curiously, the UN has not organised any international conferences to develop a treaty on petroleum transactions in addressing the germane concerns of petroleum transactions, especially in SSA.[689]

These actions by IOs have continuously courted debates on whether they are a significant source of law at the international level or not. Critics would tend to argue that actions of IOs that crystallise into law could unjustifiably perpetuate the exploitative interests of these organisations on the collective interests of the citizenry. These critics would be more etched by anxiety if the lack of accountability or minimal accountability regime of IOs is anything to go by.[690]

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[687] Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (1st edn, Hart Publishing 2016).

[688] Ikenna, "International Petroleum Law" (n 33).

[689] ibid.

[690] Simon Burall and Caroline Neligan, 'Accountability of International Organisations' (Global Public Policy Institute, GPPi Research Series No 2, 2005) < www.gppi.net/media/Burall_Neligan_2005_Accountability.pdf > accessed 13 January 2019; José Maria Beneyto, 'Accountability of international organisations for human rights Violations' (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 6 November 2013) < http://website-pace.net/documents/10643/110596/20131106-OrganisationAccountability-EN.pdf/28c93fd3-53fa-4a9d-9712-bd25f5e68be0 > accessed 16 February 2019; see also Gudrun Monika Zagel, 'International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap'(2018) 36(1) Nordic Journal of Human Rights 74.

For instance, the World Bank and IMF have been heavily criticized by social justice activists and scholars that they contribute to the aggravation of poverty situation in developing countries such as those in SSA instead of alleviating it, as these organisations always seek to portray and signed off as their missions. For example, it appears unconscionable to impose SAPs (which often require reduction on public spending) on poor countries that adversely affect rights to employment, and education.[691] However, these shortfalls are not entirely the complete outlook of IOs in respect of law-making that may enhance their interests. Indeed, in the area of petroleum law, the actions of these IOs can, as argued by optimists such as Ikenna,[692] be seen to be significant in a number of instances:

i. The actions of IOs would stand to characterise or associate with significant milestone in the consolidation of customary rules and principles that regulate petroleum E&P as well as trading. For instance, 'UN resolutions on ownership concepts that have been applicable to petroleum resources including General Assembly Resolution 1803 (XVII) of 1962,[693] or Communiques from petroleum international conferences such as those from the natural resources law's section[694]

[691] STWR, 'The IMF, World Bank and trade: an overview' (Share the World's Resources, 9 May 2008) < www.sharing.org/information-centre/articles/imf-world-bank-and-trade-overview > accessed 13 June 2018.

[692] Ikenna, "International Petroleum Law" (n 33).

[693] Permanent sovereignty over natural resources (n 21).

[694] International Bar Association, 'Legal Practice Division: Energy, Environment, Natural Resources and Infrastructure Law (SEERIL) section' < www.ibanet.org/LPD/SEERIL/Default.aspx > accessed 12 February 2019.

of International Bar Association[695] and the Energy Institute[696] have served as rallying points in building international consensus on customary petroleum law.[697]

ii. The resolutions or guidelines that have been issued by IOs for their internal operations can serve as a useful benchmark for legislating and contracting on petroleum transactions. For example, resolutions of OPEC regarding petroleum development, pricing and control (e.g. supply limits) have been a source of reference for HS and petroleum companies. Furthermore, there are guidelines and resolutions of these IOs that are geared towards regulating the conduct of petroleum operations at the global level. For instance, in 1992, the World Bank came out with 'Guidelines on Foreign Direct Investment'.[698]

Prior to that, International Maritime Organisation (IMO) enacted regulations on Abandonment in 1989. These two instruments and similar ones from other IOs could act as a useful guide in the determination of the appropriateness of petroleum operations. They could even 'have full legal effect that establishes binding rules on member states and organs of the institution'.[699] As a matter of fact, non-members or associates may even adopt such rules when the rules appear to have superior attraction to their regulatory purposes. These could end

[695] International Bar Association, 'IBA conferences and events' < www.ibanet.org/Conferences/conferences_home.aspx > accessed 12 February 2019.

[696] See Energy Institute, 'Oil and natural gas remain the world's leading fuels, accounting for nearly 60% of global energy consumption' (*Oil and Gas,* energy institute, 2019) < www.energyinst.org/exploring-energy/topic/oil-and-gas > accessed 16 February 2019.

[697] Ikenna, "International Petroleum Law" (n 33).

[698] ibid.

[699] ibid.

up as customary petroleum legal rules that would be respected by states and IOs, as well as private companies such as MNPCs operating in SSA.[700]

iii. IOs make provisions for their organs to issue binding decisions or determinations regarding their constituent instruments. When this happens, these IOs get to respect the decisions thereof. These get to serve as standards for those entities that respect the IOs. What this suggests, for example, is that given the overarching dominance the World Bank has on the global financing landscape, it is reasonable for some MNPCs that respect the World Bank to abide by determinations it may make on its constituent instruments.[701]

iv. IOs may commission a committee constituting jurists to inquire into a legal problem of concern to them – even if not to the society. Any determination or decision reached by this committee of jurists could expand the frontiers not only of knowledge in the area in which the legal problem is situated but also, enrich the consolidation process of the legal framework that captures this legal issue.[702]

It would appear, therefore, that all these four instances that point to the relevance of conduct of IOs in international – or in fact – national petroleum law-making, are presented as customary in nature which would have the proclivity to be transposed into state legislations and treaty regimes or remain customary. It is possible for some of the actions of IOs to graduate into peremptory norms (i.e. *jus cogens*).[703]

[700] ibid.

[701] ibid.

[702] ibid.

[703] ibid.

Of immediate attraction is the legal norm that, the creation and conclusion of agreements must be devoid of force or coercion – as provided in Article 52 of VCLT. The VCLT which 'was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the UN Conference on the Law of Treaties'[704] is one of the many actions of IOs that have crystallised into an international legal norm. Although VCLT technically applies to only states, other subjects of international law are reasonably subject to this provision. This means that, agreements or rules of IOs must not be entered into through coercion and force. By implication, it is unconscionable for MNPCs to use means of force and coercion, even in their camouflaged forms, to tie the hands of HS in SSA with petroleum contracts that may not sit well with ROL and justice – or ethics.[705]

6.3.10 Reclassified sources of petroleum law and *lex petrolea*

It is possible to reclassify the above sources of petroleum law into broader categories other than the nine sources above. For instance, treaties, general principles of law, customary practices, juristic works, arbitral tribunal decisions and, to some extent, resolutions/decisions of IOs are all known basic sources of general international law.[706] Therefore, all these elements could stay distinctly and paired with contracts and national legislations. In such a categorisation, international law's section is eliminated as a distinct source. The observations or content under the above distinct section that is labelled as 'international law' will

[704] Office of Legal Affairs, 'Chapter XXIII: Law of Treaties' (UN Treaty Collections, Depository, and Status as at 05 March 2019) < https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en > accessed 5 March 2019.

[705] Ikenna, "International Petroleum Law" (n 33).

[706] Greenwood, 'Sources of International Law: An Introduction' (n 605).

then be captured and absorbed by the sections labelled as 'treaties' and/or customary practices. This would make the principal sources of petroleum law, from the international perspective, to be about eight, rather than nine. Thus, the eight sources will be: National legislation, petroleum contracts, customary practices, treaties, general principles of law, juristic works, judicial/arbitral decisions and resolutions/decisions of organs of IOs.

Alternatively, the sources of international law as distinct labels could be eliminated by allowing international law to stay as distinct label and paired with contracts and national legislations to form three main sources of petroleum law. This is so because the rest of the other sources mentioned above are sources of international law. Consequently, the alternative classification of the sources would be contracts, national legislations and international law. The three-form reclassification is more persuasive because it is clearer, condensed and non-repetitive. These generally highlight the categories of sources of *lex petrolea* or customary law in the petroleum industry. Some of these sources have been contentious, nonetheless. For example, there have been contentions on the extent to which precedents, customs or practices as key components of customary law, can create a uniform petroleum law at the international level or *lex petrolea*.[707]

With respect to the 1982 decision of the Arbitral Tribunal in *Aminoil v Kuwait,* for instance, the arbitral tribunal dismissed the precedents' arguments as source of

[707] Thomas C Childs, 'Update on *Lex Petrolea*: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' (2011) 4(3) Journal of World Energy Law & Business 214; A Timothy Martin, 'Lex Petrolea in International Law' < http://timmartin.ca/wp-content/uploads/2016/02/Lex-Petrolea-in-International-Law-Martin2012.pdf > accessed 15 February 2019; John P Bowman, 'Lex Petrolea: Sources and Successes of International Petroleum Law' (Houston, International Upstream Energy Conference, 11 June 2015).

lex petrolea.[708] This popular arbitration case had Kuwait's government put up an argument that the "compensation for its expropriation of Aminoil's concession should be based on precedents resulting from a series of transnational negotiations and Agreements arising out of other recent nationalizations in the Middle East".[709] Kuwait further submitted that precedents from these transnational engagements did generate 'a kind of customary rule that was valid for the typical framework of the oil industry'.[710]

Accordingly, for Kuwait, a *lex petrolea* was said to have been formed. In the light of this, therefore, the government of Kuwait did not see it necessary to offer more than the "netbook value of the redeemable assets as compensation for its expropriation"[711] of the oil. Founded on the facts of the case and the applicable laws, the tribunal did not find any reasons not to reject the arguments of Kuwait which claimed that the cited precedents amounted to a *lex petrolea*.[712] One of the critical non-legal but poignant points that informed the tribunal's rejection of Kuwait's submissions was that the concessionaires were said to have usually been pressurised to give their consents by a number of politico-economic constraints

[708] *The Government of the State of Kuwait v The American Independent Oil Company* [1982] Ad hoc Arbitral Tribunal 66 ILM 519.

[709] Bowman, 'Lex Petrolea: Sources and Successes of International Petroleum Law' (n 707).

[710] ibid.

[711] John Bowman, 'Lex Petrolea: Sources and Successes of International Petroleum Law' (King & Spalding, 13 February 2015) < www.kslaw.com/blog-posts/lex-petrolea-sources-successes-international-petroleum-law > accessed 13 March 2017.

[712] ibid.

that had "nothing to do with law".[713] This disposition has not changed that much, since then.

The continued modernisation of the global trading and investment environment comes with it growing intricacies of the global petroleum industry which produce a challenge to the foundation and consolidation of *lex petrolea*. So, it is essential to understand and reformulate the composition and scope of *lex petrolea* to have an unrestricted presence in modern transnational law that regulates ownership, control, exploration, production and transportation as well as trading and taxing of petroleum resources.[714]

In this regard, Bowman has, in present times, categorised 'possible sources of *lex petrolea*' into four (4) areas of consideration: 'National petroleum laws; international petroleum contracts; custom and practice in the international oil industry; and international arbitration awards'. These broad sources are preconditioned on the hindsight of the ensuing debates regarding the 'composition and existence of *lex petrolea*' in the first place.[715] In contrast, the sources presented by Ikenna are more exhaustive, supported by significant literature in the field and, of course, includes the sources of *lex petrolea* articulated by Bowman. But Ikenna's classification risks repetition, as observed earlier, just as 'custom and practice in the international petroleum industry; and international

[713] ibid.

[714] Childs, 'Update on *Lex Petrolea*: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' (n 707); Martin, 'Lex Petrolea in International Law' (n 707).

[715] Bowman, 'Lex Petrolea: Sources and Successes of International Petroleum Law' (n 711).

arbitration awards' are elements under Bowman's four-tier classification which are merely listing two sources of international law.

Arguably, both Ikenna's and Bowman's categorisations can be best fitted into the categories averred by this thesis, namely: International law, contracts, and national legislations. After all, sources of petroleum law navigate across the winding trenches between international law and municipal or national law relating to petroleum transactions. The sources of international petroleum law are likely to expand further as international and municipal laws continue to mutate in tandem with the dynamic interests of stakeholders and in regard of necessity, reasonableness and proportionality.[716] It follows that sources of petroleum law can be indicatively said to be any recognised legal avenues and materials that would contain relevant rules, prescriptions and norms which can be defined and utilised in petroleum transactions and associated issues by policy makers, lawyers, jurists, judges and other decision makers and actors in the petroleum arena.[717]

6.3.11 Formation of *lex petrolea* through dispute settlements

Dispute types that have demonstrated the formation of elements under these sources of *lex petrolea* include five main categories:

- 'State v State;
- Company v State;

[716] Childs, 'Update on *Lex Petrolea*: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' (n 707) 214; Martin, 'Lex Petrolea in International Law' (n 707).

[717] ibid*;* Ikenna, "International Petroleum Law" (n 33); Greenwood, 'Sources of International Law: An Introduction' (n 605); Bowman, 'Lex Petrolea: Sources and Successes of International Petroleum Law' (n 711)

- Company v Company;
- Individual v Company';[718]
- Individual v State disputes.

Martin identified the first four types as the dispute formation types which are evident in *lex petrolea*. However, the fifth one, *Individual(s) v State*,[719] that has been included, is informed by the human rights and environmental related cases in which individuals would sue the state for either inaction or omission to act properly on regulating the conduct of petroleum companies or that the state is accused of being an active participant in committing the human right. The state may also sue individuals on both civil and criminal grounds depending on the conduct of the individuals in the petroleum transactions that may be considered by the state as unlawful conduct.[720]

For any of these dispute formation types to make an impact on *lex petrolea*, they ought to be considered as persuasive precedent, practice or custom that has been reasonably accepted or welcomed by the courts, arbitration panels, the state, lawyers, legal experts and other players in the following adjudication forums or dispute resolution methods which are patronised by the stakeholders in the

[718] Martin, 'Dispute Resolution in the International Energy Sector: An Overview' (n 405).

[719] See, for instance, HRH *Emere Godwin Bebe Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd & Lucky Alame and others v Royal Dutch Shell Plc v Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191 – regarding two consolidated actions by individual appellants against Royal Dutch Shell on the oil leak and environmental damage caused by the respondents.

[720] Martin, 'Dispute Resolution in the International Energy Sector: An Overview' (n 405) 332; see also Jonathan Warne (ed), *International Commercial Dispute Resolution* (Tottel Publishing 2009); Mary Ellen O'Connell, *International Dispute Resolution: Cases and Materials* (2nd edn, Carolina Academic Press 2012); Vesna Lazić and Steven Stuij (eds), *International Dispute Resolution Selected Issues in International Litigation and Arbitration* (Springer 2018).

petroleum industry: These methods are; negotiation, mediation, expert determination, dispute review board, litigation, and arbitration.[721]

Arbitration is popularly used in the petroleum industry primarily because it provides some advantages such as 'greater flexibility, opportunity for parties to select arbitrators of their choice, selection of the kind and extent of their arbitration process, and the liberty to choose the venue and forum for the arbitration, as well as the opportunity for foreign jurisdictions to recognise and enforce arbitral awards'.[722] In the large part, as Martin has observed, litigations in court and outcomes thereof hardly have these opportunities that are integral to arbitration. The other measures neither also have stronger appeal to the parties in most cases except in special situations that require the use of either of them. For instance, in highly technical economic evaluation of petroleum resources, expert determination would be more suitable.[723]

Ultimately, *lex petrolea* or uniformity of petroleum laws are expected to be generated from any of the configuration of the sources above. They are usually centred on precedents or 'customs and practices' which appear to sometimes be on collision course with the competition between international law and municipal law to gain the status as a treaty-based model of law with common features that resonate across power-brokers or powerful nations and IGOs in the comity of nations.[724] *Lex petrolea* is, therefore, still being consolidated in what appears to be somewhat, a hostile terrain of international law and competition for petroleum

[721] ibid.

[722] ibid.

[723] ibid.

[724] ibid.

resources in domestic settings which attract the suspicious approach of diverse municipal laws.[725] This implies that, petroleum law is still loosely generated from these reasoned sources of international and national laws.[726] Therefore, this thesis contributes also to the debate of the formation and consolidation of petroleum law through the insights of reclassification it brings to bear on understanding the sources of petroleum law.

6.4 Petroleum Ownership and Control Theories

6.4.1 General perspective of ownership

The first coordinated and critical legal thought that initiates processes leading to the use of petroleum resources in any part of the world is mainly centred on four considerations: thus; who owns, how to own, who controls and how to control the resources. The distinguishing feature across these parameters is 'ownership and control of the natural resource'.[727] The nature of ownership and control of petroleum resources becomes centripetal to the amount of benefit that would be

[725] Desta, 'Competition for Natural Resources and International Investment Law (n 15).

[726] Childs, 'Update on *Lex Petrolea*: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' (n 707); Martin, 'Lex Petrolea in International Law' (n 707).

[726] ibid*;* Ikenna, "International Petroleum Law" (n 33)*;* Greenwood*,* 'Sources of International Law: An Introduction' (n 605); Bowman, 'Lex Petrolea: Sources and Successes of International Petroleum Law' (n 711).

[727] Michele Graziadei and Lionel Smith, *Comparative Property Law: Global Perspectives* (Research Handbooks in Comparative Law, Edward Elgar 2017); Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Contributions in Legal Studies, Greenwood Press 2000); Lanre Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (2013)38 Thurgood Marshall Law Review 159; see also; Encyclopaedia Britannica, 'Ownership: Law' < www.britannica.com/topic/ownership> accessed 02 November 2018.

generated from the resources for each of the parties. The dimension of these two parameters largely depends on capacity and capability of parties or stakeholders at any material point from exploration, development to production and dispensing or distribution of the resource.[728]

Although varied, a classical definition of full ownership of anything is broadly characterised by the right that has been possessed by a person or group of persons to be able to absolutely keep, enjoy or dispose of that object to the fullest extent possible where no interference is envisaged, entertained or permitted. A partial ownership is applicable in *mutatis mutandis* to the extent of the rights acquired by the subject and associating the possession and usage of the object with the subject.[729]

Legally speaking, ownership refers to the legal relations that exist between an individual, a group of individuals, public entity or business entity otherwise deemed as subject or person (natural and legal) on one hand and a veritable object on the other hand whereby the subject has the right to exercise possession, control and utilisation over the object for the benefit of the subject.[730] This kind of ownership has been broadly defined as the unfettered wad of equitable and legal rights that have been earned through a lawful title to occupy, possess, use, enjoy, sell, rent, assign or transfer the property as well as the right to exclude other people from the use of or interference with that property. The object in question can be 'corporeal element such as oil and gas, or a totally legal creature such as

[728] ibid.

[729] ibid; Richard A Epstein, 'Possession as the Root of Title' (1979) 13 Georgia Law Review 1221 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2235&context=journal_articles> accessed 13 January 2017.

[730] ibid.

a patent, intellectual property, copyright, trust, annuity or trademark'.[731] The relations and rights the subject should have and would be able to exercise over the object are dependent upon or influenced by different legal regimes, cultures and customs as well as the economic systems.[732]

In effect, the proprietary rights over petroleum resources tend to throw up a number of legal constraints especially relating to claims or disputations over ownership and control of oil and gas.[733] To help fully appreciate this reality, there are a couple of 'ownership and control theories' which lay out systematic interchanges, expectations and legal relations regarding how to identify, own and control energy resources like petroleum.[734] These include: 'the theory of non-ownership', 'the ownership in place theory', 'theory of qualified ownership' and 'servitude theory' as well as ownership theory of strata.[735] They are each briefly explored in turn below.

6.4.2 Theory of non-ownership

The theory of non-ownership' holds the position that since petroleum is 'fugacious', its ownership is only guaranteed when the owner of the land surface, underneath which the petroleum is found, has been able to explore, develop and produce the petroleum.[736] Thus, the owner of a piece of land can only become

[731] ibid.

[732] ibid.

[733] Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (n 727).

[734] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727) 159.

[735] ibid.

[736] ibid; Graziadei and Smith, *Comparative Property Law* (n 727); Mattei, *Basic Principles of Property Law* (n 727); see also Encyclopaedia Britannica, 'Ownership: Law' (n 727).

owner of petroleum thereof if they are able to dig down beneath the surface of the land to possess the petroleum. In other words, you cannot own petroleum underneath your land unless and until you are capable of possessing it and have subsequently been able to possess it. But as long as the 'fugacious' substance still stays underneath the land owner's surface and the owner has not granted or gained access, no one has the right to claim ownership.[737] There have been many contentions surrounding this notion of non-ownership, but the bottom-line is that no one is deemed to have the right to claim ownership of the petroleum until the resource is accessed and possessed and interested parties are licenced to exploit it.[738]

6.4.3 Ownership in place theory

Theory of ownership in place is also known as the theory of absolute ownership of petroleum resources. This theory is founded on the *ad coelum* doctrine which states in Latin: '*Cuius est solum, eius est usque ad coelum et ad inferos'.*[739] This fundamentally translates to mean that anyone that owns a parcel of land is the one that also owns the mineral resources that lie underneath that land - wherein land here captures every other thing from the surface up to the sky right down to the very lowest and deepest parts of the earth underneath the earth crust. This doctrine presents absolute claim for anyone who owns a piece of land. [740]

Inspired by this doctrine, therefore, ownership in place theory posits that all minerals, including petroleum, beneath the land are owned by the owner of the

[737] ibid.

[738] ibid.

[739] Howard Epstein, *Land-Use Planning* (Irwin Law 2017).

[740] ibid.

land surface. The owner of a plot of land is at liberty to assign any title to it including: 'Severance, reservation, or separation'.[741] However, if the petroleum moves to another person's land and get captured, the latter gets to own petroleum.[742] In effect, any petroleum produced from this land, as long as possessed therefrom, remains the 'personal property of the party that has been able to capture the petroleum'.[743]

The 'capture and own principle' is crucial because, since petroleum resources tend to be fugacious, the oil and gas found beneath the surface of a land owned by a party may, with time, migrate to another party's land.[744] The absolute ownership theory, therefore, stipulates that the ownership of oil and gas beneath someone's land is only limited to the time when the petroleum resource remains beneath the land they own and that which is within their limit of capture.[745] The first party's ownership of the mineral is denied or dispossessed when the resource migrates to some other persons' land where the second party can capture it beneath their own land.[746]

[741] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727).

[742] Bryan Clark, 'Migratory Things on Land: Property Rights and a Law of Capture' (2002) 6.3(2) Electronic Journal of Comparative Law < www.ejcl.org//63/art63-3.html#N_1_ > accessed 15 September 2018.

[743] ibid; Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727); Martin and Kramer, *Williams & Meyers, Oil and Gas Law* (n 109).

[744] ibid.

[745] ibid.

[746] ibid; Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (n 727).

In *Barnard v Monongahela,*[747] Monongahela, as the defendant, had been granted a title for a parcel of oil-rich land by a neighbour to drill for oil. [748] The defendant succeeded in drilling this land but ended up obtaining oil from underground well on Barnard's land which was lying adjacently nearby. Barnard sued to claim ownership of the oil.[749] However, the plaintiff lost since the court held that underground oil and gas are fugacious and must only be captured and possessed before it can really be owned by the owner of the land beneath which the oil and gas may have initially been 'imprisoned' or found underneath. The court referred to oil and gas as 'fugitive' at some point and, particularly, as 'wild animal' at another point. That is, the fact that you have seen a wild animal on your farm does not mean that the animal necessarily belongs to you until you are able to chase it and kill it within the perimeters of your farm.[750]

Arguably, unlike the principle of non-ownership, the strict reading of this absolute ownership principle will, however, suggest that if technology or such other innovation assists someone to cross into another person's underground territory to draw in or capture oil, that conduct would be deemed illegal.[751] For individuals,

[747] *Barnard v Monongahela Natural Gas Co* [1907] 216 Pa 362. Even though this case is from the USA, it is one of the foundational and popular cases that have received an international acclaim to initiate conversations on ownership of mineral resources. Other cases from the USA that have been cited in this section are also such popular cases that really do not matter whether jurisdictions are civil law countries such as Norway and Angola or common law countries such as the UK, Ghana and Nigeria; see Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727); *Mattei, Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (n 727).

[748] *Barnard v Monongahela Natural Gas Co* [1907] 216 Pa 362.

[749] ibid.

[750] *Pierson v Post* [NY 1805] 2 Am Dec 264.

[751] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727); Martin and Kramer, *Williams & Meyers, Oil and Gas Law* (n 109).

the theory of ownership in place is increasingly becoming inapplicable in many countries where ownership of petroleum resources is transferred or bequeathed to the government and state.[752] In fact, almost all SSA countries including Ghana,[753] Nigeria[754] and Angola[755] entrust ownership of petroleum resources in the hands of the government and state.

In many countries outside SSA, this ownership disposition for the state does hold sway. Some few parts of USA such as in Texas[756] and Canada such as in Alberta[757] still operate with this theory as it is traditionally recognised whereof private individuals that own land are still granted the authority of ownership over petroleum resources underneath the lands they own.[758] Under the theory of eminent domain where the state may have the right to confiscate property for public use purposes, it is possible for some government authorities to seize private lands for petroleum mining activities. In other developed countries such as UK and Russia, the theory of absolute ownership no longer operates to favour individual

[752] Aladeitan (n 721).

[753] The Constitution of the Republic of Ghana [1992], Art 257(6).

[754] The Constitution of the Republic of Nigeria [1999], Art 44 (3).

[755] The Constitution of the Republic of Angola [2010], Art 16.

[756] George Snell and others, 'A Comparative Review of Oil and Gas Law in Texas, North Dakota, Wyoming, Montana, Colorado and Utah' [2004] Landman 28 < http://jay.law.ou.edu/faculty/Hampton/Mineral%20Title%20Examination/Spring%202012/ComparativeReviewOfOandGLaw.pdf > 5 April 2017.

[757] Andre Plourde, 'Oil And Gas In The Canadian Federation' (Department of Economics, University of Alberta, 2010) Working Paper No. 2010-01 < https://sites.ualberta.ca/~econwps/2010/wp2010-01.pdf > accessed 10 February 2019.

[758] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727).

claimants other than mostly by the state or legal/natural persons the state has contracted to explore and produce the petroleum.[759]

Under the circumstance and in the context of this thesis, therefore, petroleum-rich states, in invoking their sovereign and ownership rights over petroleum resources, are still able to sustain the doctrine of *ad coelum* and apply the theory of absolute ownership to their advantage against other states that may want to overreach their ownership rights.[760] So, as it goes, petroleum resources in the territory of any sovereign state are protected by this theory of absoluteness. This is in tandem with the Latin legal phrase: '*quicquic plantatur solo, solo cedit'*, a principle essentially translated, in context, to mean that sovereign states own whatever is contained in their land from the outer space and skies of the earth to deep down underneath the earth crust including mountains and territorial waters with all its mineral resources, no matter their nature, shape or form. In fact, from the standpoint of international law,[761] every state has the sovereign right to own and control its minerals including petroleum resources. If the State does not have reasonable capacity to effectively exercise its sovereignty, the right to exercise absolute ownership can be undermined and is sometimes undermined through the operations of MNPCs especially operating in SSA.[762]

As long as the petroleum is within their sovereign territories, therefore, petroleum-rich countries are protected by these two principles, legally and theoretically. This

[759] ibid; Martin and Kramer, *Williams & Meyers, Oil and Gas Law* (n 109); Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (n 727).

[760] ibid.

[761] PSNR, Arts 1 and 2; DRTD, Art 1.

[762] Desta, 'Competition for Natural Resources and International Investment Law' (n 15).

is also subject to the limitations brought about by the rule of capture where oil and gas in one state's jurisdiction could move to another's jurisdiction, with time, for others to capture and control, particularly where adjoining states may develop technological capabilities to draw in and capture oil and gas deposited in each other's territories.[763] Under the circumstance, in order to protect this sovereign right of the state, it is imperative that each state develops the capability to prevent oil and gas deposited in their territorial areas from migrating into other sovereign territories. That is a sovereign legal right each state can invoke.[764]

6.4.4 Theory of qualified ownership

In qualified ownership theory, ownership is seen to be 'non-absolute' where right to own or access petroleum resources is correlatively shared between owners of 'surface land' with common reservoirs where they each have the duty to use the petroleum prudently and efficiently.[765] The crux of this theory is that two adjoining nearby oil and gas wells do have shared ownerships. That is, no particular party can claim complete ownership until one captures the oil and has proven that to be the case. The examination of the absolute theory did dovetail into the qualified theory because of the rule of capture that sets the boundary or limits for the *ad coelum* doctrine. For, whereas absolute ownership theory is built on the doctrine of *ad coelum*, that of qualified ownership is founded on the rule of capture principle.[766]

[763] Clark, 'Migratory Things on Land: Property Rights and a Law of Capture' (n 742); Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (n 727).

[764] PSNR; DRTD.

[765] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727).

[766] Martin and Kramer, *Williams & Meyers, Oil and Gas Law* (n 109).

What happens, therefore, under this theory is that no owner of a private land can be able to claim ownership of petroleum resources beneath their land as far as they have not yet drilled and produced the crude oil and gas therefrom. The exclusivity[767] of their right is limited to seeking to acquire the mineral wealth through their own land. They are, thus, only qualified to own the petroleum when they have captured and retained it. The cases[768] cited in the absolute ownership apply here too. Clearly, the absolute ownership and qualified ownership theories do augment each other.[769] This can be applied in addressing issues concerning the exploitation of transboundary petroleum resources.

6.4.5 Theory of servitude

Servitude theory, from the 'profits' perspective, grants lessees the right to extract or produce petroleum deposits from the land of the lessor. Servitude can also be occasioned by the 'eminent domain rule' whereby state authorities can issue executive orders, fiats or such other statutory instruments recognised by law to appropriate or confiscate the land of private persons for the use by the public.[770] Essentially, this theory establishes the frontiers between right granted to the petroleum company to access land owner's petroleum for profit and right to own

[767] Aladeitan (n 727) 159.

[768] *Barnard v Monongahela Natural Gas Co* [1907] 216 Pa 362; *Pierson v Post* [NY1805] 2 Am Dec 264; *Bernstein v Skyviews & General Ltd* [1978] 1 QB 479; *Del Monte Mining v Last Chance* [1898] 171 US 55; see also *Ohio Oil Company v Indiana USSC* [1900] 44 L Ed 729, par 64; *South Atlantic Petroleum Limited v Minister of Petroleum Resources* [2006] 10 CLRN 122.

[769] *Brown v Humble Oil & Refining Co* [1935] Tex SC, 83 SW (2d) 935.

[770] Martin and Kramer, *Williams & Meyers, Oil and Gas Law* (n 109); Mattei, *Basic Principles of Property Law* (n 727).

the land surface beneath which the petroleum is found. It also grants the right of the state to acquire the right to access petroleum beneath private lands.[771]

6.4.6 Theoretical intercourse of petroleum resource ownership

There is also the theory of ownership of strata which is often applied in conjunction with the other theories. This theory is considered as subordinate theory of ownership. It stipulates that the owner of a parcel of land is also the owner of the sedimentary layer that harbours the petroleum within the recognised limits of the vertical planes that characterise the boundaries of the tract of the owner.[772]

The foregoing five theories of resource ownership generally have some overlapping or common features.[773] They interrelate in a number of ways. For instance, 'non-ownership' and 'ownership in place' theories do share the same principle of having the right to own the mineral resource underneath except that the former is obsessed with ownership with possession while the latter is obsessed with absolute ownership even before possession of the mineral resource underneath a surface land owned.[774] The absolute ownership theory and the qualified ownership theory present an umbrella under which the other two theories may find some shelter. These theories have inspired the nature and character of petroleum legal systems in many petroleum-rich countries globally where three

[771] Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (n 727); Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (n 727).

[772] ibid.

[773] ibid; Martin and Kramer, *Williams & Meyers, Oil and Gas Law* (n 109).

[774] ibid; Mattei, *Basic Principles of Property Law* (n 727); Epstein, 'Possession as the Root of Title' (n 729).

main ownership types have been formed by states to govern their natural resource development.[775]

These general property ownership types of petroleum resources are: 'Public or state ownership' where the state acquires full ownership, exploration and production right from owners of surface lands on which mineral resources are found underneath; 'private ownership' in which, depending on the jurisdiction, the various ownership rights appropriated under 'non-ownership, ownership in place and qualified ownership as well as servitude theories' can be applied; and 'mixed or joint ownership' whereof the government shares ownership rights with a private person who may have originally fully owned the surface land or has been invited by the state to acquire a stake in ownership, exploration, development or production of the natural resource.[776]

These ownership types are executed by three different formations of contractual arrangements: Production sharing contract, concession contract and service contract.[777] There is also the fourth contract formation – joint venture contract - which straddles across the three main contract types. These forms of agreements spell out the obligations and rights that define the relationship between the original owner of the petroleum resource and that of the petroleum E&P

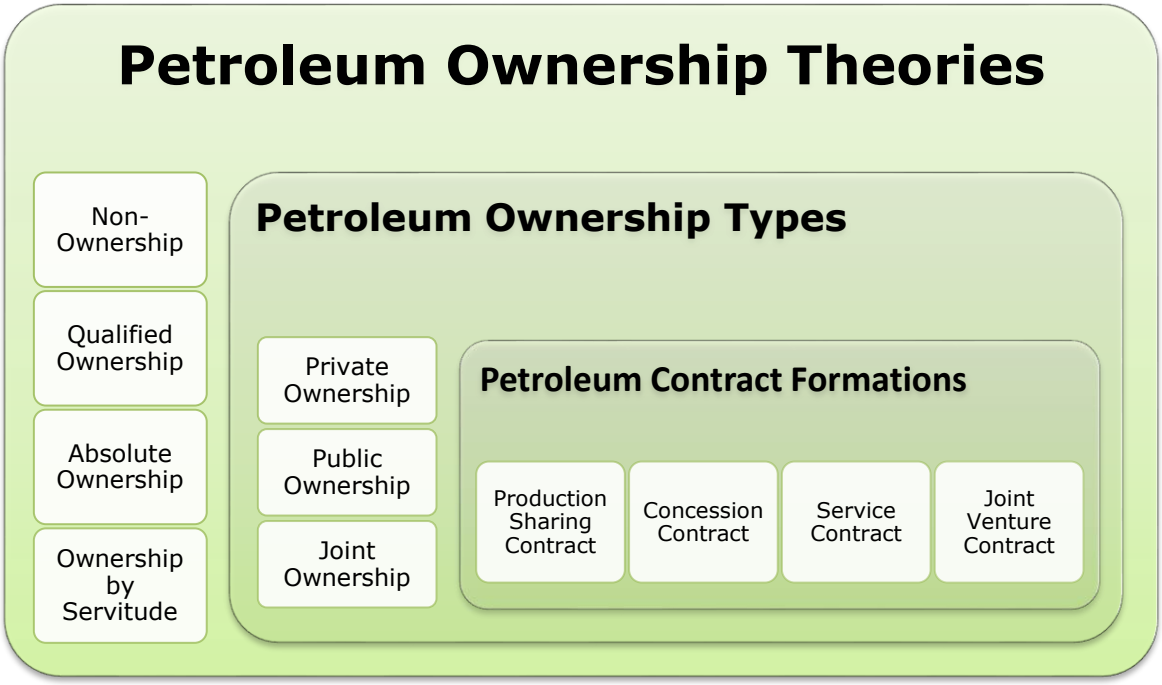
[775] ibid.

[776] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (n 727).

[777] See chapter seven of the thesis below for further details about the contract types.

company.[778] See in the figure 2 below a construct on how the theories, types and formations of ownership of petroleum resources are interrelated.

Figure 2: Relationship between Ownership Theories, Types and Contracts



The most commonly used type of resource ownership by many SSA countries is the absolute state ownership of resources. This system is popular in SSA countries such as Ghana, Nigeria, and Angola.[779] For instance, Article 257 (6) of 1992 Republican Constitution of Ghana vests 'ownership rights of mineral resources'[780] in the state, represented by the president of the republic acting on behalf of the

[778] Mattei, *Basic Principles of Property Law* (n 727); Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727); Graziadei and Smith, *Comparative Property Law* (n 727).

[779] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (n 727).

[780] The Constitution of the Republic of Ghana [1992], Art 257(6).

citizens.[781] This is the same ownership structure operated by the MENA[782] sub-region where 'about 60% of global oil reserves and 45% of world's natural gas reserves', as discovered, are deemed to be located.[783]

The state's ownership of the petroleum resource can be vitiated by either incompetent or compromised concessions made in the contractual arrangements.[784] Although beneficiaries' expectations on the trustee, in this regard, have appeared to be unaligned to proper execution of the terms of the deed, the philosophical disposition behind the state ownership of natural resources is, undeniably, in pursuit of justice and socioeconomic rights, whereof ROL is sacrosanct. This system of ownership is ever more suitable in SSA where the state requires huge amount of financial resources from the collective natural resources to undertake meaningful developmental projects.[785]

6.5 Conclusion

Lex petrolea, as a concept that claims the existence of a universalised petroleum law, is still contentious[786] since there is yet to be any globalised treaty regime for petroleum transactions. However, by virtue of the competitive nature of petroleum

[781] The Constitution of the Republic of Ghana [1992], Art 257(2).

[782] MENA refers to Middle East and North Africa sub-region with about 22 countries, constituting about 6% of global population.

[783] Investopedia, 'Middle East and North Africa – MENA' < www.investopedia.com/terms/m/middle-east-and-north-africa-mena.asp#ixzz5W67ZZPDe > accessed 06 November 2018.

[784] Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (n 727).

[785] ibid.

[786] Terence Daintith, 'Against 'lex petrolea'' (2017) 10 Journal of World Energy Law and Business 1.

and international participants in the petroleum industry such as MNPCs, as well as judicial precedent and state customary practice over the years, petroleum law, even if unconsolidated, has an international ambit - with great national appeal, nonetheless.[787]

The sources of international petroleum law include legislations, contracts, treaties, general principles of law, judicial decisions, resolutions/decisions of IOs, juristic works and customary practices.[788] Contracts remain the top source of petroleum law especially when it comes to dispute resolutions. The ownership theories help in shaping rights and duties in contractual arrangements. The various ownership types boil down to private ownership, public ownership and joint-ownership regimes available in various forms in the petroleum industry.[789] Having considered key concepts, theories and principles which inform petroleum law, the next chapter explores the various petroleum legal regimes in the world.

[787] ibid.

[788] Ikenna, "International Petroleum Law" (n 33); Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84); Burney, 'International Law: a brief primer' (n 604); Kolb, 'Sources of International Law' (n 604); Greenwood, 'Sources of International Law: An Introduction' (n 605).

[789] Graziadei and Smith, *Comparative Property Law* (n 727); Mattei, *Basic Principles of Property Law* (n 727); Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria' (n 727); see also Encyclopaedia Britannica, 'Ownership: Law' (n 727).

CHAPTER SEVEN

GLOBAL PETROLEUM LEGAL ARCHITECTURE

7.1 Introduction

Globally, petroleum E&P is governed by a menu of diverse legal regimes that aim to provide standards for engagements in the petroleum legal architecture. These regimes constitute 'explicit and implicit principles, norms, rules and decision-making procedures' around which the expectations of stakeholders do converge on how to explore, develop, produce and share the oil and gas resources.[790] In this chapter, the applicable legal frameworks under which petroleum E&P activities are executed have been explored to unravel the intricacies of these legal regimes.

In doing so, the chapter surveys petroleum legal regimes under which most oil and gas contracts are entered into between the HS and petroleum companies, especially the MNPCs operating in the upstream sector. The analytical focus is centred on fiscal and legal arrangements of petroleum contracts and adducible reasons associated with the choice of any of such mechanisms which could be pertinent to SSA. The reason for this focus is to critically establish best practice in petroleum contracting that is aligned to ROL and justice which could be applied in SSA.

7.2 Nature of Legal Facts in the Global Petroleum Architecture

The global petroleum E&P regime is driven by gamut of interests and constellation of relationships. Two cardinal legal facts characterise the relationships that form the regulatory framework in which petroleum E&P activities are conducted across

[790] Naseem and Naseem, 'World Petroleum Regimes' (n 84)149.

petroleum regimes in the world. These legal facts are inspired by the constitutive elements that define international petroleum law. As established in chapter six above, the first legal fact is that the state has the proclivity to be vested with the right to own oil and gas resources. Most countries endowed with 'potential or actual' petroleum resources are more inclined to and have been 'vesting petroleum ownership rights in the state'.[791]

This fact is deemed to be 'given' regardless of the nature in which its terms are expressed and how state authorities have been dispositioned.[792] Entrusting ownership of natural resources such as oil and gas in the state is deemed to be 'given' primarily because not only states represent sovereign power and control in a given territory but also the majority of states across the globe see this course of action as more reasonable – almost automatic in the light of imperatives of ROL and justice. It is only in few countries such as USA and Canada that have ownership of natural resources such as oil and gas situated within imperative perimeter of "complex mix of private and public ownership arrangements".[793]

In the USA, for example, most lands are privately owned wherein ownership thereof entails ownership of subsoil resources upon which owners have the absolute entitlement to enter into any contractual relationship with corporate

[791] Silvana Tordo with David Johnston and Daniel Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (World Bank Working Paper No. 179, 2010); Naseem and Naseem, 'World Petroleum Regimes' (n 84)149; NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[792] EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14).

[793] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Naseem and Naseem, 'World Petroleum Regimes' (n 84)149; NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

entities in order to explore, produce and market the resources. For instance, most of the shale oil and gas are found in private lands. However, there are also "extensive federal lands and offshore waters" owned by the public and vested in the State or the Federal Government. Public and private ownerships of petroleum resources, therefore, exist side-by-side in the USA.[794]

The second legal fact that confronts petroleum-rich states is to the effect that, by virtue of the carried obligations of HS and the expectations of citizens thereof, HS are required to come out with "a series of coherent policy choices, contract forms and fiscal instruments in a distinct structure or framework".[795] The legitimate expectation of citizens has been that HS will protect, develop and utilise the resources on their behalf and for their benefit through reasonable courses of action within defined and predictable frame, especially when it comes to finalising contractual arrangements with investors such as MNPCs and their partners. In fact, petroleum contracts or agreements and licences are at the heart of the legal frameworks since they are the first point of call when it comes to reconciling the conflictual relationship between private investment rights and public resource ownership rights.[796]

7.2.1 Duty of host states in respect of the legal facts and instruments

The HS are obliged to fashion out and comply with applicable legal frameworks to ensure successful outturns of these two legal facts which have been pervasive in many HS to the extent that they tend to be overtly considered as "a matter of

[794] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[795] ibid.

[796] Talus (ed), *Research Handbook on International Energy Law* (n 337).

public policy".[797] In most petroleum-rich countries, selection of the type and nature of petroleum contracts is hugely influenced by the two legal facts, which are to own petroleum resources and enact legislations and policies. These generate legal instruments and principles to guide state authorities in making decisions about investment relations and choices in the petroleum industry.[798] The onus on state actors is how they are to be effectively guided with the prevailing 'best practice' in the global petroleum legal architecture and meander through many competing alternative courses of action to arrive at a legal apparatus that delivers the best dividends for socioeconomic rights. Governments are, therefore, required to ensure that the necessary legal instruments are utilised and developed prior to making decisions on type and nature of investment contracts in petroleum E&P.[799]

International and national legal instruments such as 'covenants, declarations, treaties, articles of associations', bills, 'constitutions, legislations/statutes, regulations and model contracts' are, therefore, worth the consideration of HS in the process of developing the legal framework for exploration and production of petroleum resources. The consideration often finds detailed expression in legislation and accompanying regulations and contracts in most HS. This consideration does, in fact, create a reasonable platform for procuring and

[797] EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14).

[798] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[799] ibid.

dispensing petroleum contracts and licences which are of particular relevance to ensuring effective discharge of obligations by the duty-bearers. [800]

Figure 3 below shows four main streams of legal instruments interconnecting each other to help the HS in protecting rights and discharging obligations and responsibilities. These constitute the fundamental components of petroleum legal regime in most HS. Naseem and Naseem, however, associate the main components of petroleum regime in HS with "constitution, statutes/legislations, rules and regulations and/or host government contracts".[801] This deposition by Naseem, arguably, appears limited in scope since it fails to capture the fact that international legal imperatives do also influence the legal framework of any petroleum legal regime. For instance, IBHR have influenced the formulation, reformulation and operational aspects of many constitutions across the globe. Naseem's rendition also appears to underestimate the role that policies play in forming the legal architecture of petroleum E&P. Admittedly, those elements stated by Naseem are the most visible constituents of petroleum legal framework of many States.[802]

Whereas the constitution, in large part, is the foundational municipal legal authority from which other municipal legal instruments source their power, authority and legitimacy, on one hand, charters, declarations, bills, covenants/treaties and articles of associations, on the other hand, provide the horizontal basis for international legal imperatives to be articulated. Guided by the state constitution and international legal instruments, the specific or detailed

[800] ibid; EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[801] Naseem and Naseem, 'World Petroleum Regimes' (n 84)149, 151.

[802] Talus (ed), *Research Handbook on International Energy Law* (n 337).

terms on transactional relationships between the HS and private investors are expressed in both primary and secondary legislations, which usually occupy the space of the second legal fact established beforehand.[803]

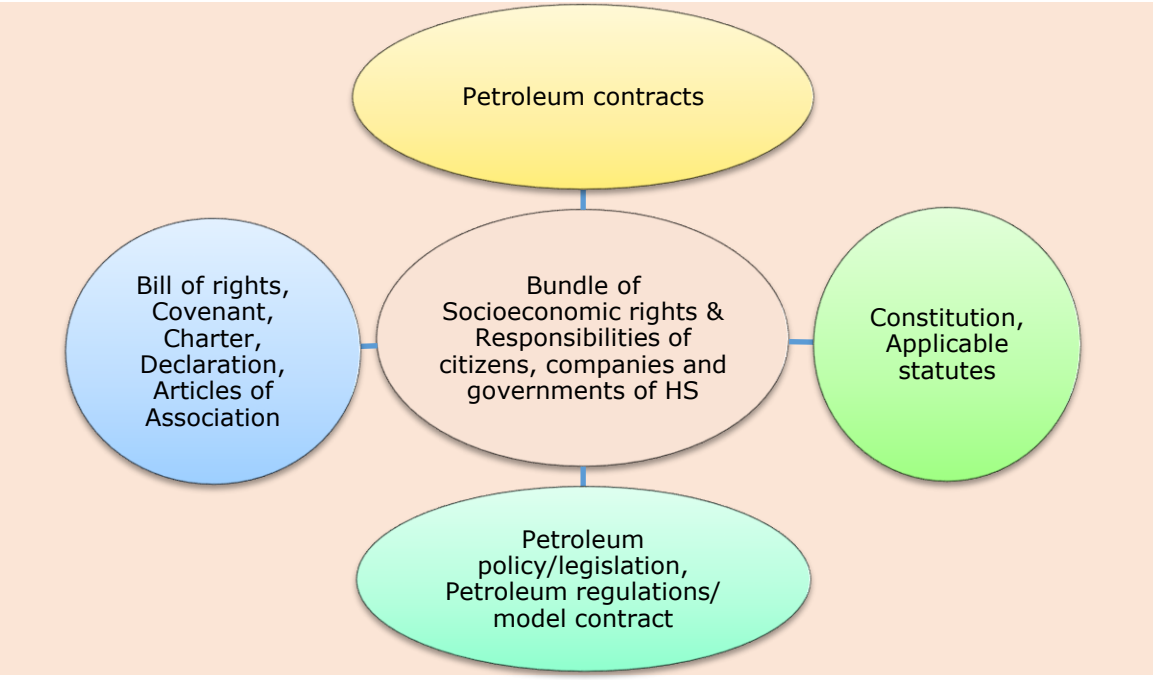
Whichever way the pendulum swings, the municipal and international baseline legal instruments provide the backbone for petroleum policies/legislations, petroleum regulations/rules, petroleum model contracts, petroleum leases and petroleum contracts. At the same time, contracts are direct products of legislation, policies and regulations. Existing contracts also provide lessons for future legislation, policies and regulations.[804] Meanwhile, contracts also draw direct inspirations and guidance from constitutions and international legal instruments such as bills, covenants, declarations and charters just as legislations, policies and regulations do. In a nutshell, the legal instruments in the framework each interacts with and contributes to each other, *albeit* in substantially different degrees.[805]

[803] Ibid; see The World Bank, 'Articles of Agreement' (1944) < www.worldbank.org/en/about/articles-of-agreement > accessed 14 November 2017.

[804] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[805] ibid.

Figure 3: Interactions of Legal Instruments in the Petroleum Legal Frame



Across time and in many countries, most of these legal instruments have been widely deployed by the state in the petroleum industry. However, as dictated by time and peculiarities of local circumstances such as competence of authorities, political/government priorities, petroleum industry experience and rent-seeking elements, a number of countries tend to design and execute these legal imperatives in different ways. While some host countries utilise fragmented or isolated approaches to the design and implementation of legislative and constitutional instruments on petroleum E&P, other HS adopt coordinated or comprehensive legal approaches thereof.[806]

[806] Talus (ed), *Research Handbook on International Energy Law* (n 337).

It is quite reasonable to see "more stable and predictable legal frameworks"[807] in the HS that utilise coordinated or comprehensive legal approaches than in the HS that utilise fragmented or isolated approaches "that leave more aspects"[808] of their legal frames permitting the opportunity to 'conduct negotiations in individual contracts' with MNPCs.[809] Comprehensive and coordinated legal approaches appear to be more rewarding for decision-making, investment and socioeconomic justice, and are generally utilised by developed countries such as Norway and UK.[810] Isolated legal approaches lend themselves to rent-seeking, iniquities and abuse of socioeconomic rights of citizens, which have been largely exhibited by most developing countries in SSA.[811]

In such SSA countries, the full extent of petroleum reserves is, on one hand, yet to be determined and, on the other hand, many human capital and institutional inadequacies abound.[812] This has resulted in the establishment of petroleum laws and regulations that are deficient and are not fully protective of the legitimate interests and socioeconomic rights of citizens. This, thus, tries to short-change[813]

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[807] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[808] ibid.

[809] ibid

[810] ibid.

[811] ibid.

[812] Paul Collier, *The plundered planet:* Why we must and how we can manage nature for global prosperity (Oxford University Press 2010); Collier and Mpungwe (panellists), 'In Focus - Managing Natural Resources in Africa' (n 94).

[813] Jeffrey D Sachs and Andrew M Warner, 'Natural Resources and Economic Development: The Curse of National Resources' (2001) 45 European Economic Review 827; Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz, *Escaping the Resource Curse* (Columbia University Press 2007).

the benefits that the society and citizens should derive from petroleum resource management in petroleum-rich countries in SSA. This is partly because engagement[814] of citizens and positive political leadership action thereof appear to be in desideratum in these countries.[815]

It is imperative, therefore, that any endeavour to propose, reform or refine and safeguard pertinent legal instruments that form the baselines of the legal framework of petroleum E&P in SSA must pay serious attention to both legal concerns and internal inadequacies which prominently feature political manoeuvring and manifested in different dimensions of 'destructive rent-seeking amongst competing interest groups'.[816] Legislative and constitutional instruments guided by tenets of justice, and ROL are, especially, fundamental to securing a sustainable remedy for inequities and rent-seeking dispositions on the transactional chain of petroleum E&P. These should help in enhancing socioeconomic rights of HS. It is important that the legal instruments are constantly updated and refined to meet the needs of citizens of HS. The legal

[814] Sheona Shackelton and Bruce Campbell, *Empowering Communities to Manage Natural Resources: Case Studies from Southern Africa* (CSIR March 2000); Phil Rene´ Oyono, 'One Step Forward, Two Steps Back? Paradoxes of Natural Resources Management in Cameroon' (2004) 42(1) Journal of Modern African Studies 91; Cerian Gibbes and Eric Keys, 'The Illusion of equity: An Examination of Community-Based Natural Resource Management and Inequality in Africa' (2010) 4(9) Geography Compass 1324.

[815] Collier, 'Using Africa's Resources for Development - Part 1' (n 94); Collier and Mpungwe (panellists), 'In Focus - Managing Natural Resources in Africa' (n 94); Korbla P Puplampu, 'Capacity Question, Leadership & Strategic Choices: Environmental Sustainability and Natural Resources Management in Africa' in Kobena T Hanson, Francis Owusu and Cristina D'Alessandro (eds), *Managing Africa's Natural Resources: Capacities for Development* (Palgrave Macmillan 2014)162.

[816] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14).

framework which the instruments do formulate must, in effect, be holistic to the extent that it protects all the ownership rights of citizens and their government but must also respect the investment and capital rights of companies.[817]

It is in this light that NRGI observes that, "A well-designed legal architecture [should, among other things,[818] be able to regulate] how companies acquire and manage licences; the fiscal terms governing payments between companies and the state; and how the government will manage natural resources"[819] like oil and gas. It is also important that how to build and sustain financial and legal capabilities of SSA are included in any competent legal framework. Low and Battaglia aver that capabilities of HS are quite important because the 'ability of HS to exercise control over their petroleum resources, to define the contractual terms, to mandate growing national rewards (indigenisation) and government share, go to the heart of determining overall transactional terms and financial dividends therefrom'.[820] This consideration is crucial because when the state possesses the required legal competence and financial muscle, it is difficult for any unhealthy relationship between the State and MNPCs to be perpetuated by the MNPCs or their compatriots.

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[817] ibid.

[818] Other areas the legal framework should provide rules to regulate, rightly posited by NRGI include: "how state institutions are structured; environmental management; relationships between extractive projects and neighbouring communities; the behaviour of public officials active in the sector; public information disclosure and accountability" as well as the way the resources are managed by the government of the HS; see NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14) 1.

[819] ibid.

[820] Lucinda A Low and Richard J Battaglia, 'Corruption and the Energy Sector: Inevitable Bedfellows?' in Kim Talus (ed), *Research Handbook on International Energy Law* (Research Handbooks in International Law, Edward Elgar, Cheltenham 2014) 475.

7.3 International Legal Instruments in Petroleum Exploration and Production

International law, with its multifarious branches or forms, does play dual if not multifaceted roles in petroleum E&P.[821] On one hand, it is a foundational legal pillar for municipal legislation on petroleum E&P. It also inspires the formation and amendments of municipal constitutions which stipulate inter alia the rights, management, distribution, ownership, trading of natural resources. This is so because most of the state parties to any form of international law or the other are morally and/or legally obliged to respect and to some extent mainstream the tenets in their respective domestic legal frameworks. In fact, international law enables sovereignty of petroleum states and their petroleum resources to be closely connected with each other in structure and substance.[822] For Dickstein, international law should be able to "balance the needs of developing nations with the needs of developed nations"[823] through mutual respect and engagements by parties.[824]

The key international legal instruments that seek to do this and to ensure harmony between the phenomenal realms of natural resources and state sovereignty include: The Convention on the Continental Shelf 1958 (CCS),[825] PSNR, Charter of

[821] Talus, 'Internationalization of energy law' (n 598) 3.

[822] ibid.

[823] Michael E Dickstein, 'Revitalizing the International Law Governing Concession Agreements' (1988) 6 (1) Berkeley Journal of International Law 54, 64 < http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1077&context=bjil > accessed 21 December 2017.

[824] PSNR, Art 6.

[825] See CCS, Arts 2, 3 and 4.

Economic Rights and Duties of States 1974 (CERDS),[826] DRTD, ICESCR and others. The CCS is noted to be 'the first modern expression'[827] of the relationship between sovereignty of coastal states and natural resources. The instrument stipulates the sovereign rights, responsibilities and obligations of states exercised over natural resources on the continental shelf. The CCS was not broad enough as it did not cover other geographical areas in the jurisdiction where resources were located.[828] PSNR then emerged in 1962 through UN Resolution General Assembly Resolution 1803 (XVII) because of the following underlying factors:

a) The limitations of CCS, increasing number of countries gaining independence at the time; and

b) States demanding sovereignty over natural resources such as oil and gas against a 'highly unfavourable contractual terms which foreign investors have had over the newly independent and developing HS' such in SSA.

A number of exciting provisions with respect to permanent resource sovereignty and utilisation, including Articles 1 and 2, were deposited in the PSNR. Article 1 of PSNR sought to cure or remedy the wanton depletion of the sovereign capital by foreign investors and so prescribed that*:*

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised

[826] Charter of Economic Rights and Duties of States [General Assembly Resolution 3281 (XXIX) 12 December 1974].

[827] Particularly at a time when new technology was being secured or acquired to 'explore and exploit offshore hydrocarbons and other mineral resources'; Talus, 'Internationalization of energy law' (n 598) 3-17; Dickstein, 'Revitalizing the International Law Governing Concession Agreements' (n 823).

[828] ibid.

> in the interest of their national development and of the well-being of the people of the State concerned.[829]

This provision grants governments of HS the authority to utilise sovereign resources of their states to enhance the socioeconomic rights of their people.[830] Article 2 thereof goes further to not only mandate the HS to explore, develop and produce their petroleum resources but also source foreign capital in ways that conform to "the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities".[831] Therefore, agreements reached between MNPCs and HS ought to have terms and conditions that do not exploit the fragilities of HS to unduly favour the private investors.[832] The weak point of PSNR is that it is merely a declarative instrument and does not effectively bind member states of the UN. However, a number of legal provisions such as Articles 1 and 2 are gradually being transposed by collective conscience of states to the realm of *jus cogens*.

Due to the constraints faced by PSNR, Dickstein suggests that instead of only clinging on to PSNR, developing countries (including those in SSA) can alternatively pursue strategies such as seeking for legal doctrines like PSNR to be adjusted.[833] This way, for Dickstein, the effects of being bound to 'internationalised contracts such as concessions', which may vitiate aspects of sovereignty over

[829] PSNR, Art 1.

[830] ibid.

[831] PSNR, Art 2.

[832] ibid.

[833] Dickstein, 'Revitalizing the International Law Governing Concession Agreements' (n 823).

petroleum resources, can be moderated.[834] Instead of an alternative, PSNR can be strategically used alongside other strategies since they may not be mutually exclusive as far as they are operating for mutual and equitable benefits.

The CERDS[835] which followed PSNR did not appear to marshal enough forces beyond the reluctant implementation responses received by the PSNR. But the provisions therein appeared to be relatively more comprehensive in respect of ownership right protection.[836] It was, however, at best, supplementary to the PSNR. At present, the energetic way in which capital from petroleum resources are pursued by investors must be confronted with similar rigour of rights granting and protection mechanisms.

In fact, more than ever before, citizens of petroleum-rich states increasingly see themselves as "co-owners" of the petroleum wealth alongside the state and are, thus, advocating for their governments to exhibit a "visual proof that their natural resources" are not only demonstrably explored and reasonably produced but that the produced resources are used to directly enhance their socioeconomic wellbeing and rights.[837]

There is existential concern of disputes arising out of misunderstanding between other independent neighbouring states that try to claim ownership of petroleum

[834] ibid.

[835] Charter of Economic Rights and Duties of States [General Assembly Resolution 3281 (XXIX) 12 December 1974].

[836] See CERDS, Arts 2, 3 and 16.

[837] Tim Boykett and others, *Oil Contracts: How to read and understand them* (ed version 1.1, OpenOil 2012) < www.eisourcebook.org/cms/January%202016/Oil%20Contratcs,%20How%20to%20Read%20and%20Understand%20them%202011.pdf > accessed 5 November 2017.

resources running across their common frontiers or boundaries.[838] This is, particularly, so with respect to states sharing common maritime boundaries, mainly such as the territorial sea, continental shelf, exclusive economic zone (EEZ) and contiguous zone. Martin observes that there is a "long history" of petroleum-resourced States trying to address oil and gas issues concerning delimiting their international boundaries and disputes arising therefrom in order to own and exploit such resources. [839]

With respect to the delimitation of territorial boundaries, state disputes over boundaries in such domains have had to be independently adjudicated at international courts and tribunals for independent or neutral resolution. Although such international border disputes are ordinarily and technically between governments in adjoining states, MNPCs and their allies including governments of their countries of origin are sometimes indirectly pushed into the fray in order to protect their investment interests that "straddle" the boundaries in dispute.[840] The dispute between Ghana and Ivory Coast[841] is more recent and one of territorial delimitation disputes on offshore waters. In this case, Ivory Coast went to United

[838] Tim Martin, 'Energy and International Boundaries' in Kim Talus (ed), *Research Handbook on International Energy Law* (Research Handbooks in International Law, Edward Elgar, Cheltenham, 2014)181.

[839] ibid.

[840] ibid.

[841] See 'Judgment on Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte D'Ivoire in the Atlantic Ocean' (Case No. 23, International Tribunal for the Law of the Sea, 23 September 2017) < www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf > accessed 15 October 2017.

Nations ITLOS[842] under provisions of UNCLOS[843] claiming that part of Ghana's current petroleum exploratory territory belonged to Ivorian people and should be declared accordingly. The tribunal in September 2017 judgement rejected this claim and gave coordinates that appeared to have incidentally increased Ghana's offshore territory bordering Ivory Coast.[844] UNCLOS is therefore a handy international instrument for protecting sovereign rights of petroleum ownership.

There are other international legal instruments and imperatives that harness the sovereign ownership and development rights of HS.[845] For instance, countries party to human rights instruments such as DRTD, IBHR and ACHPR[846] are expected to integrate the principles thereof in their domestic legal frameworks containing such municipal legal instruments including constitutions, policies, legislation, regulations and contracts. This is also the case with respect to legal instruments such as the AU Convention on Combating Corruption (AUCCC),[847] UN Convention against Corruption (UNCC),[848] OECD's Convention on Combating Bribery of

[842] International Tribunal for the Law of the Sea (ITLOS).

[843] UNCLOS.

[844] Case No. 23 (n 841).

[845] See ICJ, 'The Statute of the International Court of Justice' (n 667), Art 38(1); Greenwood, 'Sources of International Law: An Introduction' (n 605).

[846] ACHPR.

[847] AU, African Union Convention on Combating Corruption (African Union, adopted 11 July 2003) <www.african-court.org/en/images/Basic%20Documents/AU%20Convention%20on%20Combatting%20Corruption.pdf > accessed 17 November 2017.

[848] UN, *United Nations Convention against Corruption* (United Nations Office on Drugs and Crime 2004).

Foreign Public Officials in International Business Transactions (CCBFBOIBT)[849] and the Council of Europe's Criminal Law Convention Against Corruption (CoECLCC)[850] as well as OAS's Inter-American Convention against Corruption (IACC).[851] AUACC, UNCC, CCBFBOIBT, CLCCCoE and IACC gear towards mitigating corruption tendencies and practices in socioeconomic undertakings such as the E&P of petroleum resources.[852] They, particularly, enhance investigations of corrupt practices and enforcement actions against suspected corrupt elements across international borders of state parties. They are instruments that present some international standards to promote transparency and to impede corruption on international investment platforms.[853]

On international public procurement, there are frameworks which also serve as an anti-corruption tool to some extent. Agencies of the state are usually involved in using the resources of the public to buy goods and services in order to perform their roles, through a process largely known as public procurement.[854] Thus, in the petroleum industry, for instance, it is not uncommon to see state agencies

[849] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related documents* (Organisation for Economic Cooperation and Development 2011).

[850] Council of Europe, *Criminal Law Convention on Corruption* (CoE, adopted 27 January 1999) European Treaty Series- No. 173 < https://rm.coe.int/168007f3f5 > accessed 11 October 2017.

[851] See OAS, *Inter-American Convention against Corruption* (Organisation of American States, adopted 29 March 1996) < www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp > accessed 18 November 2017.

[852] Low and Battaglia, 'Corruption and the Energy Sector: Inevitable Bedfellows?' (n 820) 479.

[853] ibid; Ivar Kolstad and Arne Wiig, 'Is transparency the key to reducing corruption in resource-rich countries?' (2009) 37(3) World Development 521.

[854] EBRD, 'Public Procurement International Standards' (European Bank for Reconstruction and Development) < www.ebrd.com/what-we-do/sectors/legal-reform/public-procurement/international-standards.html > accessed 26 November 2017.

such as NOC purchasing services of petroleum contractors like MNPCs and buying all kinds of oil and gas E&P products to help them carry out their functions. There are, arguably, three main famously acclaimed public procurement law regimes on the global scale authored by the European Union (EU), the World Trade Organisation (WTO) and the United Nations International Commission for Trade Law (UNCITRAL).

Respectively, these procurement legal regimes are:

- 2011 UNCITRAL Model Law on Public Procurement;[855]
- WTO's 2012[856] Revised Agreement on Government Procurement (GPA);[857] and

[855] UN General Assembly, 'United Nations Commission on International Trade Law Model Law on Public Procurement' (A/RES/66/95, Agenda item 79, 13 January 2012); UNCITRAL, 2011 UNCITRAL Model Law on Public Procurement (United Nations 2014) < www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf > accessed 21 September 2017; see related legal instruments to the model law at: UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) < www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2003Model_PFIP.html > accessed 13 September 2017; UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) < www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFIP.html > accessed 13 September 2017; and UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) < www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html > accessed 14 September 2017; See also UNCITRAL, 'Case Law on UNCITRAL Texts (CLOUT)' (United Nations Commission on International Trade Law) < www.uncitral.org/uncitral/en/case_law.html > accessed 26 November 2017.

[856] WTO, 'Revised Agreement on Government Procurement' < www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm > accessed 17 August 2017.

[857] EBRD, 'Public Procurement International Standards' (n 854).

- The EU's Public Procurement Legislative Package. This package includes: Directive 2014/24/EU replacing directive 2004/18/EC Directive 2014/25/EU replacing directive 2004/17/EC;[858] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;[859] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts;[860] and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance).[861]

EU public procurement law appears to be more detailed and standardised to be used as international procurement model for public procurement reform in SSA, especially if and when combined/harmonised with GPA, UNCITRAL Model Law on Procurement and unique local imperatives.[862] These have a degree of significance for petroleum E&P since it is a truism that natural resource exploitation has a lot of temptations for corruption which take advantage over procurement lacunas to ultimately curtail the socioeconomic rights of citizens. Other applicable international normative instruments include: The Energy Charter 1994, SDGs,

[858] EUR-LEX, 'Directive 2014/24/EU' < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG > accessed 19 July 2017.

[859] ibid.

[860] ibid.

[861] ibid.

[862] EBRD, 'Public Procurement International Standards' (n 854).

EITI, Natural Resource Charter 2014,[863] Paris Agreement 2015 and Agenda 2063 of the African Union (AU).[864]

Although some of the international legal instruments are more directly applicable to a number of SSA countries than others, it is a customary expectation that even those legal instruments that are indirectly applicable to SSA would also command respect amongst SSA countries that would wish to attract investments from Europe, the Americas and other parts of the world.[865] SSA should, therefore, be persuaded to adopt best legal and normative practices that have the capacity to bring about respect and promotion of socioeconomic rights, through engendering more transparency, accountability, investment friendliness, ROL and justice in petroleum E&P discourse.

7.4 Constitutional Imperatives in Petroleum Exploration and Production

Usually, ownership rights are stated generally in brief terms in the constitution. Indeed, the constitution provides the legal basis for petroleum E&P in most countries.[866] However, constitutions do not establish specific rules governing the petroleum sector. Ghana's 1992 Republican Constitution broadly vests ownership

[863] NRGI, 'Natural Resource Charter' (2nd edn 12 June 2014) <https://resourcegovernance.org/analysis-tools/publications/natural-resource-charter-2nd-ed > accessed 7 November 2017.

[864] AU, Agenda 2063: Africa we want (2nd edn Popular version, African Union August 2014) < http://archive.au.int/assets/images/agenda2063.pdf > accessed 26 November 2017.

[865] Gordon and Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (n 266).

[866] Silvana Tordo, 'Fiscal Systems for Hydrocarbons: Design Issues' (World Bank Working Paper No. 123, 2007) < https://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf > accessed 15 July 2018.

rights in the state by coding that all kinds of natural resources including petroleum resources are "the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana".[867] This is a 'wide-ranging' ownership right which has not been clearly articulated as to how the President of the republic of Ghana should exhibit the entitlement of that right, on behalf of the state. Article 44 (3) of 1999 Constitution of the Federal Republic of Nigeria states that every petroleum resource:

> …in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[868]

This provision apparently vests ownership right in Nigerian Federal Government without succinct characterisation of the nature of the ownership other than to delegate authority to the National Assembly to determine how the resources should be managed.

In South Sudan, the Constitution stipulates that the citizens of South Sudan own the petroleum resources as the resources belong to the citizens upon which government is vested with the authority to manage on behalf of the public.[869] The three cases illustrate the same constitutional principle which can be seen expressed in similar fashion in countries such as Egypt,[870] United Arab Emirates

[867] The Constitution of the Republic of Ghana [1992], Art 257 (6).

[868] The Constitution of the Federal Republic of Nigeria [1999], Art 44(3).

[869] The Constitution of South Sudan [2011], Art 173(1).

[870] The Constitution of Egypt [2014], Art 32.

(UAE),[871] Angola[872] and SSA, generally. Ownership rights have been stated in general terms with the expectation that the legislature will expatiate and operationalise the ownership vested in the state and government.

Other African countries such as Niger, Ghana and Tunisia also specify in their constitutions that parliament is required to give 'approval to approve contracts'. In Ghana, for instance, the 1992 Republican Constitution stipulates that all contracts on exploitation of any natural resource including oil and gas resources "shall be subject to ratification by Parliament".[873] Two-thirds majority of parliament may derogate this provision under Article 268(2) by exempting "provisions of clause (1) of this article [268] any particular class of transactions, contracts or undertakings", and can also delegate the mandate of approving "grant of rights, concessions or contracts" in petroleum E&P to "any other agency of government" as stipulated by Article 269(2).[874]

Thus, all these provisions do present the explicit provision that specifies that petroleum E&P contracts must be approved by the respective legislative organ in the state for transparency and accountability. It should be very beneficial if SSA countries were to express the terms of ownership rights of petroleum resources in clearer or reasonably specific terms[875] in entrenched provisions of their

[871] The Constitution of United Arab Emirates [2009], Art 23: states that, "The natural resources and wealth in each Emirate are deemed the public property of that Emirate". The resources have to be used for the "national economy".

[872] The Constitution of the Republic of Angola [2010], Art 16.

[873] The Constitution of the Republic of Ghana [1992], Art 268 (1).

[874] The Constitution of the Republic of Ghana [1992].

[875] Cameron and Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (n 330).

constitutions than most currently have them done. This could make it more difficult to effect needless amendments by political actors who can easily do such amendments to legislations and regulations.

However, even when some reasonable amount of detailed expression of ownership rights and how that can be translated into harnessing the socioeconomic development of citizens are demonstrably illustrated in the constitution, there should still be the opportunity for more detailed expression of rights, responsibilities and obligations to be articulated by legislative imperatives.[876] Such a comprehensive rendition thereof will serve as a sufficient guide to effectively translate ownership rights into a regime of awarding rights, stipulating requisite terms and duration that activate the rights, as well as determining "obligations, the form of contract, regulation of operations,[877] institutional coordination and the distribution of revenues among the country's citizen".[878] This stage is noted to be one of the very important considerations in designing the legal framework. It is the stage that not only comes face to face with numerous "challenges and choices" but also it churns out outputs which are heavily reliant on "political bargaining" dynamics of the HS.[879]

7.5 Legislative Imperatives in Petroleum Exploration and Production

Policies, laws and regulations are interconnected – not only in petroleum E&P but more so in it. Policies of petroleum-rich states are the broad propositional narratives on which the strategic intentions of state authorities regarding

[876] ibid.

[877] ibid.

[878] ibid.

[879] ibid.

petroleum E&P are benchmarked and rolled out for the benefit of socioeconomic rights of the people.[880] Policies do inform the nature and scope of legislations that are formulated to give effect to the ownership rights enshrined in the constitution. When properly designed and coordinated, it is expected that the policies and laws of HS will "provide a coherent set of strategies and rules to govern behaviour" [881] of stakeholders or participants in petroleum E&P.[882]

Therefore, most HS first generate petroleum policies that promulgate "a core set of principles and goals that will underpin all other rules and activities"[883] in the industry. On that basis, the state through institutions such as the legislative and executive arms of government then develops detailed primary and secondary legislations for protecting the ownership of the resources, regulating the conduct of actors in the petroleum industry and harnessing the prospects thereof for investment and development.[884]

NRGI defines legislation as "the legally binding set of rules that govern the vision established in a policy".[885] When the legislative body enacts petroleum laws, it makes provisions for NOCs and petroleum regulatory institutions to develop further 'implementing rules and guidelines', as and when necessary, to give proper

[880] Cameron and Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (n 330).

[881] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14) 3.

[882] ibid; EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[883] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14) 2;

[884] ibid.

[885] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14) 3.

meaning and effect to the E&P legislations.[886] Essentially, to secure best policy outcomes, it is imperative that petroleum policies involve "broad-based consultation that incorporates stakeholder feedback and provides a clear explanation of public strategy" [887] as reliable basis to engineer and operationalise laws and regulations in the petroleum industry.[888]

7.6 Global Petroleum Contracts

> Countries rich in oil, gas and minerals often fail to secure a fair share of their natural resource wealth.[889]

The question is, why should this be the case? And, just how can petroleum-rich states get the 'fair share' of the benefits deriving from their resource wealth whereby the interests between petroleum E&P companies are balanced with that of the HS? There is ongoing dialogue as to the appropriate answers to the above questions. To some extent, the dialogue is contentious since the ambivalences that crisscross the offers to the remedy are sometimes convoluted. Whereas 'almost everyone would agree that the HS should receive fair or just share of petroleum benefits[890] – that the HS should be getting more from the petroleum

[886] ibid.

[887] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14) 3.

[888] ibid; Cameron and Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (n 330); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[889] Hubert, 'Many Ways to Lose a Billion: How Governments Fail to Secure a Fair Share of Natural Resource Wealth' (n 416).

[890] Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66).

resources - it is challenging to identify the specific share that is considered as fair,[891] such as 'how much more, more of what, and more for whom'.[892]

For many years since oil and gas was discovered and commercialised in the world, responsible petroleum-rich states have not only designed petroleum E&P contracts in ways that have given them the power to exert ownership and control rights over their petroleum wealth but also to ensure that they maximise revenues that are used to enhance socio-economic development of citizens.[893] This is in the spirit of justice. Because of the "high risk, big expenses and investment" that characterise petroleum E&P, it is often more reasonable to engage other interested parties such as the MNPCs who especially have the needed financial wherewithal to partner the state in harnessing the petroleum wealth of citizens.[894]

This underscores the need for collaboration between the state and financiers and service providers. This way, the state is able to source part of the needed technical know-how and capital from the intergovernmental, civil society and private sectors. To regulate relations of parties in such engagements, the state enters into contract with the providers. If the suitable contractual relations are procured by the state, investment risks will be minimised, *albeit* not eliminated entirely because contracts themselves are complex with inherent risks. Costs associated

[891] ibid.

[892] ibid.

[893] Naseem and Naseem, 'World Petroleum Regimes' (n 84)149; EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14); Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36(2) International Organisation 185.

[894] ibid.

with petroleum E&P could also be reasonably shared between the parties in the contract. This often comes with complex relations, terms and conditions.[895]

But even though contractual relations can sometimes be very complex, Marikar and Butler contend that 'the governing dynamics for creating contracts are simple'. That is, on one hand, a contracting party seeks to procure "the largest amount of revenue".[896] Thus, the motivation for selecting a given petroleum E&P regime by the state, for instance, is mainly accentuated by the maximum returns and benefits the state will generate from the contractual arrangement between the parties to explore and produce the petroleum resources. On the other hand, a contracting party seeks to incur "the smallest expense".[897] In this case, the state is rationally thought to choose a contract type that does not cost it much. The government may renege in its efforts to execute this rational thought.[898] This is a challenge that summarises the contractual arrangements in SSA.

However, the dynamics may not be as simple as they appear on the surface since interest bearers are quite unpredictable in their desire to change the rules of the game to satisfy their ravening needs on unstable revenue and expense streams. This is partly attributed to the fact that while the state will want to get more revenue but incur less cost, the private investors equally strive to get better returns on their investments. The resulting competition of interest between the

[895] ibid.

[896] Qadir Marikar and Melanie Butler, 'Contract risk: Managing risk and unlocking value' (Pwc UK) < www.pwc.co.uk/governance-risk-compliance/insights/grc-11-contract-risk.html > accessed 30 November 2017.

[897] ibid.

[898] ibid.

parties, therefore, makes the dynamic more complicated than, at first, appeared to be.[899]

7.6.1 Disposition of global petroleum contracts

The sanctity of the contract between investors and the HS is recognised by PSNR as primarily resting on 'the terms of the contract, current national legislation and international law'[900] as well as 'good faith observance of freely entered foreign investment contracts without any chance for unilateral derogation[901] or negation of contractual terms'.[902] These require all parties to be kept abreast of the intricacies thereof. Parties should be able to decipher the kind of risks and costs they are sharing with each other as well as the implications thereof. The state is usually at the receiving end and must be able to generate the requisite competence to effectively contain the persuasive prowess of investors.[903]

Four types of international petroleum contracts are commonly available to petroleum-rich countries in the exploration and production of their petroleum

[899] Naseem and Naseem, 'World Petroleum Regimes' (n 84)149; EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330); Qadir Marikar and Melanie Butler, 'Contract risk: Managing risk and unlocking value' (n 896).

[900] PSNR, Art 3.

[901] This is contrasted with the theory of efficient breach, which gives a contracting party the opportunity to breach terms of the contract and pay for damages in lieu of performance in so far as it is reasonable and economical to breach the contract than to discharge or perform duties thereof; see Gregory Klass, George Letsas and Prince Saprai, *Philosophical Foundations of Contract Law* (Oxford Scholarship Online 2015).

[902] PSNR, Art 8; Energy Charter Treaty [1994], Art 18: in respect of *pacta sunt servanda*.

[903] EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14).

resources.[904] Thus, in the petroleum upstream sector, the common contracts between the HS and petroleum E&P companies like MNPCs are:

i. Concession Contract (CC);

ii. Production Sharing Contract (PSC);

iii. Service Contract (SC); and

iv. Joint Venture Contract (JVC).[905]

Also, scholars such as Omorogbe,[906] Barberis,[907] and Smith and others,[908] do subscribe to the four typologies. EISB, however, identifies three types or legal forms of petroleum contracts. These constitute the first three contract types (i, ii, iii) above. The fourth type has not been considered by EISB apparently due to the fact the JVC appears to be derived from the first three.[909] However, the four-type

[904] Naseem and Naseem, 'World Petroleum Regimes' (n 84)149; Zuhairah Ariff Abd Ghadas and Sabah Karimsharif, 'Types and Features of International Petroleum Contracts' (2014) 4(3) South East Asia Journal of Contemporary Business, Economics and Law 34-41; see also Kamal Hossain, *Law and policy in petroleum development: Changing relations between transnationals and governments* (Nichols Publishing Company 1979); Thomas W Wälde and Nicky Beredjick (eds), *Petroleum Investment Policies in Development Countries* (Graham & Tortman Ltd 1988); Daniel Johnston, *International Petroleum Fiscal Systems and Production Sharing Contracts* (PennWell Books 1994); Tengku Nathan Machmud, *The Indonesian Production Sharing Contract: An Investor's Perspective* (Kluwer Law International 2000); Bernard Taverne, *Petroleum Industry Governments: A Global Study of the Involvement of Industry and Government in the Production and Use of Petroleum* (2nd edn, International Energy & Resources Law & Policy, Kluwer Law International 2008).

[905] ibid.

[906] Omorogbe, *The Oil and Gas Industry: Exploration and Production Contracts* (n 639).

[907] Danièle Barberis, *Negotiating Mining Agreements: Past, Present and Future Trends* (Kluwer Law International 1998).

[908] Ernest E Smith and others, *International Petroleum Transactions* (2nd edn, Rocky Mountain Mineral Law Foundation 2000).

[909] EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14).

classification of the petroleum contracts is more appealing in the context of widening dimensions of petroleum E&P contractual relations.

There are authors like Tordo and others that have argued that these petroleum contracts are derived from two main petroleum legal regimes which have been designed "to address the rights and obligations of host governments and private investors".[910] These two legal regimes are: Concessions and Contracts/Agreements. Brosio and Singh also support the view of Tordo by positing that concession and contractual regimes are the two main instruments for petroleum E&P legal arrangement between the private investor and the HS.[911] In this respect, the contractual regime generally mandates host government to take responsibility for petroleum E&P decisions whereby the government, on behalf of the state, enters into different contractual arrangements with private investors to "implement" such policies.[912]

These contractual arrangements do vary based on "the range of decisions for which the government takes the responsibility" in exploring and producing the resource. The concession regime, however, permits the private investor to take responsibility "for all the decisions concerning exploration, development, production, transport and sale of the resource" whereupon the investor gets to own the petroleum resources when the deposits are "extracted". Under the

[910] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 8.

[911] Giorgio Brosio and Raju Jan Singh, 'Revenue Sharing of Natural Resources in Africa: Reflections from a Review of International Practices' (World Bank Background Paper, April 2014) 18 < http://documents.worldbank.org/curated/en/890931468209041225/pdf/902520WP0P1437000Final00April020140.pdf > accessed 3 November 2017.

[912] ibid.

circumstance, the private investor is obliged to pay the HS the required taxes and may also be obliged to "sell a share of the production on the domestic market at some agreed price".[913]

This contractual-concession classification, as posed by Tordo, Brosio and Singh, and others alike, is somewhat misleading if not limited. This is because even though the defining characteristics of concessions in this case tend to prove otherwise, concessions are treated as if they are not 'contracts' *sensu stricto* while the remaining three of the four contractual types above are classified under contracts. This rendition, arguably, does not appear to be persuasive enough because many concessions in the petroleum industry, by all intent and purposes, do largely meet the standard test of contracts - as extensively discussed in Chapter six above. The kind of concessions that may not necessarily be considered as contracts could be found, *albeit* at the margins, in the mining industry wherein concessions have been historically[914] prevalent.[915] The two-tier classification would only, however, be relevant for purposes of differentiating the unique features of concession contracts and the other three contractual arrangements as practised by 'almost half of countries in the world'.[916]

The contracts have, over time, been developed and applied by the HS and investors in collaboration with the public and other supporting agencies such as

[913] ibid; Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[914] Tordo with David Johnston and Daniel Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[915] EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14).

[916] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 9.

IGOs[917] and CSOs.[918] However, the key parties to such contracts are usually the state in conjunction with NOC and private providers or contractors, mainly the MNPCs and their partners or consortium.[919] The active participation of the state as a contractual party in the E&P enterprise is usually achieved by a number of HS through the NOC. NOCs are known to play instrumental role in contractual arrangements since the NOCs are made to have a stake or designated share in petroleum resource revenues (PRR).

Countries such as Venezuela and Brazil in South America and many African countries do mostly use PSCs wherein their NOCs are given dominant role to play on behalf of the HS. In addition, Norway is popular for its use of concession contract in which its NOCs play a very significant role in petroleum E&P legal arrangements.[920] In instances where there is enough local capacity or when huge financial capital outlay and technical expertise is not required, the contract can be entered between the HS and its NOC and local private petroleum companies without necessarily engaging the interests of MNPCs.[921] Furthermore, there are cooperation or working contracts which the investing companies, and sometimes

[917] Examples of IGOs include: The World Bank, United Nations, International Monetary Fund, and Organisation for Economic Cooperation and Development.

[918] CSOs such as EITI, Transparency International (TI) and NRGI at the international level but with offices at national levels.

[919] Naseem and Naseem, 'World Petroleum Regimes' (n 84)149.

[920] Helge Ryggvik, 'The Norwegian Oil experience: A Toolbox for Managing Resources' (Centre for Technology, Innovation and Culture - TIK Centre, 2010) < www.sv.uio.no/tik/forskning/publikasjoner/tik-rapportserie/Ryggvik.pdf > accessed 2 December 2017.

[921] Ghadas and Karimsharif, 'Types and Features of International Petroleum Contracts' (n 904); Naseem and Naseem, 'World Petroleum Regimes' (n 84)149.

including the representative NOC, do establish amongst themselves. This regulates relations amongst operating partners.

EISB, observes that contract classification types into the four, three or two formations are deemed to be 'only conventions', the use of which can differ from country to country with "economic content" being the most significant consideration.[922] Application of these contractual forms tend to reveal a pattern of "substantial variation between … contracts within a given category". Naseem and Naseem arguably contend that the main differentiating feature is the fiscal component.[923] However, this may not necessarily be the case because the variations between the contractual regimes or types often lie not only on the fiscal but also their legal and technical characteristics deployed to regulate petroleum E&P. For instance, one of the fundamental distinguishing features between concession contract and service contract is their legal disposition. The levels of effectiveness in achieving the purposes of the chosen contract type may still, however, be dependent on comprehensiveness and useful application of the legal form.[924]

Therefore, despite the fact that each of the contractual forms could be theoretically divergent especially when it comes to 'levels of governmental control, ownership rights and arrangements on compensation', they tend to also share some similar "basic provisions" and so may be deployed in any of the contractual regimes to

[922] EISB, 'Policy, Legal and Contractual Framework' in EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 14).

[923] Naseem and Naseem, 'World Petroleum Regimes' (n 84) 149, 151; Gordon Hensley Barrows, *Worldwide Concession Contracts and Petroleum Legislation* (1989).

[924] ibid.

achieve similar purposes.[925] For instance, regardless of the type of contract, some of the major terms which are common to most standard contracts in the world are: Contractual parties, exploration, development and production, operations' conduct, control and inspection, information submission, ownership of data and confidentiality, asset ownership, assignment, foreign exchange, auditing and accounting, qualification of contractor, health safety and environment, reclamation and decommissioning, local goods and services, training and local employment, stabilization, force majeure, and termination.[926]

Of utmost importance is the effective legal relations established by the above four contracts between the HS, NOC and providers or contractors. Indeed, depending on the policy orientation, administrative competence, legislative and constitutional imperatives that interrelate to define national objective prioritises, the four contracts may not be mutually exclusive.[927] And thus, each of them may be used alongside each other or each of them may be transformed in ways that churn out similar social and economic outcomes like each one of them would originally or even metamorphically do.[928]

There are some countries that go the 'hybrid way' by adopting contractual arrangement regime that 'have features from more than one contractual type'. For instance, while China, Nigeria, Indonesia, Ghana, Russia, India and Malaysia

[925] EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[926] ibid; Naseem and Naseem, 'World Petroleum Regimes' (n 84) 149, 151; Gordon Hensley Barrows, *Worldwide Concession Contracts and Petroleum Legislation* (1989); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[927] ibid; Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[928] ibid.

largely adopt PSCs, they also do include 'royalties and/or taxes in their standard contractual agreements'.[929] One poignant reason that sometimes account for concurrent adoption of two or more of the contractual regimes has been found to be that, because petroleum E&P processes take quite some time to complete a contractual duration and because not all the potential areas or avenues for new engagement to explore, develop and produce the petroleum resources are exhausted, there is always an opportunity to change a contracting regime for the newcomers while maintaining the existing regime with the old-comers.[930] It means, therefore, that at one time or the other, it is possible to have, for instance, concession contract which was awarded years ago but which is still in force running alongside with a new production sharing contract which has been subsequently entered with new petroleum E&P companies.

It is partly on that basis that EISB submits that 'economic or fiscal considerations', even though are crucial in the final analysis, do not solely dictate or inform the kind of petroleum contractual regime to choose. The precedent imperatives largely do determine that.[931] Thus, national priorities and how a particular contract is deemed to have the potency to meet these priorities will substantially inform the nature of legislation which will in turn determine the contractual arrangements HS will enter with the petroleum E&P companies.[932] The significance of the type of contracts, however, rests on how they each give a guide as to how the petroleum

[929] ibid.

[930] EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[931] ibid.

[932] ibid.

policy and legislative priorities can be situated within a particular frame of legal relations to generating the desired social and economic ends for the parties.[933]

In respect of the length of contracts, the increasing understanding of "experts" is of the persuasion that "the model with more detailed laws and regulations" has the capacity to build "a stronger foundation" for effective management of petroleum E&P legal regimes to give proper effect and meaning to reasonable priorities of HS and their socioeconomic rights therewith.[934] NRGI adds that detailed model laws and regulations on petroleum E&P gives investor confidence as investors get to feel that they are given equal treatment "across deals". In addition, because detailed model laws and regulations have terms that are 'consistent across projects, they are able to streamline monitoring mechanisms for institutions of host governments'.[935] A further advantage of this scenario is that it allows more space for easy public participation due to the expected robustness of the "legislative framework".[936] The opposite scenario has limitations that require sound integrity, enhanced tactfulness and stronger accountability mechanisms before it can yield maximum returns.[937]

Crucially, even though the detailed model provides many opportunities for better outcomes, it is only when ROL and justice are sufficiently featured in contracts that they can deliver best of outcomes such as effective protection of right to

[933] ibid; T Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (Edward Elgar 2015).

[934] ibid.

[935] ibid.

[936] ibid.

[937] Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (n 933).

adequate standard of living.[938] As long as tenets such as accountability, transparency, consistency, equal opportunity, fairness and equity are operationalised in the petroleum legal framework, the petroleum legislation and contracts will deliver the desired results, even if the legislations and contracts are not detailed. Admittedly, these tenets can easily be expressed in the model with detailed laws, contracts and regulations.[939] Generally, in most HS especially in SSA, the specifics on engagement terms are in the contracts rather than legislations and regulations and constitutions.[940] Host countries in SSA are encouraged to adopt detailed petroleum legislation and regulations in which model contracts and actual contracts must be detailed and well-structured.[941]

7.6.2 Petroleum model contract (PMC)

Based on the prescriptions given in policies, laws and regulations, it is a norm held sway in petroleum-rich states to develop petroleum model contract (PMC) or petroleum model agreement (PMA) to further guide in drafting and entering into petroleum contracts or agreements with petroleum E&P companies. PMC presents to the HS a useful template in which the state can use to enter into agreements with petroleum companies.[942] Depending on the country and their policy imperatives, the HS can choose one of two pathways. One way is to draft

[938] Shihata, 'The Role of Law in Business Development' (n 149) 1577; Friedman, 'Legal Rules and the Process of Social Change' (n 255); Shihata, 'Legal Framework for Development (n 28).

[939] ibid; Talus (ed), *Research Handbook on International Energy Law* (n 337).

[940] EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[941] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[942] Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (n 933).

reasonably productive PMC to 'serve as a starting point of the state's entry into contracts with petroleum companies wherein there is a vast provision to accommodate more substantial variations during negotiations'.[943]

The second option is to draft more detailed PMC in which specific provisions are drafted/penned/included to accommodate "the results of a tender process", or possibility of negotiation to complete the contract or agreement.[944] Whereas the second scenario is less exposed to manipulative tendencies of MNPCs and their local collaborators, the first scenario is vulnerable for the HS to accept more unfavourable terms from the petroleum companies, sometimes done under circumstances almost tantamount to duress and corruption.[945]

With the detailed PMC, even though the tendency of manipulation is not completely warded off, there is the promising line of hope that state actors would take their time to carefully model the contract or agreement on the basis of the general petroleum legal framework of the country and for the ultimate benefit of the citizens.[946] The watch word is building capacity to design PMCs in a way that conforms to justice and ROL tenets so that even if negotiation or competition is used, there would be a checks and balance mechanism that would make it difficult for the state actors and petroleum companies to get away with suspicious deals and malfeasant activities that adversely affect the achievement of socioeconomic rights such as rights to education and health. As indicated earlier, ROL and justice

[943] ibid; NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[944] ibid

[945] ibid.

[946] Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (n 933).

will more easily welcome a detailed PMC that has high level of transparency and accountability mechanisms.[947]

In adopting the detailed PMC, state actors in SSA must not be limited to their local domain of competence – they must reach out. They must extend hands to more competent professionals who can be engaged right from considering the type of contracts to adopt through designing PMC to negotiating actual contracts.[948] Contractual arrangements between the HS and petroleum experts must be such that the professionals will be deterred from selling their professional conscience and interests of citizens to the skewed investment demands of petroleum companies. Selection of experts must be carefully and competitively done to avoid being caught up in the murkiness of moral hazards. Beyond that, there should be unrepentant transparency entrenched in ways that not only makes state actors actively involved in the process but also that the citizens must know the details of the transactional processes.[949]

7.6.3 Concession contract (CC)

Concession contract is generally defined as a legal arrangement between the HS and petroleum E&P company in which an exclusive legal entitlement or licence with privileges, rights and obligations is granted to the petroleum company

[947] Shihata, 'Legal Framework for Development (n 28); Talus (ed), *Research Handbook on International Energy Law* (n 337); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[948] ibid.

[949] A Timothy Martin, 'Contracts: A Survey of the Global Petroleum Industry' (2004) 22(3) Journal of Energy & Natural Resources Law 281 < https://doi.org/10.1080/02646811.2004.11433373 > accessed 5 August 2017; EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

whereby the petroleum company is authorised to undertake petroleum exploration, development and production activities over a specified time and area of the HS against which appropriate payments such as fees and taxes are made by the petroleum company to the HS.[950] Cotula supports this view by noting that concession is a contractual arrangement in which government of natural resource-rich state grants a private investor "the exclusive right to exploit its natural resources in a given area for a specified period of time, in exchange for payment of royalties, taxation and fees".[951]

The unique features of CC include, 'the taxes, royalty and fees' which the private investor is obligated to pay upon execution of the authorisation or licence that has been granted.[952] In the same vein, Guirauden has observed that CCs vest the investor with the 'exclusive exploration, development and production rights for every commercial discovery'.[953] In Norway, for example, these rights are given to petroleum E&P companies that eventually are required to pay a total of 78% tax.[954] Whereas the right at the exploration stage can be described as a licence, the rights granted at the development and production stage are noted to be the

[950] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Denis Guirauden, 'Legal, fiscal and contractual framework' in Jean-Pierre Favennec and Nadine Bret-Rouzaut (eds), *Oil and Gas Exploration and Production: reserves, costs and contracts* (3rd edn, Editions TECHNIP 2011).

[951] Cotula, *Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments* (n 125) 24.

[952] ibid.

[953] Guirauden, 'Legal, fiscal and contractual framework' in Favennec and Bret-Rouzaut (eds), *Oil and Gas Exploration and Production: reserves, costs and contracts* (n 950).

[954] NORSK, 'Fundamental Regulatory Principles' (Updated, 5 February 2019) < www.norskpetroleum.no/en/framework/fundamental-regulatory-principles/ > accessed 13 April 2019.

lease.[955] Tordo and others aver that, to acquire a concession licence, petroleum E&P entities that have interest in taking part in a "licensing round" are usually expected to present "a letter of intent, technical and financial reports for the last two years, their latest audit report, and a completed and signed company profile".[956] The HS then conducts prequalification and qualification of interested E&P companies to ascertain, among other things, "technical and financial capabilities" of these investors. The results from this examination is usually expected to be announced publicly so that anyone can have access to it.[957]

Essentially, in CCs, HS are compensated for derogating their ownership stake in the petroleum resources by the licence or acreage fee, bonuses, royalty and taxes.[958] Depending on the rates and structure of the compensation scheme for the HS, some HS may include all these four rewards in its concession contracting processes, some may choose either of them. Even with the good reward system in CC for the HS, usually, the concessionaire is still empowered to exercise a great degree of 'discretion over most facets of the exploitation processes'.[959] In all these constellations, the key elements that try to balance the rights of HS and the rights of private investors or concessionaire are renegotiation, the courts, administrative agencies and arbitration panels. In particular, according to Smith and Dzienkowski, "judicial decisions have produced a series of implied covenants that impose a duty upon the person or entity holding the right to explore a particular

[955] Guirauden, 'Legal, fiscal and contractual framework' (n 950).

[956] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 9.

[957] ibid.

[958] ibid.

[959] Gao (ed), *International Petroleum Contracts* (n 111).

tract to develop it for the mutual benefit"[960] of contracting parties. However, it is disturbing to note that the duty so imposed on the concessionaire is often either a responsibility that can be unfairly allocated or that which can be flagrantly disregarded by the concessionaire to the disadvantage of the HS if the HS has not demonstrated effective capability.[961]

These, if not handled judiciously, are likely to overreach the ownership and production rights of the HS. This threat and the legitimacy displeasures which CC can unleash, appear not to present significant obstacles to popularity of concession contracts in the global petroleum E&P enterprise. CCs are said to be deployed by almost 50% of HS in the world but with significantly varied architecture especially in respect of fiscal designs such as 'royalty rate and structure, adoption of corporate taxes and/or special taxes as well as granting of incentives like allowances and credits on investments'[962] in E&P of the petroleum resources.[963] Essentially, the effectiveness and benefits from concession contracts depend upon how well the responsibilities and rights are allocated and dispensed to generate reasonable returns for the HS.[964] For instance, even though Norway uses CCs, Norway generates maximum economic benefits from its petroleum resources.[965]

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[960] Ernest E Smith and John S Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (University of Texas at Austin School of Law Publications 1989) 5; see Howard R Williams, Charles J Meyers, Patrick H Martin, and Bruce M Kramer, *Oil and Gas Law* (Abridged 4th edn, LexisNexis 2010).

[961] ibid.

[962] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[963] ibid.

[964] Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (n 933).

[965] NORSK, 'Fundamental Regulatory Principles' (n 954).

This is not the case for SSA countries[966] such as Angola, Nigeria and Chad. These countries have hardly maximised economic benefits from their petroleum concessions, *albeit* PSC is used alongside.[967]

7.6.4 Production sharing contract (PSC)

Production sharing contract is generally a contractual arrangement between HS and petroleum E&P companies wherein the HS tasks investors such as MNPCs to manage its petroleum E&P activities on its behalf, for which all costs and risks are borne by the investors without recourse to any compensation from the state should there be any losses, but that in which there is a pre-agreed profit sharing arrangement between the parties if petroleum is successfully discovered and profits are subsequently declared by the investor upon production of the resource.[968] Typical arrangement of modern PSC is that the NOC takes participating share and sometimes bear some costs in the E&P. In Ghana, for instance, the minimum participating interest at no cost bearing is 15% for the GNPC (NOC) but any additional interest acquired by the state attracts costs and

[966] Ghana's Petroleum Act 919 does not provide space for concession contracts. In effect, the petroleum legal regime in Ghana does not make provision for concessions. See Chapter eight of this thesis for further details of petroleum legal regime in Ghana; also see OpenOil, 'Ghana' < https://repository.openoil.net/wiki/Ghana > accessed 20 July 2019.

[967] See CCs in Nigeria at: OpenOil, 'Nigeria' < https://repository.openoil.net/wiki/Nigeria > accessed 20 July 2019; see CCs in Angola at: OpenOil, 'Angola' < https://repository.openoil.net/wiki/Angola> accessed 20 July 2019; see CCs in Chad at: OpenOil, 'Chad' < https://repository.openoil.net/wiki/Chad > accessed 20 July 2019.

[968] Bernard Taverne, 'Production Sharing Agreements in Principle and in Practice' in Martyn R David (ed) *Upstream Oil and Gas Agreement* (Sweet & Maxwell 1996) 43; Machmud, *The Indonesian Production Sharing Contract* (n 903); Taverne, *Petroleum Industry Governments: A Global Study of the Involvement of Industry and Government in the Production and Use of Petroleum* (n 904); Boykett and others, *Oil Contracts: How to read and understand them* (n 837).

risks as borne by the petroleum E&P companies.[969] For Gao, PSC represents a contractual arrangement wherein, upon successful discovery of commercially viable quantities of oil:

> … foreign company, serving as a contractor to the [HS / its NOC], recovers its costs each year from production and is further entitled to receive a certain share of the remaining productions as payment in kind for the exploration risks assumed and the development service performed if there is commercial discovery.[970]

This presentation by Gao appears to be one of the most comprehensive definitions of PSC.[971] There is, however, a limitation regarding the scope of petroleum E&P companies in this definition since it does not consider a situation where the private investors can also be local companies. Nonetheless, Gao's scope of definition fits into the context of this thesis because the representation of local petroleum E&P companies is very limited in petroleum E&P in most SSA countries.

One of the high points of PSC is that it not only gives recognition to the prevailing circumstances and tendencies of HS and MNPCs but also underscores that the idea of production sharing does see mutuality of interest in contractual relationship principle as being more succinctly endorsed and exhibited in the contractual arrangement.[972] Gao argues that the relationship between the HS and contractor

[969] Petroleum (Exploration and Production), 2016 [Act 919], s 10 (14) a.

[970] Gao (ed), *International Petroleum Contracts* (n 111) 45; Ghadas and Karimsharif, 'Types and Features of International Petroleum Contracts' (n 904) 36.

[971] Ghadas and Karimsharif, 'Types and Features of International Petroleum Contracts' (n 904) 36.

[972] Gao (ed), *International Petroleum Contracts* (n 111).

in PSC is presented with stability of contractual terms. Of course, the stability of contractual relationship that is offered by PSC will depend upon factors such as legal and policy imperatives of HS as well as the capacity of the contractor.[973]

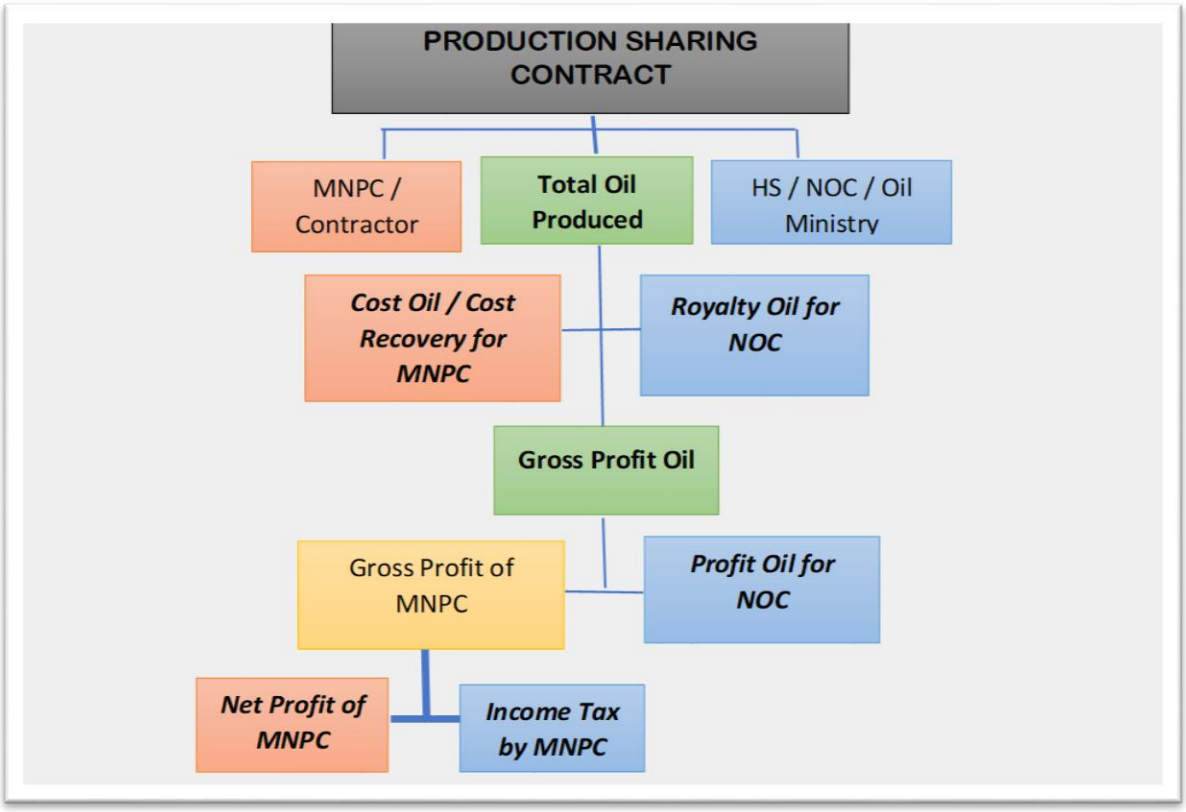
With PSC, even though mutual cooperation and understanding are often expected to be created amongst parties, this relationship is sometimes exposed to disequilibrium whereby the HS only accepts terms of the MNPC due to a number of factors including HS desperation to explore and produce petroleum to unleash badly needed revenues, incompetence of HS and corruptive disposition of both parties.[974] Notwithstanding, PSC is currently very popular and commonly used contractual arrangement in petroleum E&P enterprise across the globe. The Figure 4 below illustrates what essentially is generated from the PSC, in terms of the petroleum, the recovery of costs, and the profit as well as the tax thereon.[975]

[973] ibid.

[974] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960); Desta, 'Competition for Natural Resources and International Investment Law (n 15).

[975] ibid.

Figure 4: Key Outcome Elements of the PSCs[976]



7.6.5 Joint venture contract (JVC)

Joint ventures are built upon an initiating agreement entered between parties to operate as mutual partners in a petroleum exploration and production enterprise. Upon the initial agreement, petroleum companies establish an operating company to explore and produce petroleum along with the HS.[977] That operating company is the joint venture, which, theoretically is partnership or corporation involving HS and petroleum companies. Because of the participation of a number of companies

[976] Kirsten Bindemann, *Production-sharing agreements: an economic analysis* (Oxford Institute for Energy Studies 1999);Taverne, 'Production Sharing Agreements in Principle and in Practice' in David (ed) *Upstream Oil and Gas Agreement* (n 968); Ghadas and Karimsharif, 'Types and Features of International Petroleum Contracts' (n 904) 37.

[977] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960).

in an operative company, also with the HS participation, JVC arrangements are also referred to as participation contracts. Indeed, in this operative company, the contractors have an operational partnership with the NOC of the HS.[978]

From theoretical perspective, whereas the contribution of the HS is fundamentally in the form of providing the acreage for the exploration and production activities, the MNPC and its partners make contribution to the operating partnership in the form of provision of the needed capital, technology and expertise. [979] The joint entity is usually allowed to operate by a management committee wherein there is representation from the MNPC and the HS. There are times when both management and ownership are 'equally divided' amongst parties. There are other times when the HS is made to 'retain a 1% advantage' over other parties. Practically, depending on the nature of initial agreement on which this JVC is based, the narrative regarding contribution of parties may slightly differ from one venture to the other. This sometimes makes it a little challenging to generalise.[980]

Often, apart from forming a joint venture from the start, participation contract involving the HS is taken to be used as an option to be added to CCs and PSCs.

[978] Godfrey Etikerentse, *Nigeria: Nigerian Petroleum Law* (Macmillan 1985).

[979] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960).

[980] ibid.

This is evident in Nigeria,[981] Angola[982] and Ghana.[983] The unspoken challenge is, however, that because participation in contractual arrangements have, historically, been 'developed from the traditional Middle Eastern concessions, the development of the structure of such contracts has been based on compromise instead of based on an initial decision to create such a participation contract'.[984]

7.6.6 Service contract (SC)

Service contracts come in different forms. These include: 'risk service contracts, pure service contracts and technical assistance contracts'. The RSC is commonly used by contracting parties. With this type, the contracted petroleum firm agrees to bear all investment risks, as well as supply all the needed funds and render appropriate technical expertise which are required to explore, develop and produce the petroleum.[985] In the event that the contracted party has not been

[981] This JV constitutes NNPC (60%), Agip (20%) and Phillips Petroleum (20%) participating interests. Agip operates the JV mainly from small onshore fields; See NNPC, 'Joint Operating Agreement' (2019) < www.nnpcgroup.com/NNPC-Business/Upstream-Ventures/Pages/Joint-Operating-Agreement.aspx > accessed 21 April 2019.

[982] See OpenOil, 'Angola: Available contracts' (Last updated, 13 February 2015) < https://repository.openoil.net/wiki/Angola > accessed 21 April 2019; Pedro Guimarães, João Robles and Cláudia Fernandes, 'General Strategy for the Award of Petroleum Concessions (2019-2025)' (Newsletter, FCB Global, February 2019) < www.fcblegal.com/xms/files/AO_General_Strategy_for_the_Award_of_Petroleum_Concessions_-2019-2025-.pdf > accessed 21 April 2019.

[983] See Agreement between the AGM Petroleum Ghana Limited, Ghana National Petroleum Corporation, and GNPC Exploration and Production Company Limited, in respect of South Deepwater Tano Contract Area (10 September 2013) < www.resourcecontracts.org/contract/ocds-591adf-2262702985/view#/pdf > accessed 23 April 2019.

[984] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960).

[985] ibid; Raymond F Mikesell, *Petroleum Company Operations and Agreements in the Developing Countries* (Routledge 2016).

able to find petroleum deposits in commercial quantities, there is no obligation on the HS to offer any compensation nor is it within the right of the contracted oil company to demand or receive compensation for the costs and risks incurred in the exploration for petroleum.[986] The nature of RSCs often appear to be similar to that of the PSCs. The difference is, however, that RSC grants 'fewer rights to the contracted petroleum company with respect to the acreage that is being explored'.[987]

The contracted petroleum company only benefits when it is able to discover the petroleum. That is, upon discovery of petroleum in viable commercial deposits, the petroleum company must be rewarded for risks taken and for costs incurred. However, the contractor is obliged to proceed to develop and operationalise the oil field by way of producing the petroleum. It is only when production has started that contracted petroleum company must be reimbursed by the HS in cash for the investment risk and other investment associated costs. Alternatively, the oil company has the right to choose to buy the oil that has been produced at a discounted price.[988] Modern RSCs usually include terms that have been framed "to require reinvestment in the country for petroleum-related projects and to favour domestic suppliers and employees".[989] The rationale behind this inclusion is "to

[986] Etikerentse, *Nigeria: Nigerian Petroleum Law* (n 978), 41; Michael Likosky, 'Contracting and regulatory issues in the oil and gas and metallic minerals industries' (April 2009) 18(1) Transnational Corporations 1.

[987] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960); Mikesell, *Petroleum Company Operations and Agreements in the Developing Countries* (Routledge 2016).

[988] Etikerentse, *Nigeria: Nigerian Petroleum Law* (n 978), 41; Likosky, 'Contracting and regulatory issues in the oil and gas and metallic minerals industries' (n 986)1.

[989] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960).

integrate the petroleum operations into the national economy and to maintain control over the reserves"[990].

With the pure service contract, the MNPC or foreign company with expertise in petroleum is contracted to 'perform a specified service for a flat fee'.[991] A number of MNPCs sometimes do not find the pure service contracts as attractive since they are sometimes not granted the right to produce the petroleum. The 'buyback' imperative that enables the MNPC to purchase the petroleum produced at a special rate or obtain a fraction of the petroleum rather than the flat fee payment for services rendered is, therefore, integrated into the contractual arrangements by some HS to attract MNPCs into pure service contracts.[992]

With respect to the technical assistance contract, the contracted petroleum company agrees that it will provide the HS with technical assistance such as equipment and training provision to explore, develop, produce, and, sometimes, refine oil. In exchange, a fee is paid to the contractor according to the quantity of oil that is produced, in addition to reimbursement of expenses incurred by the contractor or an equivalent measure of oil exchange. This type of SC somewhat appears to be the sophisticated one.[993]

The fundamental disposition of SC is that the HS and the contracted party enter into an agreement where the petroleum company will provide the HS the needed services and or data that can enable the HS to explore and produce its petroleum

[990] ibid.

[991] ibid*;* Mikesell, *Petroleum Company Operations and Agreements in the Developing Countries* (n 985).

[992] ibid.

[993] Smith and Dzienkowski*, A fifty-year perspective on World Petroleum Arrangements (*n 960*)*.

resources. In return, the contracted party is paid a fee or is made to have a share of the petroleum that has been produced.[994] Retaining ownership and control of petroleum resources for the HS and taking advantage of the following three strong points of MNPCs is crucial in SC arrangements:

- Capital or financial resources of MNPCs;
- Managerial expertise of MNPCs;
- Technological expertise of MNPCs.[995]

7.6.7 Interrelationships of petroleum contracts

For all the foregoing petroleum contracts, usually, the HS holds ownership title (even if nominal) to the petroleum that is produced in the contract area by the contracting petroleum company. At the same time, any risks associated with the investment by the contractor as well as production costs, are usually in large part borne by the contactor. Benefits in terms of profits are then shared between the parties based on an already existing percentage of sharing that has been agreed.[996] These are more succinctly exhibited by the PSC but are also characteristic of the other petroleum contract types in different degrees of risks, costs and profit sharing.[997] It must be noted that, under normal framework of these contract formations, the following levels of participation is usually obtained.

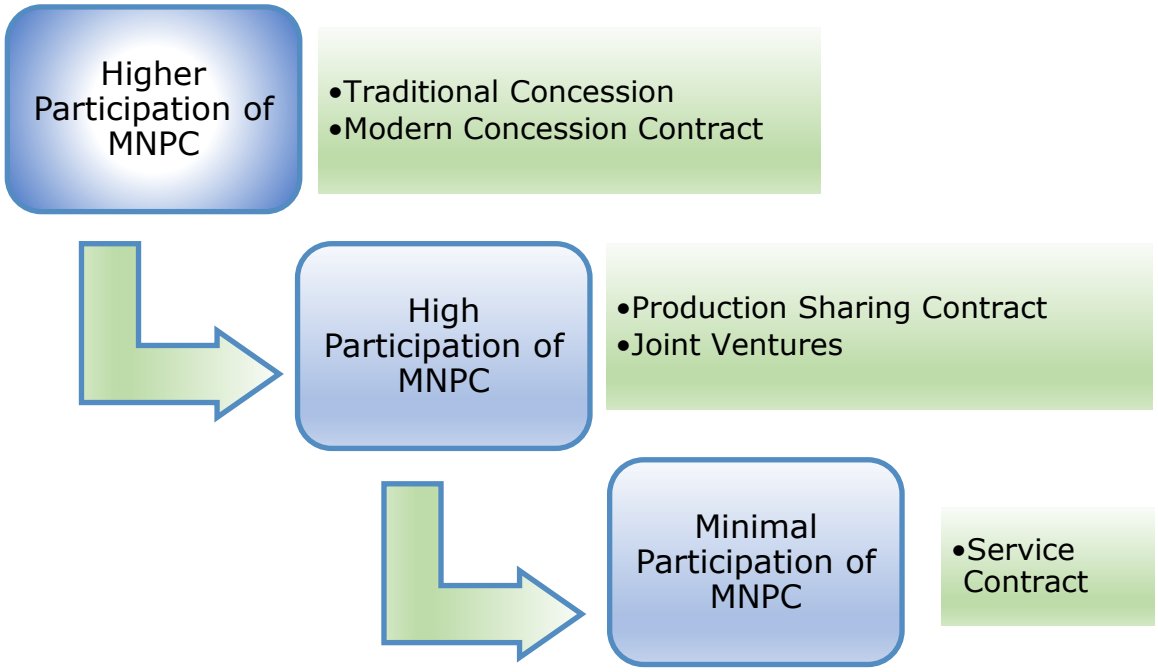
[994] ibid.

[995] ibid.

[996] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330); Cotula , *Investment contracts and sustainable development* (n 125); Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights' (n 791).

[997] Ikenna, "International Petroleum Law" (n 33).

Figure 5: Interrelationships between contract types



Thus, the CCs tend to have the highest participation by foreign oil companies. The participation of the foreign petroleum firms decreases in both PSCs and JVCs. This participation decreases further with respect to SCs and may well be at its minimum. This is mindful of the fact that, as demonstrated earlier, some countries may use the structure of one contract form, but the terms and conditions therein may substantively appear like the other form.[998]

JVC partly distinguishes itself from CC, PSC and SC in terms of legal personality. In CC and PSC, the HS and the MNPC are usually treated as distinct entities. This is same with SCs. This is not the case in JVC wherein an operating company is jointly established to contain the MNPC and the HS in order to explore and produce

[998] Omorogbe, *The Oil and Gas Industry: Exploration and Production Contracts* (n 639); Barberis, *Negotiating Mining Agreements: Past, Present and Future Trends* (n 907); Smith and others, *International Petroleum Transactions* (n 908); Likosky, 'Contracting and regulatory issues in the oil and gas and metallic minerals industries' (n 986) 1.

the petroleum reserves of the HS for the mutual benefit of the parties.[999] Another feature that runs through all the four petroleum contractual arrangements is that they all face uncertainties and risks especially the challenge of how such uncertainties and risks can be handled by the parties. [1000]

7.7 Conclusion

The architecture of global legal regime for petroleum is complex. This demonstrates the difficulty in defining the limits of petroleum law that oscillates between municipal law and international law. Petroleum law is made up of many components drawn from diverse municipal and international legal instruments.[1001] The key international legal instruments that form part of global petroleum regime include treaties, arbitrary awards, works of jurists, and resolutions of international organisations. The principal municipal legal instruments include the national constitution, petroleum legislation, petroleum model contract and petroleum contracts. Petroleum contracts represent the micro-level demonstration of rights and duties of the HS and MNPCs.[1002]

As can be seen in figure 6 below, whether contracts are more detailed, or legislations/regulations/model contracts are, contracts are at the centre of the legal arrangements between HS and petroleum E&P companies. They establish direct legal relationships between the contracting parties. In these arrangements,

[999] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960).

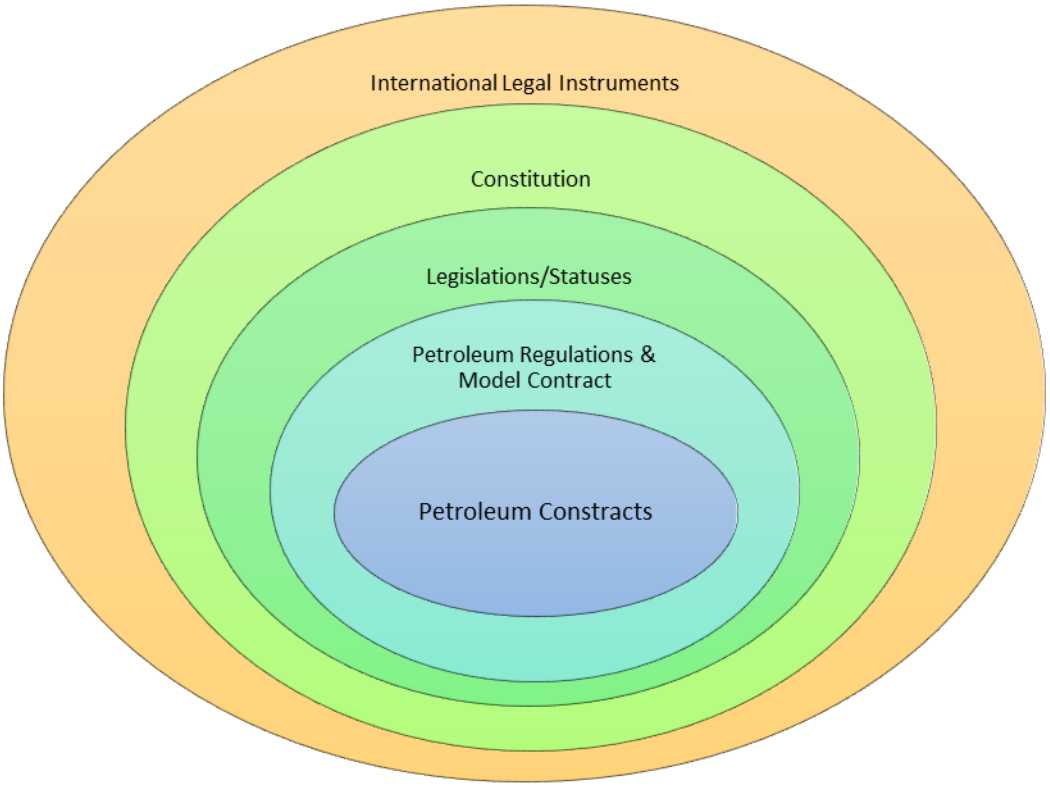
[1000] ibid.

[1001] Smith and Dzienkowski, *A fifty-year perspective on World Petroleum Arrangements* (n 960); Naseem and Naseem, 'World Petroleum Regimes' (n 84); Ikenna, "International Petroleum Law" (n 33); Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84).

[1002] ibid.

contracts are expected to draw legitimacy and legal basis from the preceding legal instruments within the purview of interrelated spheres of influences.

Figure 6: Spheres of Influence of Petroleum Legal Instruments



In order to avoid inconsistencies, moral hazards and rent seeking, it will be more beneficial that accountability, transparency and public participation are made the foundation of or bedrock for petroleum contractual negotiations to provide further details on individual contracts.[1003] Whether the contracts are PSCs, CCs, JVCs or SCs, the crucial decision making factor rests on the extent to which contractual terms are able to yield maximum economic recovery or benefit for the HS while

[1003] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330); Cotula Lorenzo, *Investment contracts and sustainable development* (n 125); see also Shihata, 'The Role of Law in Business Development' (n 149) 1577; Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights' (n 791).

also making it possible for the petroleum E&P companies to procure reasonable returns on their investments.[1004] It is envisaged that if contractual terms are in tandem with the tenets of ROL and justice, petroleum law will enhance socioeconomic rights of citizens and protect profit interests of companies.[1005] The next chapter takes a closer look at five case studies of petroleum legal regimes.

[1004] ibid.

[1005] Shihata, 'Legal Framework for Development (n 28); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (n 34); Shihata, 'The Role of Law in Business Development' (n 149).

CHAPTER EIGHT

CASE STUDIES OF PETROLEUM

8.1 Introduction

Five main case studies have been used to provide a critical analysis of nature and scope of contractual arrangements as they are situated in the legal and regulatory frameworks of host countries of petroleum resources. The cases drawn from SSA countries are examples of legally questionable and at times controversial petroleum legal models which largely characterise the petroleum legal frame in SSA. The cases drawn from the developed countries such as the UK and Norway are used as petroleum E&P legal models that can be innovatively utilised by SSA countries.

First, the UK and Norway case studies are explored to provide a good background of what it is like to have petroleum legal regime that significantly entertains ROL and justice and in ways that significantly inure to the benefit of socioeconomic rights. The second dimension of the chapter takes an explorative look at the Nigerian and Angolan case studies to provide a reasonable picture of the extent to which ROL and justice as well as socioeconomic rights are challenged in the petroleum legal regimes of the two most petroleum- resourced[1006] countries in SSA.

In the third dimension, the Ghanaian situation is explored to demonstrate the issues faced by one of the pacesetters of Africa that had discovered petroleum in

[1006] AfDB, *African Economic Outlook 2019* (African Development Bank 2019) < www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2019AEO/AEO_2019-EN.pdf > accessed 9 June 2019.

economically viable quantities about a little over a decade ago. Could Ghana set a good example for other SSA countries to emulate or will Ghana suffer and/or is suffering from the same fate as its 'seniors'[1007] in petroleum E&P in SSA? This question leads to the fourth dimension of the chapter which takes a comparative look at these three SSA countries relative to the UK and Norway in the light of relevant parameters that ultimately harness the petroleum resources of these SSA countries. This chapter contributes to the argument that is geared towards making petroleum legislation and contracts in SSA more just and fairer for the benefit of socioeconomic rights.

8.2 The Case of United Kingdom (UK)

8.2.1 Petroleum E&P legislations in UK

In the UK, petroleum E&P is governed by the Petroleum Act 1998.[1008] Like many countries, Act 1998 entrusts ownership rights of petroleum in the head of state or government – in this case, the Crown.[1009] However, the secretary of state for Department of Business, Energy and Industrial Strategy (DBEIS) acting through the Oil and Gas Authority (OGA) as the sole shareholder thereof is granted the authority to issue E&P licences to petroleum companies as seen fit by the OGA – of course on behalf of the Crown and of the UK state.[1010] This can be allowed for 'licences that confer exclusive and non-exclusive rights to search for, bore for and

[1007] Such as Angola, Nigeria, Republic of Congo, Gabon and Equatorial Guinea.

[1008] Petroleum Act 1998 c 17 < www.legislation.gov.uk/ukpga/1998/17/contents > accessed 13 February 2019.

[1009] Greg Gordon, John Paterson and Emre Usenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends* (Vol I, Resource Management and Regulatory Law, 3rd edn, Edinburgh University Press 2018).

[1010] ibid.

get or extract petroleum'.[1011] Presently, DBEIS is the Supervisory Department of Petroleum activities while OGA[1012] is the entity in charge of regulating, promoting and influencing the petroleum industry[1013] of UK so as "to maximise the economic recovery of the UK's oil and gas resources".[1014]

The Petroleum Act 1998 is complemented by 'the 2008 Model Clauses for use in offshore production licences and the model clauses in use for onshore production licences'.[1015] Model Clauses are required 'to be laid in secondary legislation, which are ordinarily then incorporated into new licences if there are no exceptional cases'.[1016] However, Model Clauses that are subsequently issued do not affect licences that are already in existence. An exception is given in this regard if the 1998 Act provided specific retrospective measures. The Petroleum Act 1998 is also supported by the EU Hydrocarbon Licensing Directive year 1994[1017] which has been transposed by the UK Hydrocarbon Licensing Directive Regulations of 1995. Another legal instrument of importance in the petroleum legal framework is EU

[1011] Oil and Gas Authority, 'Overview' (Last updated, 13 December 2017) < www.ogauthority.co.uk/licensing-consents/overview/ > accessed 18 February 2019.

[1012] Energy Act 2016, c 20 < www.legislation.gov.uk/ukpga/2016/20/pdfs/ukpga_20160020_en.pdf > accessed 14 June 2019.

[1013] David Hough, 'UK offshore oil and gas industry' (Briefing Paper, Number CBP 07268, House of Commons Library, 29 March 2017); Flavio G I Inocencio, 'Independent Regulatory Agencies in the Oil and Gas Industry' (2018) 4 International Energy Law Review 136.

[1014] Oil and Gas Authority, 'What we do' (Last updated, 19 October 2017) < www.ogauthority.co.uk/about-us/what-we-do/ > accessed 18 February 2019.

[1015] ibid.

[1016] ibid.

[1017] Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons OJ L 164, 30.6.1994, 3-8.

Offshore Safety Directive 2013[1018] whose requirements for petroleum licensing are implemented via the UK Offshore Petroleum Licensing (Offshore Safety Directive) Regulations of 2015.[1019]

To regulate onshore petroleum activities, there is also the Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations of 2014. For the purposes of conservation of species in offshore, Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (as amended) is also applicable in the UK petroleum E&P industry. To support OGA's operation costs and such other related expenses, the Oil and Gas Authority (Fees and Petroleum Licensing) (Amendment) Regulations of 2017 is also established.[1020]

The petroleum legal regime of most states covers petroleum activities within the states (Inland and outland), the territorial sea of the states and that of the Continental Shelf thereto.[1021] This usually requires agreements between neighbouring states in consolidation of the provisions of the 1982 Law of the Sea Convention.[1022] In the UK, the Continental Shelf Act 1964 is a framework Law that has been in place to provide instruments for refining the area that has been

[1018] Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC Text with EEA relevance OJ L 178, [28 June 2013] 66-106.

[1019] Oil and Gas Authority, 'Overview' (n 1011); Gordon, Paterson and Usenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends* (n 1009).

[1020] Oil and Gas Authority, 'Overview' (n 1011).

[1021] ibid; NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[1022] United Nations Convention on the Law of the Sea [1994] 1835 UNTS 3; Rothwell and Stephens, *The International Law of the Sea* (n 687).

designated as the UK Continental Shelf (UKCS) based on boundary agreements that have been concluded between UK and its neighbouring states.[1023]

8.2.2 Petroleum E&P licensing in UK

UK has had a long petroleum licensing history. The licensing regime has significantly improved over time. In 1935 the first onshore licence was issued. Although the licensing regime was instigated by the demands of fuel during World War 1, no comprehensive licence was issued. For offshore, the first petroleum licence was issued by the then Ministry of Power in 1964 following the 1960s' North Sea boom.[1024] Intensive exploration began in the early 1970s while production began around a decade later.[1025] The offshore petroleum potential and activities thereto are more prominent in the UK. The onshore does have significant petroleum fields but have not, as yet, yielded very significant production of petroleum.[1026] By 1999, the 1000th offshore petroleum licence was issued by the then Department of Trade and Industry.[1027] This demonstrates not only the

[1023] Oil and Gas Authority, 'Overview' (n 1011); Paterson and Usenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends* (n 1009).

[1024] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 63.

[1025] Oil & Gas UK, 'Industry Overview: Celebrating 50 years of UK Offshore Oil and Gas' < https://oilandgasuk.co.uk/industry-video/ > accessed 3 April 2019.

[1026] Philip Mace and others, 'Oil and gas regulation in the UK: overview' (Thompson Reuters, Practical Law, 1 October 2017) < https://uk.practicallaw.thomsonreuters.com/5-524-5349?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 > accessed 16 March 2019.

[1027] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 65.

experience UK has had with petroleum licensing but also the positive role licensing would have played in the petroleum industry of UK.[1028]

Inspired by the above legal frame and brief historical perspective of licensing in the UK, three basic licence types can be granted. These are exploration licences, seaward production licences, and landward petroleum exploration and development licences. The nature of these licences is dependent upon the geographical outlook – either it is offshore or onshore. With exploration licences (ELs), 'nonexclusive exploration rights are granted to licensees in areas that are below the low water line, and that which have not been covered or affected by any production licence'.[1029] It, thus, covers "all acreage outside those areas covered by any of the corresponding production licences that are in force at the time".[1030]

ELs are usually used to collate seismic data on petroleum availability in an area. This licence is relevant to seismic contractors whose aim is to acquire the seismic data in order 'to sell it to production licence holders who would want to explore outside the areas where they hold licence or would require exclusive rights'. This means that licensees with ELs are not interested in exploiting geological resources by themselves, neither do their ELs permit them to do so. In fact, ELs do only

[1028] John A P Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (Edward Elgar 2018).

[1029] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 62; Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (n 1028).

[1030] Oil and Gas Authority, 'Types of Licence'< www.ogauthority.co.uk/licensing-consents/types-of-licence/ >accessed 26 February 2019.

grant licensees the right to only explore but not to produce petroleum.[1031] This can be both onshore and offshore petroleum licensing.[1032]

Meanwhile, with respect to production licences (PLs), 'exclusive E&P rights are granted to licensees in areas relating to the territorial sea and that of the continental shelf'.[1033] So, these are technically referred to as seaward PLs which grant permission for "non-intrusive exploration whether carried out for the sake of hydrocarbon production, gas storage, carbon capture and sequestration, or any combination of them".[1034] The PLs are usually valid or tenable for terms (1st to 3rd terms), which are referred to as 'a successive or sequence of periods'.[1035] The terms are often related with a particular operation or activity such as exploration, development and/or production.[1036] The first or initial term is associated with exploration and work plan. At the initial term, the PL expires as scheduled except if the licensee has "completed an agreed initial term work programme and surrendered a fixed amount of acreage (usually 50%)".[1037]

The second term is linked with approval of development plan by the OGA. Licensees are not required to provide a work programme for the second term. The licensee is required to have in place a development plan which must be approved

[1031] ibid.

[1032] Paterson and Usenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends* (n 1009).

[1033] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[1034] Oil and Gas Authority, 'Overview' (n 1011).

[1035] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[1036] Oil and Gas Authority, 'Types of Licence' (n 1030).

[1037] Oil and Gas Authority, 'Overview' (n 1011).

by OGA before the PL can still be valid at the end of the second term. Otherwise, the PL expires at the end of this term. The third term is associated with production. This is where the licensee will now engage in the production of petroleum.[1038]

It must be noted, however, that the PLs confer rights that do not vary between the terms – this may make the association of each term with any activity to overlap. This means that 'any licensee who is able to move quickly to obtain the required permissions and consents is allowed to start production during the initial term'[1039] even though this stage is usually for exploration activities such as providing a work programme as a prequalification for the next term. Essentially, each of the terms has a clearly laid down prequalification for entry into the next term. There can be variation in how long any of the terms would last or run. OGA has to agree with any duration of a term that is proposed by the prospective licensee.[1040]

The licences granted in the production licensing regime used to include: 'the traditional licenses, promote licences, and frontier licences'. They have all now been replaced by the offshore innovate licence.[1041] The offshore innovate licence (OIL) gives "greater flexibility in the duration of the Initial and Second Terms". The duration had presented the critical difference between the old types of petroleum licences which have now been replaced by the OIL. What the OIL does is that prospective licensees are granted the right to "propose the durations of the

[1038] ibid.

[1039] Oil and Gas Authority, 'Types of Licence' (n 1030).

[1040] ibid.

[1041] ibid.

Initial and Second Terms".[1042] Permutations for acceptable duration which 'may be presented forward by prospective licensees are still characterised by each of the older licence types'. With OIL, the initial term has up to three subdivisions in phases (phase A to phase C) wherein the work programme is divided correspondingly.[1043]

For a little illustration, phase 'A' represents a period in which geo-technical studies are conducted and where geo-physical data is reprocessed. For phase 'B', seismic surveys are carried out while other geophysical data are also acquired. With respect to phase 'C', proper extraction of petroleum kicks in. It is where actual drilling for petroleum is carried out.[1044] Whereas the first two phases are optional which may be chosen or utilised based on the plans of the prospective licensee, the 'C' phase is compulsory. Thus, there cannot be a work programme without demonstration of drilling for petroleum.[1045]

There are special or exceptional cases where a prospective licensee would not have to propose any exploration works required in the initial term but would have to go straightforward to 'propose to develop an existing field discovery or redevelop a field'. In that case, the applicant goes to propose same and a licence may be awarded thereto without initial term. This is aligned to the practice of awarding 'a straight to second term licence'.[1046]

[1042] ibid.

[1043] ibid.

[1044] ibid.

[1045] ibid.

[1046] ibid.

Regarding the petroleum exploration and development licences (PEDLs), 'exclusive E&P rights are granted to licensees in the "landward areas," which are essentially areas that are landward of the baseline of the territorial sea'.[1047]

These landward petroleum licences 'do follow the same pattern as their seaward version, which is the PLs'. The model clauses of PEDLs can be found in the petroleum licensing (exploration and production) (landward areas) regulations of 2014 just as that of the PLs can be found in the 2008 Model Clauses (as amended in 2017).[1048] Essentially, PEDLs have similar rights as that of the PLs except that PEDLs is landward and grants permission for non-intrusive exploration for only hydrocarbons and without 'core sampling'. PLs have core sampling to 350 metres and covers 'gas storage, carbon capture and sequestration, or any combination of them' in addition to hydrocarbon production.[1049]

The UK government's policy objective, that informs the nature of the petroleum licences, is mainly anchored on encouraging "the best possible prospection, exploration, and production of the country's petroleum resources".[1050] UK, in

[1047] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[1048] Oil and Gas Authority, 'Types of Licence' (n 1030).

[1049] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Oil and Gas Authority, 'Types of Licence' (n 1030); Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (n 1028).

[1050] Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons OJ L 164, 30.6.1994, 3-8; See the Petroleum (Production) (Landward Areas) Regulations 1995 [S.I. 1995/1436] and the Petroleum (Production) (Seaward Areas) (Amendment) Regulations 1995 [S.I. 1995/1435] - which further implement Directive 94/22/EC; see also Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

effect, focuses on Maximum Economic Recovery (MER) from its petroleum wealth in a way that harnesses ROL and justice. The conditions which are necessary include 'competition, non-discriminatory resource access, environmental protection and respect of the interests of other users of the sea'.[1051] The licensing system in the UK is mostly based on competitive offers whereby 'licences are usually issued through competitive licensing rounds according to work programme bidding'.[1052]

This is particularly so because the process is open and transparent and applications 'may only be procured in accord with approved procedures'. In fact, PLs are issued by OGA based on competitive licensing rounds. The rationale is that OGA sees these processes as that which 'yield better quality bids ever more than other methods of issuing petroleum PLs.[1053] In fact, as part of the transparency measures, all prospective licensees are appropriately informed of the 'mark scheme' criteria used to assess all the applications. The work programmes of all successful applicants for licences are also regularly published. At the same time, those applicants that have been unsuccessful are at liberty to make a request for 'a more detailed feedback on the evaluation of their proposals so submitted'.[1054]

Competitive rounds are far better than auctions and wobbly negotiations. While auctions divert a lot of money from exploratory work, negotiated licensing is prone

[1051] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 65.

[1052] ibid, 62.

[1053] Oil and Gas Authority, 'Licence applications' < www.ogauthority.co.uk/licensing-consents/licensing-system/licence-applications/ > accessed 26 February 2019.

[1054] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (n 1028).

to underhand dealings, uncertainty and unfair deals that eventually will not yield the desired economic recovery for the state. On the contrary, competitive rounds 'give a greater expectation that a petroleum licence will be awarded to the bid that promises to maximise the economic recovery of the UK's petroleum resources'.[1055] This would ensure enduring predictability for investors and gives greater benefit to the state for its ownership of the resource.[1056]

So far, as of July 2018, UK has had 31 Offshore Licensing Rounds. Indeed, the OGA sent out an invitation on 31st January 2019 for companies to submit applications for licences for the 31st supplementary offshore licensing round. Prospective licensees can submit their applications for licence through the 'Larry system' on the energy portal up until 2nd May 2019 after which applications would no longer be accepted.[1057] The 32nd licensing round was opened on 11 July 2019 and applications for licences will be accepted until 12 November 2019.[1058]

Under exceptional situations that provide compelling reasons to issue a licence out-of-round, competitive bidding may not be exhaustively used. The exceptional conditions include when there is "urgency (when a drilling rig may be available within a specific timeframe), or when competition for a particular area was not likely"[1059] largely due to the fact that the petroleum acreage can only be of interest

[1055] Oil and Gas Authority, 'Licence applications' (n 1053).

[1056] Paterson and Usenmez (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends* (n 1009).

[1057] Oil and Gas Authority, 'Licensing rounds' (Last updated, 19 December 2018) <www.ogauthority.co.uk/licensing-consents/licensing-rounds/> accessed 26 February 2019; Hough, 'UK offshore oil and gas industry' (n 1013).

[1058] Oil and Gas Authority, 'Licensing rounds' (n 1057).

[1059] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 65.

to a company whose existing licence covers adjoining acreage'.[1060] It is the discretion of the OGA to grant or award licences to companies.[1061] This discretion must be exercised in line with established rules and procedure. So, if an exceptional situation may be reasonable to allow for a licensing to be carried out before the next licensing round so that OGA and the interested company do not have to wait until then, the OGA may allow for an out-of-licensing to be executed.[1062]

In this regard, any petroleum company that seeks for an out-of-round licence is required to "first convince or justify to the OGA of the case to issue an out-of-round invitation".[1063] The usual procedure goes that the companies interested in out-of-round licence justify to OGA to consider issuing invitation for the process to begin. Invitation for an out-of-round is published in the European Journal at the instance of the OGA. Prospective Licensees can submit their applications to the OGA, at least, 90 days after the publication in the journal.[1064]

Notably, upon invitation for out-of-round applications by OGA, prospective Licensees are required to submit their applications "in the same way as during a licensing round and the same guidance will apply".[1065] What this means is that the out-of-round licensing may only be differentiated from the licensing round applications based on the fact that while the former is not carried out at a time

[1060] ibid.

[1061] Oil and Gas Authority, 'Overview' (n 1011).

[1062] Oil and Gas Authority, 'Licence applications' (n 1053).

[1063] ibid.

[1064] ibid.

[1065] ibid.

scheduled for bidding to be done, the latter goes according to the licensing calendar of the OGA. In effect, both apply similar application procedures but with unplanned and less competitive processes for the out-of-round on one hand while on the other hand planned and competitive licensing process for the round licence applications. The challenge is that because the out-of-round licensing is not properly situated within the calendar of the OGA, there is the likelihood that OGA may sometimes be caught off-guard which may come with the disadvantages associated with inadequate preparations in petroleum transactions.[1066]

Interestingly, OGA designates ELs as non-exclusive which therefore do not 'attract issues of competition in the licensing processes'. What this disposition does support is that there is no consideration of round or out-of-round licence application when it comes to exploration for petroleum. Petroleum E&P companies are at liberty to submit application for a new EL or to have their existing EL extended any time they so wish to do so. Application for an EL can be submitted via email to be considered by the OGA.[1067]

The judgement on the applicants or potential licensees to be selected rests on 'the background that the potential licensees do fully meet the general objective of encouraging expeditious, thorough, and efficient exploration to identify the

[1066] ibid.

[1067] ibid.

petroleum resources of the UK'.[1068] To reach a judgement on selecting licensees, the criteria that have been spelt out in applicable regulations[1069] are applied.

These criteria include:

- The threshold standards of financial capability and environmental management must be met;
- Technical competence of licensees must be demonstrated by them - usually based on applicants' interpretation of the geological area applied for and their plans for further exploration and appraisal of the potential resources of the geological area thereof.[1070]

When production licence confers exclusive production rights in a field to a petroleum company, such a company must have every required technical and financial capacity and viability that is appropriate or enough to enable the company to contribute towards the delivery of the UK's maximum economic recovery (MER). These are primarily considered 'as an important criterion for a company to be accepted and granted a PL to be a licensee'.[1071]

Beyond the financial and technical capacity required of a company, requirements such as the need for licensees to establish 'a tax base, finance, residence and

[1068] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 62.

[1069] See the Petroleum (Production) (Landward Areas) Regulations 1995 [S.I. 1995/1436]; See also the Petroleum (Production) (Seaward Areas) (Amendment) Regulations 1995 [S.I. 1995/1435].

[1070] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (n 1028).

[1071] Oil and Gas Authority, 'Licensee Criteria' < www.ogauthority.co.uk/licensing-consents/licensing-system/licensee-criteria/ > accessed 26 February 2019.

organisational structure as well as requirements on safety and environmental capability' (if the licence is offshore based[1072]) are also imperative. The criteria to determine financial viability and capacity are usually spelt out and protected by deed of guarantees such as 'application for licences, licence assignments, and changes of control of licence'.[1073]

Additionally, business residency of licensees is considered in the evaluation to select a company. It is mandatory for prospective licensees to ensure that they "satisfy the OGA that they have a place of business in the UK" demonstrating that they have 'a staffed presence in the UK, they have registered at Companies House as a UK company, or they have a UK branch of a foreign company that is registered at Companies House'. One of the above should, at least, be met. Prospective licensees can only 'join a licence and take an interest in a petroleum producing field if they have either registered at Companies House as a UK company or undertake their business operations through a fixed place of business in the UK'.[1074] It can be observed that the procedures of licensing in the UK are significantly aligned to ROL and justice tenets such as clarity, equal opportunity, uniformity of rules, fairness and equity. These have been demonstrated to achieve higher dividends that can benefit socioeconomic rights[1075] which are evidenced below.

[1072] See Offshore Petroleum Licensing (Offshore Safety Directive) Regulations [2015].

[1073] Oil and Gas Authority, 'Licensee Criteria' (n 1071).

[1074] ibid; Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (n 1028).

[1075] UNGA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels* (n 409); Nussbaum, 'Capabilities as fundamental entitlements: Sen and social justice' (n 421) 33; Investopedia, 'Standard of Living' (n 421); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

8.2.3 Realising petroleum E&P benefits in the UK

The fiscal regime that is applied to the UK's petroleum sector entails taxes such as ring fence corporation tax (RFCT), petroleum revenue tax (PRT) and supplementary charge as well as diverted profits tax (if need be). In terms of the supplementary charge,[1076] which is an additional tax on petroleum E&P activities in UK that relate to 'ring-fence profits of petroleum companies excluding finance costs',[1077] it was at 10% as of February 2019.[1078] As of the February of 2019, the RFCT rate was 30% while 19% was non-ring-fence[1079] or Corporate Tax (CT).[1080] Although the RFCT rate appears to be this high on all profits, it is not included to benefit from the progressive decrease of CT from the current 19% to 17% by 2020.[1081] However, the petroleum companies pay CT on any of the non-ring fence activities such as 'petroleum refining, and all other normal taxes such as VAT, employment taxes and duties'. Thus, it makes them pay, at least, 40% in taxes to the UK Treasury.[1082]

[1076] Hough, 'UK offshore oil and gas industry' (n 1013).

[1077] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[1078] Oil and Gas Authority, 'Overview' (n 1011); Oil & Gas UK, 'Economic Report' (2018) 68 < https://oilandgasuk.co.uk/wp-content/uploads/2019/03/OGUK-Economic-Report-2018.pdf > accessed 3 April 2019.

[1079] Non-ring-fence of corporate tax is rate of mainstream corporation tax, which is expected to be reduced to 17% by 1 April 2020.

[1080] Oil and Gas Authority, 'Overview' (n 1011).

[1081] Oil & Gas UK, 'Economic Report' (n 1078).

[1082] ibid.

With respect to petroleum revenue tax (PRT),[1083] the rate is 0%. However, there is the possibility for payment of refunds, which can still be arisen in instances such as 'on carry-back of any losses that so arise upon the decommissioning of end of field life'[1084] or PRT-liable fields. Thus, 'losses such as those that have been incurred due to decommissioning PRT-liable fields can be carried back against past PRT payments'. When it was not 0%, PRT used to be charged on profits generated from petroleum in individual oil fields which had been granted development consent before 16 March 1993. The marginal tax rate is 40%.[1085] PRT is levied on 'a field-by-field basis'. It is not charged on 'an entity-by-entity basis'.

Diverted profits tax (DPT) has had the highest rate of 55% for a situation in which the diverted profits could have otherwise been ring-fence profits. The general DPT rate is nonetheless set to be 25%. The former usually applies. DPT aims to address any perceived abuse that involves "payments by a UK taxpayer to entities with insufficient economic substance or the avoidance of a UK taxable presence".[1086] The high rate serves as a deterrent against the diversion of profits in the petroleum industry.[1087]

[1083] This used to be 50% until it was reduced effectively from 1 January 2016.

[1084] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[1085] Oil and Gas Authority, 'Overview' (n 1011).

[1086] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[1087] Carole Nakhle, *Petroleum Taxation: Sharing the Oil Wealth: A Study of Petroleum Taxation yesterday, today and tomorrow* (1st edn, Routledge 2008).

8.2.3.1 Maximising economic recovery of petroleum resources in UK

The petroleum licensing policy of UK that is aimed at maximising economic recovery is on point. To achieve this, the petroleum policy goes with a fundamental premise that assumes that the use of work programme bidding that is assessed against a transparent criterion is that which yields better quality bids relative to other methods such as auctioning and negotiations. A competitive work programme that is transparent and robust provides certainty and predictability about which of the prospective licensees would be awarded the licence in respect of the criteria set for which the bid can optimize the exploitation of the petroleum resources of the UK.[1088]

This licensing system has yielded revenues that would have contributed significantly to the socioeconomic wellbeing of the people of UK. In this regard, Oil & Gas UK has found that for 50 years, the contribution of the petroleum sector particularly in the UKCS to the UK Treasury, in terms of payment inflows therefrom, has outranked "most other industrial sectors" in the country.[1089] The 40% tax rate[1090] on oil and gas production is about twice of what is paid by other industries in the UK.[1091] Indeed, as a source of income for the UK Treasury, from 1970 to date, the petroleum industry has generated about £330 billion in production tax for the UK Treasury. This amount of money is equivalent to 'about

[1088] ibid.

[1089] Oil & Gas UK, 'Economic Contributor' < https://oilandgasuk.co.uk/economic-contribution/ > accessed 3 April 2019.

[1090] Combination of RFCT and supplementary charge.

[1091] Oil & Gas UK, 'Economic Contributor' (n 1089).

the bills of three years accruing to the National Health Service for England in present monetary value'.[1092]

The petroleum sector has also 'created several skilled jobs and formed a vibrant supply chain that is servicing oil and gas activity both locally and internationally'.[1093] The petroleum industry has continued to support more than 280,000 jobs in the UK.[1094] This, in no small way, supports the upliftment of the socioeconomic wellbeing of the people who have had secured jobs provided by the petroleum industry. At the same time, the supply chain of the petroleum industry covers every part of the UK wherein it 'continues to service domestic activities and to export about £12 billion worth of goods and services to other basins across the globe'.[1095] This supports the income generation and growth of the UK's economy.

The huge oil and gas investments made in the UK's economy has also helped to spur the UK's economy on. For instance, in 2017 alone, the petroleum industry expended £7 billion in the operation of its assets. This was one of the leading investment expenses in the UK's industrial sector.[1096] In the same year, £5.6 billion worth of capital investment was witnessed in the offshore petroleum industry of the UK. Moreover, the petroleum sector has significantly contributed to the energy supply security of the UK. The demand for oil and gas in the UK has

[1092] ibid.

[1093] ibid.

[1094] ibid.

[1095] ibid.

[1096] ibid.

been over 50% met by the UK petroleum industry.[1097] These benefits have, in many ways, contributed to helping improve the socioeconomic rights of the UK.[1098]

Tordo makes an arguable point that the market segmentation method of allocating production rights to companies, as practised in Australia, "is of great relevance to the design of efficient licensing systems".[1099] With market segmentation, different companies are able to ensure that they achieve specialisation 'in different types of E&P activities and in tolerating risks at different levels'.[1100] Part of the segmentation is practiced in the UK where, for instance, only explorative rights are granted to companies that can only and are mainly interested in mobilising geological data on the presence of petroleum in an area. Such companies only specialise in collating data on petroleum and then sell it out to other companies that may have the capabilities to develop and produce.[1101]

The UKCS has a mature basin and has challenges such as "complex geology, smaller structural traps, and subtle stratigraphic plays [which are usually] coupled with sparse or outdated data",[1102] as well as 'the relatively small size of discoveries in commercial quantities, the aging nature of the infrastructure in the North Sea and increasing cost of developing oil fields'.[1103] However, it still has exploration, development and production opportunities that mainly rest on small and medium

[1097] Mace and others, 'Oil and gas regulation in the UK: overview' (n 1026).

[1098] Oil & Gas UK, 'Economic Contributor' (n 1089).

[1099] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791).

[1100] ibid.

[1101] ibid.

[1102] Tordo with Johnston and Johnston (n 1059) 66.

[1103] ibid.

dimensions. The large-scale opportunities appear to be on a minimal scale.[1104] But huge proven reserves still abound in the offshore segment.

The current estimates are that there are 10 to 20 billion barrels of oil equivalent (boe) that is still recoverable from the UKCS. The UK petroleum industry has, therefore, attracted major petroleum operators which, from the year 2000, account for about '50-60% of petroleum production'.[1105] The major petroleum companies are MNPCs that include BP, Total, and Shell Companies whose operations have grown over time in the UK petroleum industry.[1106] They all compete with the same petroleum E&P rulebook on the OGA's licencing platform – with little opportunity for unreasonable use of discretion as to which company is supposed to be awarded a licence; even in instances such as the explorative licensing regime which has non-exclusive rights and is largely non-competitive.[1107] It is hoped that the MER proposition by OGA will continue to critically interrogate the vitality of the current licensing regime relative to socioeconomic benefits such as socioeconomic rights derived from greater contribution to economic prosperity of UK.[1108]

Also, the licensing system in the UK which is backed by Petroleum Act 1998 and supported by several regulations, indeed, generates petroleum licences that qualify as contracts. In fact, there appears to be a settled view amongst scholars

[1104] ibid.

[1105] Oil & Gas UK, 'Economic Report' (n 1078) 72.

[1106] ibid.

[1107] Oil and Gas Authority, 'Overview' (n 1011).

[1108] Oil & Gas UK, 'Economic Report' (n 1078).

on this.[1109] In the recently held case of *Dean v the Secretary of State for Business, Energy and Industrial Strategy (SBEIS)* the prevalent academic disposition on this matter was confirmed by the court that, indeed, petroleum licence amounts to a contract.[1110] The basic facts of this case is that a PEDL was granted to *Benjamin Dean* to explore and produce 'coalbed methane' (a form of natural gas) at onshore. Subsequently, however, the licence was varied by deed for the initial term to be extended and for the second term to be reduced whereas overall duration of licence was to be left unaltered. One of the germane legal issues was as to whether the petroleum licence was contractual in nature in order to have the capability of consensual variation thereto.[1111]

The argument put forward by the licensee was that the SBEIS did act in *ultra vires* when the SBEIS entered into a deed of variation to modify or change the length of the initial term of the petroleum licence. Also, the 1998 Act[1112] that governs licences did not also contain powers to alter a licence that was already executed. The position of the SBEIS was that the petroleum licence was a contract and could, therefore, be subject to variation through additional agreement between the parties backing any such variation. The court held that the petroleum licence met the requirements of a contract per English Law essentially including an offer (in this case by the SBEIS acting as Grantor), an acceptance (in this case by the licensee), and effective consideration as well as the intention of parties to create

[1109] Peter Roberts, *Petroleum Contracts: English Law & Practice* (2nd edn, Oxford University Press 2016).

[1110] R (*Benjamin Dean) v the Secretary of State for Business, Energy and Industrial Strategy* [14 August 2017] EWHC 1998 (Admin); [2017] WLR (D) 569.

[1111] ibid.

[1112] Petroleum Act 1998 c 17, s 3(1).

legal relations that bind them. As a result, the petroleum licence is a contract and could, therefore, be subject to variation by mutual agreement.[1113]

However, even though UK's petroleum licences, as evidenced, are contractual in nature, the petroleum licensing regime in the UK requires series of deeds to transfer ownership or transaction rights to companies which, to some extent, require different structures of legal decision-making processes. These appear to be untidily exposed to complexities that are worrisome for institutions and decision-makers with low capacity and capability as obtained in many SSA countries. It is, therefore, not wholly suitable for SSA but can be used in adjustable forms such as adopting the cardinal principles of transparency, fairness, competitiveness, and maximisation of economic value for the benefit of socioeconomic rights that should give reasonable tolerance to the private rights of petroleum investors as well.[1114] A petroleum legal regime that is transparent and rigorous but reasonably simplified and produces a binding contractual document that is detailed enough to adequately protect the rights of all parties, as well as anticipate reasonable future adjustments and stability in the spirit of ROL and justice should attract greater attention of SSA.[1115]

The ROL is demonstrated in the process of petroleum contracting in the UK - to a very great extent. However, a look below the surface of the distribution of rights

[1113] R (*Benjamin Dean) v the Secretary of State for Business, Energy and Industrial Strategy* (n 1110).

[1114] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Rawls, *Justice as Fairness: A Restatement* (n 24); Sandel, *Justice: What's the Right Thing to Do?* (n 24); Sen, *The Idea of Justice* (n 404).

[1115] Talus (ed), *Research Handbook on International Energy Law* (n 337); NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

and duties that have generated certain unsettled outturns may challenge the practical demonstration of the RAHL or indeed justice in the petroleum sector of the UK. Arguably, the landscape of the petroleum industry in the UK, even with perceivable inadequacy about the fullest extent of ROL and justice, does entertain a contracting regime that can be regarded as exemplary in the light of enhancing socioeconomic rights and harnessing ROL and justice.[1116] Therefore, jurisdictions that have similar legal systems, market conditions, geological risks and competences could see UK as one of the models in petroleum licensing which they could innovatively adapt to their own local conditions. However, these countries must beware of occasional legal challenges with such petroleum models and the real maximum economic benefits that can be recovered from the petroleum resources.[1117]

8.3 The Case of Norway

8.3.1 Petroleum E&P legislations in Norway

The Petroleum Act of 29 November 1996[1118] is the major legislation in place to effectively guide the state to manage and control the petroleum E&P activities in

[1116] Oil & Gas UK, 'Economic Contributor' (n 1089); Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Nussbaum, 'Capabilities as fundamental entitlements: Sen and social justice' (n 421) 33; also see Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); UNGA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels* (n 409).

[1117] Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34); Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Talus (ed), *Research Handbook on International Energy Law* (n 337); NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14).

[1118] The Petroleum Act, 29 November 1996 No. 72 relating to petroleum activities (Last amended by Act 24 June 2011 No 38; Last translated 23 November 2012) <

Norway for the benefit of all stakeholders. The Act provides that 'the Norwegian state is granted the proprietary right over the subsea petroleum deposits on the continental shelf of Norway.[1119] The state also has the exclusive right to manage the petroleum resources in the country.[1120] This Act mandates petroleum companies and such other commercial companies operating in the petroleum industry to ensure that they 'obtain applicable licences and appropriate approvals from the competent authorities for all the phases of petroleum activities in the country'.[1121] The Petroleum Act,[1122] thus, establishes the general legal basis for the sound management of petroleum resources in Norway. Integral in the sound management is the licensing system that grants petroleum companies the appropriate rights and obligations to participate in the petroleum industry.[1123]

www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_76/pdfs/18.pdf > accessed 12 April 2019.

[1119] NORSK, 'The Petroleum Act and the Licensing System' (Updated, 14 March 2019) < www.norskpetroleum.no/en/framework/the-petroleum-act-and-the-licensing-system/#development-and-operations > accessed 13 April 2019.

[1120] The Petroleum Act, 29 November 1996 No. 72 relating to petroleum activities (Last amended by Act 24 June 2011 No 38, Last translated 23 November 2012) Section 1-1; NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

[1121] ibid.

[1122] ibid.

[1123] ibid; Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (n 1028).

The Petroleum Act[1124] is principally, supported by two other key legal instruments, namely: the CO_2 Tax Act[1125] and the Act relating to subsea natural resources.[1126] These Acts are supplemented by the following key regulations: 'regulations relating to resource management in the petroleum activities (Resource Management Regulations),[1127] regulations relating to measurement of petroleum for fiscal purposes and for calculation of CO_2-tax (Measurement Regulations),[1128] as well as regulations relating to material and documentation in connection with exploration for and exploitation of subsea reservoirs on the continental shelf for

[1124] Act 29 November 1996 No. 72 relating to petroleum activities (Last amended by Act 19 June 2015 No 65, Last translated 5 January 2018) < www.npd.no/en/regulations/acts/act-29-november-1996-no2.-72-relating-to-petroleum-activities/ >accessed 13 April 2019.

[1125] Act 21 December 1990 no 72 relating to tax on discharge of CO2 in the petroleum activities on the continental shelf (Last amended by Act 19 June 2015 no 65, Last translated 18 April 2018) < www.npd.no/en/Regulations/Acts/CO2-discharge-tax/ > accessed 13 April 2019.

[1126] Act of 21 June 1963 No. 12 relating to scientific research and exploration for and exploitation of subsea natural resources other than petroleum resources (Updated, 19 December 2018) < www.npd.no/en/regulations/acts/act-of-21-june-1963-no.-12-relating-to-scientific-research-and-exploration-for-and-exploitation-of-subsea-natural-resources-other-than-petroleum-resources/ > accessed 13 April 2019

[1127] Regulations relating to resource management in the petroleum activities (Last translated 2 January 2018) < www.npd.no/en/regulations/regulations/resource-management-in-the-petroleum-activities/ > accessed 13 April 2019.

[1128] Regulations relating to measurement of petroleum for fiscal purposes and for calculation of CO2-tax (the measurement regulations) (1 November 2001, Last translated 2 July 2012) < www.npd.no/en/regulations/regulations/measurement-of-petroleum-for-fiscal-purposes-and-for-calculation-of-co2-tax/ > accessed 2 April 2019.

storage of CO_2[1129] (regulations relating to documentation in connection with storage of CO_2 on the shelf)'.[1130]

There are other[1131] supplementing regulations such as 'Regulations to Act relating to petroleum activities',[1132] 'Regulations relating to exploitation of subsea reservoirs on the continental shelf for storage of CO_2 and relating to transportation of CO_2 on the continental shelf',[1133] 'Regulations relating to the Petroleum Register',[1134] and 'Regulations relating to norm price fixing'.[1135]

[1129] Regulations relating to materials and documentation in connection with surveys for and utilisation of subsea reservoirs on the continental shelf to store CO_2 (Last translated 2 January 2018) <www.npd.no/en/regulations/regulations/materials-and-documentation-in-connection-with-surveys-for-and-utilisation-of-subsea-reservoirs-on-the-continental-shelf-to-store-co/ > accessed 12 April 2019.

[1130] Norwegian Petroleum Directorate, 'Regulations' (Last updated, 14 March 2019) < www.npd.no/en/regulations/ > accessed 13 April 2019.

[1131] See ibid.

[1132] Regulations to Act relating to petroleum activities (Last translated 3 January 2018) < www.npd.no/en/regulations/regulations/petroleum-activities/ > accessed 13 April 2019.

[1133] Regulations relating to exploitation of subsea reservoirs on the continental shelf for storage of CO_2 and relating to transportation of CO_2 on the continental shelf (5 December 2014, Last translated 31 October 2017) < www.npd.no/en/regulations/regulations/exploitation-of-subsea-reservoirs-on-the-continental-shelf-for-storage-of-and-transportation-of-co/ > accessed 12 April 2019.

[1134] Regulations relating to the Petroleum Register (Laid down by Royal Decree 19 June 1997 pursuant to Act 29 November 1996 no 72 relating to petroleum activities, section 6-1 and section 10-18) < www.npd.no/en/regulations/regulations/petroleum-register/ > accessed 13 April 2019.

[1135] Regulations relating to norm price fixing (Stipulated by Royal Decree of 25 June 1976 pursuant to Act of 21 June 1963 No. 12 relating to exploration and exploitation of subsea natural resources and Act of 13 June 1975 No. 35 relating to taxation of subsea petroleum resources etc, Last amended by Royal Decree of 24 September 2010) < www.npd.no/en/regulations/regulations/regulations-for-determining-the-norm-price/ > accessed 12 April 2019.

8.3.2 Petroleum E&P licensing in Norway

The licensing regime of petroleum E&P in Norway is carried out on competitive basis. The process is that, after the official opening of new areas (blocks) for petroleum activities by the parliament of Norway (the s*torting*) and impact assessment done,[1136] the process towards awarding the petroleum licences is then opened by the Ministry of Petroleum and Energy.[1137] The Norwegian Petroleum Directorate (NPD) collaborates with the Ministry of Petroleum in the opening of the licensing rounds. Indeed, the NPD is charged with the responsibility of "managing and making available petroleum data from the Norwegian continental shelf".[1138]

The normal process of licensing rounds is that production licences begin with a licensing round opened by the Ministry of Petroleum and Energy. There are two licensing rounds which are carried out to explore the Norwegian Continental Shelf (NCS): the numbered licensing rounds (NLR); and the awards in predefined areas (APA).[1139]

With the NLR, it is usually carried out every year. Prior to announcing the NLR, a nomination process is carried out. The nomination process begins when 'all existing licensees and prequalified companies' for the NCS have been requested to make a nomination of blocks to be included in the licensing round. Interested companies from the above cohort then nominate blocks and adducing 'the grounds

[1136] The Petroleum Act, Chapter 3 and the Petroleum Regulations, Chapter 2a.

[1137] NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

[1138] Norwegian Petroleum Directorate, 'Facts' (Last updated, 18 March 2019) < www.npd.no/en/facts/ > accessed 13 April 2019.

[1139] NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

for the choices made in the light of their own geological assessments'.[1140] Companies are given the number of nominations they can make for the round in question.[1141]

The next step is that the NPD 'conducts reviews on all the nominations it has received and conducts its own geological assessment'.[1142] Thereafter, the NPD selects and transmits to the Ministry of Petroleum and Energy the recommendations it has made "for the blocks to be included in the licensing round".[1143] The recommendations are then put to public consultation. The final decision is subsequently made by the "Government on which blocks are to be announced, including any special environmental and fisheries-related requirements for petroleum activities".[1144]

Applications are then received and assessed according to the established criteria. There is an opportunity for companies to hold negotiations with the Ministry of Petroleum and Energy. When all is done, the Ministry of Petroleum makes a decision on the petroleum licences that will be awarded to the petroleum companies. The King in Council of Norway then gets to formally make the final awards to the deserving companies.[1145] These processes demonstrate the participatory and competitive nature of the NLR. Participation increases

[1140] ibid.

[1141] ibid.

[1142] ibid.

[1143] ibid.

[1144] ibid.

[1145] ibid.

legitimacy, integrity, accountability and acceptability of the process[1146] all of which align with tenets of ROL.

The NLR covers the 'frontier parts of the NCS'. In these areas, the knowledge about the geology is limited and there are greater technical challenges than obtained in mature areas of the NCS. At the same time, there is lack of infrastructure in the frontier areas of the NCS.[1147] This licensing round began in 1965 and has remained as the traditional and major operational round in Norway.[1148]

In respect of the APA, licensing rounds are also carried out yearly. Nomination is not required in the APA rounds. Rather, prior to the announcement on APA round, 'the NPD submits to the Ministry of Petroleum and Energy its recommendations on the inclusion of any new blocks in the APA areas, based on expert assessments'.[1149] The Ministry considers it and submits for public consultation the final proposal for the APA areas which are to be announced in the coming licensing round. Final decision is made by the Government "on which blocks are to be announced, including any special environmental and fisheries-related requirements for petroleum activities".[1150] Applications can then be submitted by companies "for licences for all acreage in APA areas not already covered by production licences".[1151] Applications are received and assessed, negotiations

[1146] Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (n 1028).

[1147] NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

[1148] ibid.

[1149] ibid.

[1150] ibid.

[1151] ibid.

carried out, and awards of licences made to deserving applicants in the same manner as done in the NLR.[1152]

However, coverage of activity is in the 'mature parts of NCS, with known geology and good infrastructure'.[1153] The APA aims at ensuring that matured areas are fully explored before any existing infrastructure is demolished or decommissioned. This kind of licensing round started in 2003 and by 2018 whereby 16 licensing rounds had been carried out.[1154]

The Ministry of Petroleum and Energy supervises the competitive process. A prequalification to apply for the licensing round is a critical process which all new entrants into the petroleum industry concerning the NCS must go through.[1155] Accordingly, all new entrants must exhibit competence to 'contribute to value creation through their technical petroleum expertise, as well as possession of the needed expertise in health, safety and environment'.[1156] Diversity of applicants (both new and old) are encouraged to apply in order to 'promote competition and efficient utilisation of the petroleum resources'.[1157]

So, for any of the licensing rounds, the Ministry of Petroleum and Energy makes an announcement based on procedures for the licensing round that, prequalified petroleum companies are invited to put in applications for award of production

[1152] Ryggvik, 'The Norwegian Oil experience: A Toolbox for Managing Resources' (n 920).

[1153] Norwegian Petroleum Directorate, 'Licensing rounds' (Last updated, 14 March 2019) < www.npd.no/en/facts/companies/licensing-rounds/ > accessed 13 April 2019.

[1154] NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

[1155] Norwegian Petroleum Directorate, 'Licensing rounds' (n 1153).

[1156] ibid.

[1157] ibid.

licences in 'certain geographical areas' that have been opened for petroleum activities by the *storting*. In this announcement, indication is made of the qualification criteria of prospective applicants, as well as the procedure and content or details of the applications.[1158] Applications are received and processed, and licences awarded on competitive grounds together with negotiations – thus, on the grounds of "fair, objective and non-discriminatory criteria" publicly made available and accessible.[1159]

At the discretion of the Ministry of Petroleum based on published criteria, production licences[1160] are normally awarded to groups of companies in joint arrangements, whereby the Ministry of Petroleum and Energy "designates an operator for the joint venture",[1161] which is charged with the responsibility to handle operational activities that have been so authorised by the production licence. The joint venture company is also responsible for financing the activities authorised by the licence. It is expected that every licensee drawn from the joint arrangement is able to utilise its own expertise. Furthermore, all the licensees are responsible "for controlling the operator's activities".[1162]

[1158] The Petroleum Act, Chapter 3 and the Petroleum Regulations, Chapter 3.

[1159] NORSK, 'The Petroleum Act and the Licensing System' (n 1119); The Petroleum Act, 29 November 1996 No. 72 relating to petroleum activities (Last amended by Act 24 June 2011 No 38; Last translated 23 November 2012).

[1160] See Model production licence of Norway at: Ole Berthelsen (ed) and Trude Christine Nagell (web ed), 'Agreement for petroleum activities and model production licences' (Ministry of Petroleum and Energy, Last updated, 06 September 2017) < www.regjeringen.no/en/find-document/dep/OED/Laws-and-rules-2/Rules/konsesjonsverk/id748087/ > accessed 13 April 2019.

[1161] NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

[1162] ibid; The Petroleum Act, 29 November 1996 No. 72 relating to petroleum activities (Last amended by Act 24 June 2011 No 38; last translated 23 November 2012).

The production licence does 'grant exclusive rights to exploration, exploration drilling and production of petroleum in the area that is covered by the licence'.[1163] The rights and duties of the parties are also regulated by the petroleum licence granted. The interests of the licensees and the state of Norway must both be protected by the parties. The production licence acts as a supplement to the legislative provisions. It provides 'detailed conditions for petroleum activities in a particular area that is covered by the licence'. The Petroleum Act vests proportional ownership to licensees. Thus, once the licence is granted, the licensees are now "the owners of a share of the oil and gas produced proportional to their share of the ownership".[1164]

In principle, production licence normally extends to cover all the phases – thus, right from exploration, through development to production. However, consideration is given to a situation where licensees may not want to proceed to the next phase after success in the current phase. There is an opportunity for rearrangement for the area to be reassigned to different licensees. There is always the possibility that a licensee is reluctant to proceed to explore in areas authorised to explore – thus leaving some licensed areas to idle. The yearly area fee is imposed on each kilometre of the licensed area as "an incentive for companies to move from discoveries to development and production in the areas for which they have been awarded licences".[1165]

When production licence is awarded to an applicant, 'the licence will apply for an initial period of up to ten years, which is reserved for activities relating to

[1163] ibid.

[1164] ibid.

[1165] Norwegian Petroleum Directorate, 'Licensing rounds' (n 1153).

exploration'. Within 30 days after the production licences are awarded to petroleum companies, the licensees have an obligation to enter into an agreement regarding the petroleum activities they are to undertake. Such an agreement is a contract that has two main parts, namely: the special provisions, and an attachment that contains two enclosures (enclosure A- JOA concerning petroleum activities [i.e. the JOA], and enclosure B- accounting agreement concerning petroleum activities [i.e. the accounting agreement]).[1166]

The work programme and such other commitments in the production licence are confirmed and enhanced by parties in the JOA. A work programme is a mandatory exercise that is drawn up in detail for the first year and subsequent years of operations. So, under an obligatory work programme, a licensee group has an opportunity to continue to explore the authorised area until the assigned period of 10 years maximum has elapsed.[1167] The work programme that is carried out is an obligatory work commitment to undertake 'geological and/or geophysical activities and exploration drilling' within the stipulated period for the exploration.[1168]

The production licence grants licensee the right to be qualified to move to the development and operation phase. Therefore, successful licensees at the exploration phase can have the period of their licence extended. This is usually extended to 30 years by the Ministry of Petroleum and Energy. This does not

[1166] Berthelsen (ed) and Nagell (web ed), 'Agreement for petroleum activities and model production licences' (n 1160).

[1167] NORSK, 'The Petroleum Act and the Licensing System' (n 1119); The Petroleum Act, 29 November 1996 No. 72 relating to petroleum activities (Last amended by Act 24 June 2011 No 38; Last translated 23 November 2012).

[1168] ibid.

necessarily involve additional competition.[1169] Consideration is mainly given to whether the obligation on the work programme in the exploration phase has been fully fulfilled and whether licensee group has competence to develop the area in which the discovery of petroleum has been made.[1170]

At this stage the licensees are obliged to submit to the Ministry of Petroleum and Energy, a plan for development and operation (PDO) on the discovery of the petroleum deposit. Depending upon the importance and/or size of the project of development, the PDO may have to be laid in the Norwegian Parliament before the Ministry of Petroleum and Energy gets to approve it.[1171] It is, thus, based on the PDO that approval is given to the licensee group to proceed to develop and operate the petroleum field. The licensees will also be required to submit Plan of Installation and Operation (PIO) for approval if the development of the fields involve 'pipelines or onshore terminals'.[1172] What this process of POD/PIO seeks to ensure that "all relevant arguments for and against the project are known before a decision on development is taken"[1173] by the Ministry of Petroleum and Energy. It also ensures that the field developments that have been approved are not only responsible but also that their impacts on other public interests are acceptable'.[1174]

[1169] ibid.

[1170] ibid.

[1171] NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

[1172] ibid.

[1173] ibid.

[1174] ibid.

The licensing regime in Norway is procedurally transparent, competitive and uniform for all licensees so much to the benefit of RAL, RUL and RAHL. The regime is also substantively fair, accountable and equitable just as justice would have it, to the glory of socioeconomic rights.[1175]

8.3.3 Realising petroleum E&P benefits in Norway

Norway has been noted as one of the leading and best managed petroleum resources in the world.[1176] It is a settled proposition that one of the vital reasons why Norway has gained this feat is the robust and forward-looking, sustainable legal, regulatory and contractual regime of the petroleum industry.[1177] Norway has one of the extensive and robust legal frameworks for petroleum E&P and utilisation in the World.[1178]

The fundamental principles that underpin the regulatory framework of Norway's petroleum E&P sector are characterised by the understanding that there must, at all material times, be 'the best possible balance between the interests of petroleum

[1175] Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34); Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Talus (ed), *Research Handbook on International Energy Law* (n 337); NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[1176] Collier, *The Plundered Planet* (n 812); Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34); Inocencio, 'Independent Regulatory Agencies in the Oil and Gas Industry' (n 1013).

[1177] Jonathon W Moses and Bjørn Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (1st edn, Oxford University Press 2017); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[1178] ibid; Cameron, 'In Search of Investment Stability' in Talus (ed), *Research Handbook on International Energy Law* (n 269).

companies and that of the interests of the state authorities' that act on behalf of the citizens whose rights are not expressed just in financial gains but also in socio economic and environmental rights.[1179]

Subsequently, the petroleum policy in Norway has the general objective as "to provide a framework for the profitable production of oil and gas in the long term"[1180] in order that both the state and petroleum companies appropriately benefit. Additionally, it is a policy imperative that authorities do "ensure that as large as possible share of the value creation accrues to the state, so that it can benefit society as a whole".[1181]

It is for that matter that the tax rate for petroleum companies is set as high as 78%. This makes up 22% ordinary CT as of April 2019. Also, 56% represents an additional special tax that is levied on companies. Companies are taxed based on the profits they make as businesses but not based on the oil field or well that produces petroleum. Commercial companies are granted the right 'to deduct all the relevant costs from the tax basis including deductions for investments such as depreciation and an extra deduction from the special tax basis, called uplift'.[1182] These are incentives to compensate for the high tax rate. A system has also been put in place for 'petroleum companies to claim reimbursement of costs in the exploration phase'.[1183] This is 'an alternative to deducting these costs from the tax

[1179] NORSK, 'Fundamental Regulatory Principles' (n 954).

[1180] ibid.

[1181] ibid.

[1182] ibid.

[1183] ibid.

base'. It aims at seeing to it that petroleum companies are 'given equal treatment irrespective of whether or not the companies are liable to pay tax'.[1184]

The taxation system in Norway is designed to ensure that the value that has been added to the petroleum resources through extraction and processing significantly 'benefits the Norwegian society to the greatest possible extent'.[1185] This taxation rate obviously appears too high compared to petroleum fiscal regimes in other countries such as the UK. But the framework is designed in such a way that petroleum companies are still able to achieve reasonable returns on their investments. The imperative is that when the petroleum companies make profits, the society of Norway must also make profit in the same measure.[1186] In effect, therefore, efforts are made to ensure the operationalisation of the principles of ROL and justice in the petroleum industry. This means that the owners of the petroleum wealth are made to get their due share and petroleum investors are equally made to get reasonable returns from their investments thereto.

In the same vein, environmental and safety assurances are also a petroleum policy objective in Norway. There has to be sustainable production of the Petroleum whereby petroleum activities do not harm the environment and must be carried out in a way in which the needs of future generations are not compromised. At the same time, there must be maximum safety in undertaking petroleum activities. Another petroleum policy objective being pursued in Norway is that oil and gas operations must be in harmony with the activities of other industries in

[1184] ibid.

[1185] ibid.

[1186] Ryggvik, 'The Norwegian Oil experience: A Toolbox for Managing Resources' (n 920); Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (n 1177).

the country. Industries must coexist with each other in such a way that they contribute to each other's growth and sustainability instead of undermining each other. One should not be carried out at the unreasonable expense of the other.[1187]

To ensure that these policy objectives are realised, Norway consciously uses instruments such as 'taxation policy, the Petroleum Act (Act of 29 November 1996 No. 72 relating to petroleum activities), petroleum regulations and the oversight of resource management by the state authorities'.[1188] In these instruments, the structural guide is that there must be clear division of functions or roles and responsibilities between the state and petroleum companies and other players in the petroleum industry.[1189] While companies in the petroleum industry are assigned the responsibility of undertaking operational activities such as exploration, development and production of the petroleum, the state authorities are mainly responsible for ensuring that there is functional regulatory framework with principles and instruments that promote the achievement of the petroleum policy objectives of Norway.[1190]

The state is also billed to rightly incentivise petroleum companies so that these companies can effectively carry out their operational activities. But in incentivising commercial companies and making the best decisions for these companies, it is appropriate in the spirit of justice that the state's actions "must also be beneficial to society".[1191] These, therefore, underlie the balancing nature of the regulatory

[1187] ibid.

[1188] NORSK, 'Fundamental Regulatory Principles' (n 954).

[1189] ibid.

[1190] ibid.

[1191] ibid.

framework of petroleum E&P in Norway so that the interests of all parties are best served. The regulatory framework is made to be transparent and predictable in most of its relevant aspects.[1192] This should be procured in a way that establishes sound foundation for the petroleum policy aims to be achieved.[1193]

What can be gleaned from the foregoing is that the Norwegian petroleum legal framework is composed of provisions that have yielded enormous benefits to the Norwegian society.[1194] The benefits of the petroleum industry are characterised by the fact that the sector does represent 'the largest and most important sector of the economy of Norway in respect of the value it adds to the economy, revenues it provides for the public treasury, investments it makes in the economy, and export value it creates'.[1195] Significantly, it contributes more revenues to the public treasury and creates jobs and investment opportunities that support in the drive of the government to uplift the standard of living of the citizens. This process has helped in fostering right to development and standard of living imperatives which are both significant components of socioeconomic rights.[1196]

The petroleum legal framework of Norway smartly combines competitiveness and public participation with the ROL and justice in a way that inures to the benefit of socioeconomic rights in the form of higher standard of living[1197] through the social and economic projects the revenues and investments from the petroleum industry

[1192] Ryggvik, 'The Norwegian Oil experience: A Toolbox for Managing Resources' (n 920).

[1193] NORSK, 'Fundamental Regulatory Principles' (n 954).

[1194] Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (n 1177).

[1195] ibid.

[1196] ibid.

[1197] ICESCR, Art 11 (1).

have delivered for the Norwegian society.[1198] It has also demonstrated how meaningfully right to development as a socioeconomic right has been exhibited in terms of the full control and productive use the Norwegian state has freely made of the petroleum wealth as deposited in Article 1 of the DRTD.[1199]

The Norwegian case appears very impressive for frontier markets such as found in an SSA country such as Ghana. According to Al-Kasim, the Norwegian Model of managing resources is worth considering by countries such as in SSA – It does not have to be duplicated, though.[1200] Four observations are worth considering. The first is that the tax rate of 78% is really too high for a frontier market because it may be difficult to create the conditions necessary to attract investors into the shaky petroleum industry with this rate. Norway has succeeded in this direction because it has a good enabling environment for companies to make reasonable returns on their investments in the face of the high rates.[1201]

The second observation is that in the Norway's case, even though the licensing rounds are competitive, a provision is made for negotiations in order to address any teething issues which may not be adequately addressed by the competitive process.[1202] This step is also significant for SSA because things like development of infrastructure and engineering works for the petroleum industry may require some deeper engagement between the parties so that the petroleum companies

[1198] UDHR, Art 25.

[1199] DRTD, Art 1(1).

[1200] Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34).

[1201] Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (n 1177).

[1202] NORSK, 'The Petroleum Act and the Licensing System' (n 1119).

could support the financing process in order to exchange that for tax rebate or increase in coverage area or number of years and so on.[1203] Without this provision for negotiation, countries with low financial capacities may end up stalling their petroleum development projects when there are teething issues that need engagements and shifting of positions for the best interest of the parties.[1204] But it should only be minimally and sparingly used to avoid abuse and corruption that can easily be associated with negotiations in poor countries with low capabilities.[1205]

The third observation is that it is a very realistic expectation for justice to be secured in the petroleum industry in SSA if there are appropriate legal provisions and better management of the operationalisation of the legal instruments. Norway has done it in a spectacular way.[1206] The fourth observation is that, UK and Norway use licensing rounds and work programme bidding, but the Norway's system has more public participation than obtained in the UK. Participation of the public in the licensing system is an important tool to not only ensure greater legitimacy,

[1203] ibid.

[1204] Collier, *The Plundered Planet (*n 812); Collier and Mpungwe (panellists), 'In Focus - Managing Natural Resources in Africa' (n 94); Talus (ed), *Research Handbook on International Energy Law* (n 337); Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (n 1177).

[1205] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[1206] Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34); Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Talus (ed), *Research Handbook on International Energy Law* (n 337); NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

integrity and accountability but also it fosters greater transparency for a buy-in from the public to make petroleum projects more sustainable.[1207]

8.4 The Case of Nigeria

8.4.1 Petroleum E&P legislations in Nigeria

The Petroleum Act 1969 is the key statute that governs the petroleum industry in Nigeria.[1208] It also regulates petroleum E&P in Nigeria's 'territorial waters and the continental shelf'. The Act does "vest the ownership of, and all on-shore and off-shore revenue from petroleum resources derivable therefrom in the Federal Government and for all other matters incidental thereto".[1209] Other supporting legal instruments include:

- The Deep Offshore and Inland Basin Production Sharing Contracts Act 1999, which prominently 'give effect to selected fiscal incentives that have been granted to the operations of petroleum companies in the areas pertaining to deep offshore and inland basin under PSCs between the Nigerian National Petroleum Corporation (NNPC) and petroleum E&P companies';[1210]
- The Nigerian Oil and Gas Industry Content Development Act 2010, which establishes the minimum national content requirements with regards to threshold of employees, shareholding of petroleum companies and such other related

[1207] ibid.

[1208] The Petroleum Act 1969 (Laws of the Federation of Nigeria) Chapter P10 (Chapter 350 LFN 1990).

[1209] ibid, s 1.

[1210] Deep Offshore and Inland Basin Production Sharing Contracts Act [1999] Act No 9 LFN.

national content elements which petroleum companies in the Nigerian petroleum industry should integrate into their plans;[1211] and

- The Petroleum Profits Tax Act 1990, which imposes, assesses and enforces tax on profits of petroleum companies in the Nigerian petroleum industry.[1212] Other petroleum legislations subsist.[1213]

A couple of regulations have been formulated to supplement this principal petroleum legislation and the complementary legislations. These regulations include: Oil Prospecting Licences (Conversion to Oil Mining Leases, etc) Regulations 2003; Marginal Fields Operations (Fiscal Regime) Regulations 2005; Deep Waters Block Allocation to Companies (Block-in-Rights) Regulation 2003; Petroleum (Amendment) Regulation 1989; and the Petroleum (Drilling and Production (Amendment) Regulations 2006.[1214] There are many other[1215] petroleum regulations thereto.[1216] Both the petroleum statutes and the regulations support the position of the Nigerian Constitution that the ownership of the

[1211] The Nigerian Oil and Gas Industry Content Development Act [2010], Act No 2 LFN.

[1212] Petroleum Profits Tax Act [1990], CAP 354 LFN.

[1213] Other Acts include: Oil in Navigable Waters Act [No. 34, 1968]; Petroleum Production and Distribution (Anti- Sabotage) Act 1975; Oil Pipelines Act 1956; Petroleum Act [1969]; and Petroleum (Amendment) Decree 1996; Petroleum Products (Prices of Automotive S and Lubricating Oils) Order 1996; See Department of Petroleum Resources, 'Acts & Regulations' < www.dpr.gov.ng/acts-and-regulations/ > accessed 14 April 2019.

[1214] Department of Petroleum Resources, 'Acts & Regulations' (n 1213).

[1215] Other regulations include: Petroleum (Drilling and Production) Regulations 1969; Mineral Oils (Safety) Regulations 1997; Petroleum (Drilling and Production (Amendment) Regulations 1988; Petroleum (Drilling and Production (Amendment) Regulations 2001; Petroleum Regulations 1967; Petroleum Refining Regulations 1974; and Crude Oil (Transportation and Shipment) Regulations 1984; see Department of Petroleum Resources, 'Acts & Regulations' (n 1213).

[1216] Department of Petroleum Resources, 'Acts & Regulations' (n 1213).

petroleum resources is vested in the government that acts on behalf of the state and people of Nigeria to protect, harness and dispense the petroleum resources.[1217] The main policy imperative the desire of the Nigerian Federal Government to derive the needed benefits from the petroleum industry for the benefit of the Nigerian people.

The petroleum legal architecture, as provided by the above legal instruments, demonstrates some level of satisfaction or fulfilment of the provisions of PSNR in Nigeria. But socioeconomic rights' provisions as obtained in Article 25 of UDHR and Article 11 of ICESCR are inadequately satisfied by the collective measure and impact of these Acts and Regulations in the petroleum industry. In particular, on one hand, the share of petroleum revenues for the federal government of Nigeria does not appear to be appealing enough when compared with the share of revenues from the Norwegian Model. On the other hand, poor accountability, high corruption and overconcentration on the petroleum wealth continue to bedevil the petroleum industry which go a long way to undermine socioeconomic rights such as adequate standard of living. The legislation and regulations do look laborious and appear to be inadequate in clarity and coherence.[1218]

8.4.2 Petroleum E&P licensing in Nigeria

The Department of Petroleum Resources (DPR) under the Ministry of Petroleum Resources is the key institution that regulates the conduct and operations of

[1217] The Constitution of Republic of Nigeria [1999]; the Petroleum Act [1969].

[1218] Rob Pitman and Anne Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (Briefing, Natural Resource Governance Institute, March 2018) 16 < https://resourcegovernance.org/sites/default/files/documents/the-case-for-publishing-petroleum-contracts-in-nigeria.pdf > accessed 12 January 2019.

businesses to enhance the public ownership rights in the petroleum industry.[1219] The state actively takes part in petroleum activities through the Nigerian National Petroleum Corporation (NNPC). NNPC is the NOC that represents the federal government joint ventures (JVs) including six main JVs with MNPCs, namely: Shell Petroleum Development Company of Nigeria Limited (SPDC),[1220] Mobil Producing Nigeria Unlimited (MPNU),[1221] Nigerian Agip Oil Company Limited (NAOC),[1222] Chevron Nigeria Limited (CNL),[1223] and Elf Petroleum Nigeria Limited (EPNL)[1224]

[1219] Department of Petroleum Resources, 'Roles of DPR - Upstream' < www.dpr.gov.ng/upstream/ > accessed 14 April 2019; Department of Petroleum Resources, 'Roles of DPR - Downstream' < www.dpr.gov.ng/downstream/ > accessed 14 April 2019; Department of Petroleum Resources, 'Roles of DPR - Gas' < www.dpr.gov.ng/gas/> accessed 14 April 2019.

[1220] This JV is comprised of the following participating interests: 'NNPC (55%), Shell (30%), Elf (10%) and Agip (5 %)'. Its operation is 'mainly onshore on dry land or in the mangrove swamp'. It constitutes over '40% of Nigeria's total oil production (899,000 barrels per day (bpd) in 1997) from over 80 oil fields in the Country'. It is operated by Shell; See NNPC, 'Joint Operating Agreement' (n 981).

[1221] This JV has the following participating interests: 'NNPC (60%) and ExxonMobil (40%) operating in the shallow-water. It is operated by ExxonMobil. ExxonMobil 'also has a 50% interest in a PSC for a Deepwater offshore'; See NNPC, 'Joint Operating Agreement' (n 981).

[1222] This JV constitutes NNPC (60%), Agip (20%) and Phillips Petroleum (20%) participating interests. Agip operates the JV mainly from small onshore fields; See NNPC, 'Joint Operating Agreement' (n 981).

[1223] This JV has the following participating interests: NNPC (60%) and Chevron (40%). It is operated by Chevron in "fields located in the Warri region west of the Niger river and offshore in shallow water"; See NNPC, 'Joint Operating Agreement' (n 981).

[1224] This is a JV partnership between NNPC and Total E&P Nigeria. It is 'governed by a JOA which a basic, standard agreement between the NNPC and Total in Nigeria is'; See NNPC, 'Joint Operating Agreement' (n 981).

in the E&P of petroleum.[1225] They operate 'mainly onshore Niger Delta, coastal offshore areas and, of late, in the Deepwater areas'.[1226]

A typical JV between NNPC and MNPCs is arranged in such a way that the NNPC on behalf of the federal government of Nigeria usually has an equity share or participating interest of 60% while the remaining participating interests are shared amongst the MNPCs or foreign Companies. For instance, the JV between NNPC and foreign companies such as Agip and Philips are as follows: NNPC has an equity share of 60% while the remaining 40% stake is shared between Agip with 20% and Philips with 20% stake. The interest of Nigeria is, therefore, represented in all these arrangements by the NNPC. NNPC does this in collaboration with the Federal Ministry of Petroleum Resources[1227] and the private petroleum companies.

NNPC adopts models of contracts for petroleum E&P for use in the Industry. Models considered include CCs (which were first deployed), PSCs, JVCs, and SCs. But PSCs are predominantly used, especially starting from 1993. These contractual models are used after a licence or lease has been procured by the petroleum E&P companies and the NNPC in a competitive licensing round. There are instances where petroleum E&P contracts are negotiated between the government and the petroleum E&P companies, with or without the competitive bidding rounds. These will be based on issues such as urgency of the need to award an area to a

[1225] NNPC, 'Joint Operating Agreement' (n 981).

[1226] ibid.

[1227] Federal Ministry of Petroleum Resources, 'Parastatals' < http://petroleumresources.gov.ng/parastatals/> accessed 14 April 2019.

competent company before a licensing round and the existing exclusive advantage an existing petroleum company may already have in adjoining areas.[1228]

Entry of companies into the petroleum industry normally begins with a competitive bidding round. This process is managed by the NNPC in collaboration with DPR.[1229] Each licensing round is normally published with application procedures and guidelines. Eventually, the Minister of Petroleum Resources then grants petroleum E&P licences or leases to the merited bidders at the absolute discretion of the Minister thereof – of course based on predetermined criteria in the published guidelines for a bidding round. Technical competence and financial capabilities are primarily considered as necessary conditions for an award of a licence or lease. But they are not sufficient conditions since factors such as local content and sustainability are equally qualifying factors for an award.

E&P licences and leases are the primary legal instruments that grant different levels of petroleum entitlements (rights and interests) to petroleum companies in Nigeria. But after the licence or lease is awarded, the different models of contracts just mentioned beforehand are employed to create a special operational and interest-bearing relationship between the licensee or lessee and the NNPC. According to Act 1969, there are three forms of petroleum interests and/or rights which the minister of petroleum resources can grant to petroleum companies, namely: Oil exploration licence (OEL), oil prospecting licence (OPL) and oil mining lease (OML).[1230]

[1228] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 16;

[1229] NNPC, 'Joint Venture Activities' (2019) < www.nnpcgroup.com/NNPC-Business/Upstream-Ventures/Pages/Joint-Venture-Activities.aspx > accessed 21 April 2019.

[1230] The Petroleum Act [1969], s 2.

To acquire an exploration interest in an oil field, petroleum companies are required to apply for oil exploration licence (OEL) that will enable them to only conduct "preliminary search by surface geological and geophysical methods, including aerial surveys but excluding drilling below 91.44 metres"[1231] for petroleum in an area allocated for concession. There is no exclusive right in this licence. An OEL is valid for just one-year but it is subject to renewal for another year if the licensee meets the necessary conditions.[1232]

When OEL expires, there is an opportunity for the OEL licensee to apply for its OEL to be graduated to an oil prospecting licence (OPL). OPL grants the licensee the exclusive right[1233] 'to prospect for petroleum'.[1234] Deep offshore OPLs and those for inland basins, the duration of licence is from five to ten years, which is dependent upon where the concession is located and the depth thereto.[1235] However, with onshore contracts, OPL has a maximum period of five years.[1236]

The OPL allows licensees to engage in more extensive exploration searches or surveys. OPL also grants 'the right to carry away and dispose of petroleum that is won subject to the terms of 1st Schedule 6 of the Petroleum Act 1969.[1237] The arrangement is that OPLs which are issued to foreign companies are each accompanied with a covenant entered by the foreign entity stipulating a

[1231] The Petroleum Act [1969], ss 12; 15(1); 12(1); 2(1) a.

[1232] The Petroleum Act [1969], 1st Schedule 3.

[1233] The Petroleum Act [1969], 1st Schedule 5.

[1234] The Petroleum Act [1969], s 2(1) b.

[1235] Deep Offshore and Inland Basin Production Sharing Contracts Act [1999] Act No 9.

[1236] The Petroleum Act [1969], 1st Schedule 6.

[1237] ibid.

commitment to assign the applicable OPL to the NNPC when commercial quantities of petroleum are discovered. Upon successful discovery by the licensee, the NNPC enters into a PSC or RSC with the licensee. With the PSC, the NNPC acts as a joint venture partner with the licensee but not in the manner required of the previous JVs that needed 'cash calls' and other such contributions from the NNPC which appeared to have posed many challenges to the federal government.[1238]

The OPL can be graduated to oil mining lease (OML) if an OPL holder that has discovered petroleum in commercial quantities meets the necessary conditions and applies for such a conversion to be done.[1239] OML grants lessee the exclusive right[1240] "to search for, win, work, carry away and dispose of petroleum".[1241] The normal duration of an OML is 20 years[1242] with an option for renewal if there is satisfactory obligatory performance. This lease is all encompassing, at this point. It includes an exclusive right to prospect, explore, produce and market petroleum in the allocated area for the stipulated period. The NNPC is in a JV relationship with the licensee in the OML too. Similar to Norway and the UK, transfer of interests and rights acquired in oil fields may be permitted if the appropriate authority consents to it, in this case, the federal minister of petroleum resources.

PSCs' arrangements are between the NNPC and 'competent contractor(s)' or petroleum E&P company or companies. The competent contractors are granted exclusive rights to undertake petroleum E&P activities in the licensed area. At the

[1238] Etikerentse, *Nigeria: Nigerian Petroleum Law* (n 978) 42.

[1239] The Petroleum Act [1969], 1st Schedule 8.

[1240] The Petroleum Act [1969], 1st Schedule 11.

[1241] The Petroleum Act [1969], s 2(1) c.

[1242] The Petroleum Act [1969], 1st Schedule 10.

same time, the contractors are granted the exclusive responsibility to provide adequate funds for the financing of all the E&P operations until petroleum in commercial quantities is found, extracted and made a saleable commodity. It is until when the contractors successfully discover, develop and extract the petroleum can they be in a position to recover their E&P costs and offset their risks. If they do not discover and develop the petroleum in commercial quantities, they bear all risks and costs.[1243]

Essentially, the state in this arrangement acts as the facilitator and coordinator especially when there is discovery and arrangements have to be put in place to extract the petroleum. The petroleum E&P company has exclusivity of rights and bear all the costs and risks. It does have to come with reasonable returns to attract contractors to come on board the petroleum investment landscape. Sometimes, however, most petroleum investors stretch the overbearing nature of the arrangement to demand for unreasonable returns where the ownership rights of the HS are vitiated.[1244]

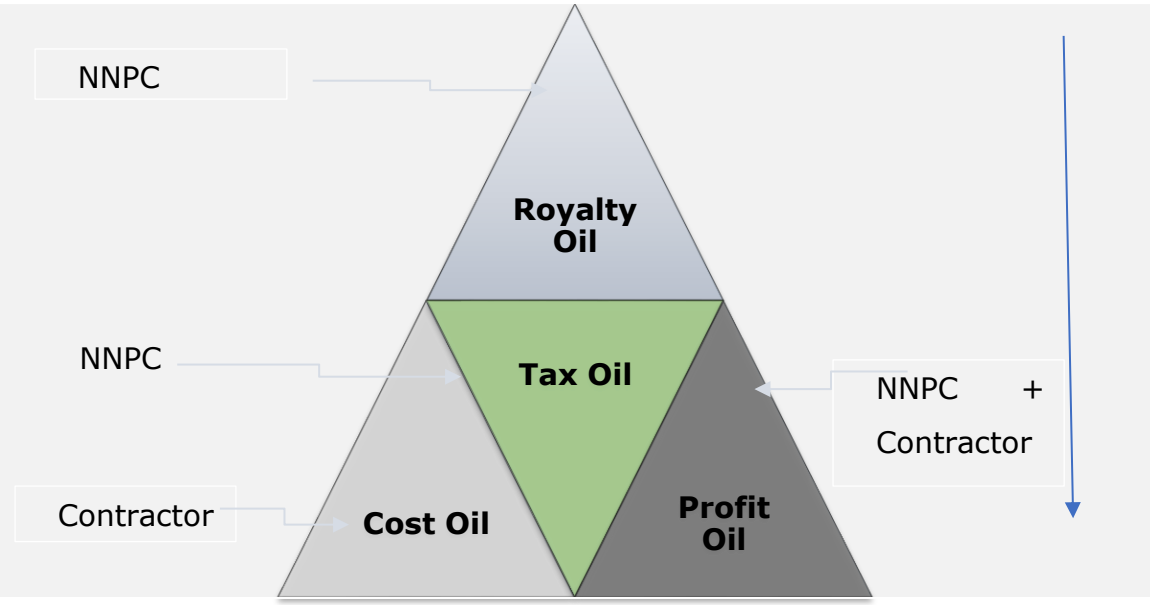
Any petroleum that is produced by the contractors is classified into four segments in descending order of allocation or deduction: 'Royalty oil, cost oil, tax oil and profit oil'. See in Figure 7 the pyramidal demonstration of the petroleum product from which revenue can be generated from PSC in Nigeria. Royalty oil, tax oil and a share of the profit oil are the revenue components for the NNPC.[1245]

[1243] Taiwo Adebola Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry' (2015) 5(8) Journal of Energy Technologies and Policy 1 < www.iiste.org/Journals/index.php/JETP/article/viewFile/24714/25317 > accessed 14 April 2019.

[1244] ibid.

[1245] Taverne, 'Production Sharing Agreements in Principle and in Practice' in David (ed) *Upstream Oil and Gas Agreement* (n 968) 43.

Figure 7: Petroleum Deduction Model



Upon production of the petroleum, the title and interest in the PSC are generally connected to a high share of the profit oil. Although the contractors are given the opportunity to get all the components of the produced oil marketed and sold except NNPC's share of the profit oil, it is the NNPC that usually determines the price at which the product will be sold based on current market dynamics.[1246]

The PSC Model, as practised in Nigeria, does show some greater level of control over the petroleum industry, in terms of the minimum participation but high share of the country. Also, the petroleum companies get great returns on their investments. This suggests a legal regime that is beneficial to both the petroleum E&P companies and that of Nigeria.[1247]

[1246] Taverne, 'Production Sharing Agreements in Principle and in Practice' (n 968).

[1247] Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry' (n 1243).

However, across board, there has not been a more suitable oil auditing provision in any of the PSC petroleum contractual models in Nigeria.[1248] What has been captured in the PSCs is that the provisions on auditing the records of oil accounting provided by the contractors regarding their operations were only concerned about the right of NNPC to audit the contractors' oil accounting records without determining the operational costs that have been incurred by the contractor to recover the petroleum. In the subsequent PSC models, there has not been any significant change to the audit provision in the 1993 PSC contractual model as provided in Clause 13(2) of the 1993 PSC.[1249]

In other countries such as the UK, Norway and Trinidad and Tobago, however, the operational costs are seen to be clearly audited. For instance, in Trinidad and Tobago, Article 18(7) of the 2006 and 2013 model PSCs make provision for verification of recovery of costs process.[1250]

[1248] ibid.

[1249] Clause 13(2) of the 1993 PSC states: "*The CORPORATION and its external auditors shall have the right to inspect and audit the accounting records relating to this Contract for any Calendar Year by giving thirty (30) days' written notice to the CONTRACTOR. The CONTRACTOR shall facilitate the work of such inspection and auditing; provided however that such inspection and auditing shall be carried out within two (2) Calendar Years following the end of the Calendar Year in question. If not, the books and accounts relating to such Calendar Year shall be deemed to be accepted by the Parties as satisfactory. Any exception must be made in writing within ninety (90) days following the end of such audit and failure to give such written notice within such time shall establish the correctness of the books and accounts*"; See Taiwo Adebola Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry' (n 1243) 8.

[1250] Article 18(7) of the 2006 and 2013 Model PSCs reads: "*Subject to the Accounting Procedure and the auditing provisions of the Contract, Contractor shall recover costs and duly verified in accordance with Article 17 of the Contract in respect of the Petroleum Operations hereunder to the extent of and out of the following maximum limits per Calendar Month of all Available Crude Oil and/or all Available Natural Gas from the Contract Area, (hereinafter referred to as "Cost Recovery Crude Oil" and/or "Cost Recovery Natural Gas" and collectively as "Cost Recovery*

Amongst other deficiencies, the inadequacy of auditing of accounting records in the Nigerian framework is a very critical loophole which needs to be filled because although there is valuation of oil and marginal or surface auditing, it is still not sufficient for the NNPC to ascertain the accuracy of the oil figures relating to cost oil and related figures which can affect the tax oil and even the profit oil – hence the total revenue of oil for the NNPC could be adversely affected.[1251] It is in the interest of contractors to show a high cost of operation, so they had been enticed to engage in creative accounting and showing low profits. And, they would continue to be enticed to do same if different measures are not put in place to address the situation.[1252]

Petroleum tax stability and predictability are crucial for both the investors and the NNPC. Tax stability and predictability are essential in the fiscal regime of any petroleum industry. While some countries do include the component of tax stabilisation in principal petroleum legislations, others choose to have subsidiary legislations or incorporate tax stability provisions in each contract between the licensor and licensee or lessor and the lessee. Nigeria has the latter arrangement. Tax stability and predictability are core to the economic benefits derived from the petroleum industry. [1253]

Petroleum")"; see Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry' (n 1243) 8.

[1251] Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry' (n 1243).

[1252] ibid.

[1253] ibid.

8.4.3 Realising petroleum E&P benefits in Nigeria

Nigeria is, by far, the most petroleum-resourced country in SSA.[1254] EITI has reported that there are 40 billion barrels of crude oil reserves in Nigeria.[1255] In addition, over 165 trillion standard cubic feet (scf) of gas reserves can be found in the country; this includes over 75.4 trillion scf of non-associated Gas.[1256] On average basis, the maximum production capacity of oil is about 2.5 million bopd,[1257] and for gas it is over 7.6 billion scf[1258] of gas in a day. The country is the thirteenth leading petroleum producer in the World.[1259] It has been placed as the leading producer of petroleum in Africa.[1260]

Despite conflict flashpoints that put fear in investment allocation in the country,[1261] it is still a profitable investment destination for a number of MNPCs. The profitability of the Nigerian petroleum industry for MNPCs is attributable to many factors including the nature of petroleum legal and regulatory framework and contractual arrangements.[1262] These factors tend to make the petroleum

[1254] AfDB, *African Economic Outlook 2019* (n 1006).

[1255] EITI, 'Overview' (NEITI, Nigeria Extractive Industries Transparency Initiative, Last updated, 11 March 2019) < https://eiti.org/nigeria > accessed 21 April 2019.

[1256] Folake Elias-Adebowale and others, 'Oil & Gas in Nigeria' (Lexology, 7 January 2019) < www.lexology.com/library/detail.aspx?g=38ab9ccc-2392-4cd6-b0dc-997695d924b6 > accessed 12 April 2019.

[1257] EITI, 'Overview' (n 1255).

[1258] Elias-Adebowale and others, 'Oil & Gas in Nigeria' (n 1256).

[1259] EITI, 'Overview' (n 1255).

[1260] ibid.

[1261] Omolade Adunbi, *Oil Wealth and Insurgency in Nigeria* (Indiana University Press 2015).

[1262] Haruna Yahaya & Co, 'Full Report: 2015 Oil & Gas Industry Audit Report' (NEITI, 27 December 2017)37-44 < https://eiti.org/sites/default/files/documents/neiti-oil-gas-report-2015-full-report-281217.pdf > accessed 15 November 2018.

companies make more income from the Nigerian petroleum industry while the Nigerian state earns relatively less income therefrom due to the fiscal arrangements which have been endorsed by the petroleum legal regime in Nigeria. This flies in the face of justice and socioeconomic rights, and even sometimes in the face of ROL due to the prevalence of bribery and corruption that make disfigured regulatory enforcement a new norm.[1263]

Indeed, Nigeria ranks 144 out of 180 countries on the CPI 2018 with a mere score of 27[1264] of 100.[1265] As a consequence, the country is caught up in the web of resource curse where it has huge petroleum wealth but stays as one of the poorest, if not the poorest in the world.[1266] For instance, out of 101 countries that were covered by the 2019 global Multidimensional Poverty Index (MPI)[1267] assessment, Nigeria and India stood out as leading countries with highest levels

[1263] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 16.

[1264] Previously Nigeria did not score any better, with its respective score of 27, 28 and 26 in 2017, 2016 and 2015; Transparency International, 'Corruption Perceptions Index 2018' < www.transparency.org/cpi2018 > accessed 21 September 2019.

[1265] ibid.

[1266] African Development Bank and the African Union, *Oil and Gas in Africa* (n 13).

[1267] The MPI is used as the tool to measure progress towards achieving the SDG 1 which seeks to eradicate poverty in all its forms and dimensions. The MPI refers to as "the product of the incidence and the intensity of multidimensional poverty". Even though both the incidence and intensity are imperative, when there is a 'reduction in intensity, MPI will reduce even if there is no change in the incidence of multidimensional poverty'. This measure does reflect the progress being made by countries to eradicate poverty. What this means is that there is higher incidence and intensity of multidimensional poverty in the poorest countries; OPHI and UNDP, 'Global Multidimensional Poverty Index 2019: Illuminating Inequalities' (the United Nations Development Programme and Oxford Poverty and Human Development Initiative, 2019) < http://hdr.undp.org/sites/default/files/mpi_2019_publication.pdf > accessed 24 September 2019.

of multidimensional poverty.[1268] In the same vein, with an MPI value[1269] of 0.291, the intensity of multidimensional poverty in Nigeria was higher with 56.6% while the incidence of poverty was 51.4%.[1270]

However, economic benefits that can be derived from the petroleum E&P industry in Nigeria are numerous including employment and investment opportunities. But, more importantly, *albeit* limited, the taxes and royalties generate revenues that have supported the government in harnessing socioeconomic rights of the Nigerian people.[1271] The rate of profit tax generally ranges from 65.75% to 85% on the 'chargeable profits'[1272] of petroleum E&P companies for onshore operations[1273] and 50% for deep offshore operations[1274] in the PSC framework. Other taxes on profits add up to about 6%. These include education tax on assessable profits of 2%, Niger-Delta development levy on total annual profits of 3% and 1% Nigerian content development levy on every upstream petroleum contract that is awarded to the Nigerian Content Development Monitoring Board.[1275]

[1268] OPHI and UNDP, 'Global Multidimensional Poverty Index 2019: Illuminating Inequalities' (n 1267)11.

[1269] Data of MPI representing the period between 2007 and 2018; ibid

[1270] ibid.

[1271] Carole Nakhle, *Petroleum Taxation: Sharing the Oil Wealth: A Study of Petroleum Taxation yesterday, today and tomorrow* (n 1087).

[1272] The Petroleum Profits Tax Act [1990] CAP 354 LFN, s 9.

[1273] The Petroleum Profits Tax Act [1990] CAP 354 LFN.

[1274] Deep Offshore and Inland Basin Production Sharing Contracts Act [1999] Act No 9 LFN.

[1275] Haruna Yahaya & Co, 'Full Report: 2015 Oil & Gas Industry Audit Report' (n 1262); Elias-Adebowale and others, 'Oil & Gas in Nigeria' (n 1256); Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218).

In the deep-water offshore, therefore, the total tax for petroleum E&P companies is about 56%.[1276] In the onshore licenses and shallow areas, the total tax on petroleum E&P companies can technically get up to 91%. But this is over-rated and unreasonable as it does not make any sense for investment.[1277] In practice, tax on petroleum companies, therefore, gets lower. Aside the taxes, other revenue sources such as rent and royalties as well as signature and production bonuses are provided for by the Petroleum Profits Tax Act 1990 and the Companies Income Tax Act 2007.[1278]

At Section 16.2 of the PSC between NNPC, Gas Transmission and Power Limited, and others signed in 2007,[1279] for instance, the royalty[1280] and tax obligations for the contractor were as follows: Petroleum profits tax (PPT) included 65.70% onshore/shallow offshore for the first five years for new entrants, 85.00% for the

[1276] Deep Offshore and Inland Basin Production Sharing Contracts Act [1999] Act No 9 LFN.

[1277] Wälde, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law' (n 271); Cameron, 'Investment Cycles and the Rule of Law in the International Oil and Gas Industry' (n 271).

[1278] Companies Income Tax Act [1979 No. 28, 2007 No. 56]; Haruna Yahaya & Co, 'Full Report: 2015 Oil & Gas Industry Audit Report' (n 1262)37-44; Elias-Adebowale and others, 'Oil & Gas in Nigeria' (n 1256); Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218).

[1279] PSC between NNPC, Gas Transmission and Power Limited, Energy 905 Suntera Ltd and Ideal Oil and Gas Ltd for Block 905 Anambra Basin (2007) s 16.2.

[1280] Royalty rates in that PSC were as follows: for Onshore areas, the rate is 20.00%; for Areas up to 100 metres water depth, the rate is 18.50%, 16.60% for Areas from 101 to 200 metres water depth, 12.00% for Areas from 201 to 500 metres water depth, 8.00% for Areas from 501 to 800 metres water depth, 8.00% for Areas from 801 to 1000 metres water depth, 8.00% for Areas in water depth higher than 1000 meters, and 10.00% for Inland Basins. These are in accord with relevant fiscal Statutes such as the Petroleum Profits Act and the Petroleum Production Sharing Act. The lower the depth of the Area the lower the royalty rate; PSC between NNPC, Gas Transmission and Power Limited, Energy 905 Suntera Ltd and Ideal Oil and Gas Ltd for Block 905 Anambra Basin (2007) s 16.1.

first five years for existing companies, and 85.00% for the subsequent years for all the companies; with deep offshore and inland basins, a flat rate of 50.00% was applied.[1281] These fiscal terms appear great, but outturns were not as good as anticipated. [1282]

Reviewing 23 petroleum contracts[1283] and 10 model contracts from the upstream segment in Nigeria, Pitman and Chinweze revealed that Nigerian petroleum contracts have many terms that need to be published for the sake of public

[1281] PSC between NNPC, Gas Transmission and Power Limited, Energy 905 Suntera Ltd and Ideal Oil and Gas Ltd for Block 905 Anambra Basin (2007) s 16.2.

[1282] For similar fiscal provisions, see Production Sharing Contract between NNPC, Sahara Energy Nigeria Limited and Seven Energy Nigeria Limited for OPL 332 (2005); Production Sharing Contract between Nigerian National Petroleum Corporation and Shell Nigeria Exploration and Production Company (19 April 1993); Production Sharing Contract between Nigerian National Petroleum Corporation and Chevron Petroleum Nigeria Ltd (14 October 1994); Production Sharing Contract between Nigerian National Petroleum Corporation and Oranto Petroleum, Orandi Petroleum Ltd (20 February 2002); Production Sharing Contract between Nigerian National Petroleum Corporation and Centrica Resources (Nigeria) Ltd/CCC Oil & Gas Nigeria Ltd/Rayflosh Petroleum Ltd (16 February 2006); and Production Sharing Contract between Nigerian National Petroleum Corporation and Nigerian Agip Oil Company Ltd, Global Energy Company Ltd, BLJ Energy Ltd (8 March 2007); Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry' (n 1243).

[1283] Including the following Contracts: Service Contract between NNPC and AGIP Energy and Natural Resources (Nigeria) Limited for Okono and Okpoho fields in OPL 91 (2000); Marginal Field Farm-Out Agreement between NNPC, Shell Petroleum Development Company of Nigeria Ltd, Nigerian Agip Oil Company Ltd and Elf Petroleum Nigeria Ltd as Farmor, and Universal Energy Resources Limited as Farmee, for Stubb Creek (2003); PSC between NNPC, Sahara Energy Nigeria Limited and Seven Energy Nigeria Limited for OPL 332 (2005); PSC between NNPC, Gas Transmission and Power Limited, Energy 905 Suntera Limited and Ideal oil and gas limited for Block 905 Anambra Basin (2007); Strategic Alliance Agreement between NNPC and Septa Energy Nigeria Limited for OMLs 4, 38 and 41 (2010); and the Strategic Alliance Agreement between NNPC and Atlantic Energy Drilling Concepts Nigeria Limited for OML 30 (2011); see Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 16.

interest.[1284] These terms do not appear to have the nerves to stand the fury of public scrutiny as they appear inconsistent with the public interest and serve only the private gain. In the fiscal space, in particular, Nigeria does look well. For instance, about 53% of the total revenue of the Nigerian federal government was generated from 'taxes, royalties, oil trading and other such related payments' in 2015.[1285]

However, the federal government has "negotiated a complex web of agreements that only a handful of people understand".[1286] This exposes Nigeria to mismanagement and corruption that facilitate significant leakages from the coffers of the government.[1287] For example, there have been instances where petroleum companies were given unreasonable 'fiscal investment incentives while others did negotiate a number of byzantine financing agreements[1288] such as modified carry agreements[1289] or third-party financing agreements'.[1290] These adversely impact on the amount of revenue and oil accruing to the federal government.[1291] For instance, the federal government had granted fiscal incentives in the form of low royalty rate to Addax Petroleum in four OMLs amounting to US$ 2.8 billion.[1292] It

[1284] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218).

[1285] ibid.

[1286] Ibid, 3.

[1287] ibid.

[1288]The byzantine agreements are very complex arrangements of financing that are usually characterised by a lot of administrative information.

[1289] Under this arrangement, the MNPCs granted special loan facility to the NNPC to undertake petroleum project in the upstream sector, usually in a joint venture arrangement.

[1290] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 3.

[1291] Haruna Yahaya & Co, 'Full Report: 2015 Oil & Gas Industry Audit Report' (n 1262) 37.

[1292] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 3; Nicholas Ibekwe, 'Investigation: Attorney-General, Adoke, in shady deal that may rob Nigeria of

was later found that Addax did bribe the responsible government representatives for these incentives to be granted.[1293] This borders not only on loss of revenue and undermining socioeconomic rights but also it amounts to criminal conduct[1294] in the petroleum industry[1295] of Nigeria.

It has been reported that about US$ 60 billion has been lost due to issues of incentives and payments on royalties in Nigeria.[1296] At the same time, 'nearly US$ 2 billion in extra government revenue' has been lost as a result of weak or non-implementation of the royalty provisions in the 1993 PSC regime that allow for payment of royalties according to the Deep Offshore and Inland Basin Production Sharing Contracts.[1297] There are some instances where public disclosure of contracts has helped independent analysis to point out problematic contractual terms which has resulted in some form of reforms.[1298]

N549billion' (*Premium Times*, 24 March 2015) < www.premiumtimesng.com/news/179015-investigation-attorney-general-adoke-in-shady-deal-that-may-rob-nigeria-of-n549billion.html > accessed 15 November 2018.

[1293] Ben Ezeamalu, 'How drowning Chinese-owned oil firm paid millions of dollars as bribe to Nigerian Officials through Emeka Offor' (Sahara Reporters, 25 November 2017) < http://saharareporters.com/2017/11/25/how-drowning-chinese-owned-oil-firm-paid-millions-dollars-bribe-nigerian-officials > accessed 15 November 2018.

[1294] See the Independent Corrupt Practices and Other Related Offences Act 2000.

[1295] See Grasso, 'The Dark Side of Power: Corruption and Bribery within the Energy Industry' (n 263).

[1296] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 3.

[1297] Nigerian Tribune, 'The Unclaimed 60bn Oil Royalty' (19 December 2017) < www.tribuneonlineng.com/the-unclaimed-60bn-oil-royalty > accessed 15 November 2018.

[1298] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218).

When the NRGI analysed the Offshore Processing Agreement (OPA),[1299] it found that 'the OPAs had terms that inappropriately favoured some Companies'.[1300] Pitman and Chinweze found that almost US$ 381 million were lost for just one year as a result of only two OPAs. Indeed, the loss was occasioned by only "three inappropriate provisions".[1301] When this came to light in the Nigerian media, it attracted public outrage,[1302] yet no one was held accountable. The OPAs in question were later abrogated by the NNPC in 2015 upon the assumption of office by a new federal government.[1303] This highlighted the fact that 'contract secrecy prevents Nigerian citizens from effectively understanding the rules that govern petroleum projects and acting on same', and therefore, such secrecy in contracts must be avoided at all material times. Nigeria is a party to the Natural Resource Charter 2014 and EITI.[1304] Nigeria must take urgent steps to publish all its petroleum contracts as required by these frameworks.[1305]

Regardless of the tax concerns, petroleum revenues continue to remain the mainstay of the Nigerian economy. The petroleum industry has accounted "for

[1299] OPA is an agreement type of the oil-for-product swap which is a present feature of the Nigerian Petroleum Industry; see Aaron Sayne, Alexandra Gillies and Christina Katsouris, 'Inside NNPC Oil Sales: A Case for Reform in Nigeria' (NRGI, 4 August 2015) 7 < https://resourcegovernance.org/sites/default/files/documents/nrgi_insidennpcoilsales_completereport.pdf > accessed 15 November 2018.

[1300] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 3.

[1301] ibid.

[1302] For examples of JVCs, PSCs and Service Contracts, see OpenOil, 'Nigeria: Available Contracts' < https://repository.openoil.net/wiki/Nigeria > accessed 15 April 2019.

[1303] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218).

[1304] EITI, 'The global standard for the good governance of oil, gas and mineral resources' (The Extractive Industries Transparency Initiative, EITI) < https://eiti.org/ > accessed 21 April 2019.

[1305] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218) 2.

65% of total revenue to the government",[1306] thus, playing a huge role in funding pubic services and socioeconomic enhancement of the Nigerian people. Because of the sensitive space it occupies in social and economic lives of the Nigerian people, the petroleum industry in Nigeria attracts the attention of accountability and participation; same with ROL and justice. In fact, since Nigeria discovered petroleum in commercial quantities in 1956 led by Shell D'Arcy and started oil production in 1958, Nigerian petroleum industry has continued to attract the attention of socioeconomic rights and justice as well as the ROL Respectively, there have been questions about how the petroleum wealth benefits the standard of living of ordinary Nigerians, how fair and just the distribution of petroleum wealth has been and the extent to which petroleum laws have been appropriately enacted and applied.[1307] It does not appear that the socioeconomic rights of Nigerian citizens have been significantly protected by the manner in which some of the petroleum legal provisions have allowed the state to be denied revenues and poor translation of the petroleum revenues to the enhancement of the wellbeing of the Nigerian people. Unlike UK and Norway where transparent, effective and efficient recovery of petroleum resources are maximised, the case of Nigeria case is troubling. Accountable extraction and utilisation of petroleum revenues is a huge challenge in Nigeria.[1308]

In recent years, nonetheless, there have been some efforts towards harnessing the resources of Nigeria for the maximum socioeconomic benefit of the Nigerian people. The work of EITI in stirring debate for enhancing transparency in the

[1306] EITI, 'Overview' (n 1255).

[1307] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218).

[1308] ibid.

petroleum industry of Nigeria is commendable.[1309] There is an ongoing reform of the legal framework of the Nigerian petroleum industry. It appears to be a landmark reform policy that could address some of the fiscal and accountability issues that hinge on justice and socioeconomic rights of the Nigerian people. The Nigerian Petroleum Industry Governance Bill, which was passed by the Nigerian Senate on the 25 May 2017,[1310] if assented to by the president of the federal republic, will form a baseline for other reforms in the pipeline to be concretised. However, this bill still has a number of concerns including lack of clear integration of the Natural Resource Charter[1311] and that of the Principles[1312] of EITI.

At the same time, it can be observed that the minister of petroleum resources has been granted many supervisory powers over all the functions authorised by the petroleum licences issued. The power to cause arrest without warrant in Section 8 of the Petroleum Act 1969 is particularly of concern as it may lend itself to abuse by the minister of petroleum resources in the absence of any robust safeguards. This may attract some unlawful acts that could abuse the fundamental rights of both legal and natural persons such as right to lawful arrest and right to legitimate due process generally applicable in the best practice of ROL of justice.[1313] In an

[1309] ibid.

[1310] ibid; Elias-Adebowale and others, 'Oil & Gas in Nigeria' (n 1256).

[1311] NRGI, 'Natural Resource Charter' (n 863), Precept 2: Accountability and transparency.

[1312] EITI, 'The EITI Principles' (February 2016) < https://eiti.org/document/eiti-principles > accessed 21 April 2019; The Principles are part of EITI Standard; see also EITI, 'The EITI Standard 2016' (EITI International Secretariat 24 May 2017) < https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf > accessed 21 April 2019.

[1313] Baron Alfred Denning, *The Due Process of Law* (1st edn, Oxford University Press 2005); Constitution of the Federal Republic of Nigeria [1999], s 17(1).

environment where ROL is not fully practised given the institutional and personnel weaknesses and deficiencies, the best way to avoid authoritarianism, arbitrariness and abuse of the rights of persons is to ensure that the checks and balances are not only very strong but also no absolute authority and discretion is granted to one individual and/or office holder to grant petroleum licences and to have such overwhelming powers as granted to the federal minister of petroleum resources without a degree of judicial oversight.

8.5 The Case of Angola

8.5.1 Petroleum E&P legislations in Angola

As is the case in the UK, Norway and Nigeria, Article 16 of the Angolan Constitution[1314] stipulates that ownership of natural resources, including petroleum, in Angola is vested in the state. This is in line with the provisions of the PSNR[1315] and right to development[1316] regarding petroleum ownership and exercise of sovereignty thereto. Until very recently, Law No. 10/04 of 12 November 2004 (Petroleum Activities Law) of Angola was the principal petroleum legal instrument that regulated how petroleum operations were accessed, conducted and accounted for in the country. This law was complemented by a number of laws and decrees including Law No. 13/04 of 24 December 2004 (Petroleum Taxation Law) which established the framework for taxation on petroleum activities, including the applicable petroleum taxes, the rates of the

[1314] Angola's Constitution of 2010 (Constitute, pdf generated: 17 January 2018)< www.constituteproject.org/constitution/Angola_2010.pdf?lang=en > accessed 13 October 2018.

[1315] PSNR, Art 1.

[1316] DRTD, Art 1(2).

taxes and the modalities for deduction of the taxes.[1317] Petroleum production tax, petroleum revenue or income tax, and the petroleum transaction tax are the principal taxes recognised by the petroleum tax law. However, the petroleum tax law also imposes surface area charge, and a charge as contribution towards training of staff from Angola.[1318]

In the spirit of the recent reforms of the Angolan petroleum industry, the Angolan National Assembly did approve amendments to the Petroleum Activities Law 2004 and the Taxation Law 2004.[1319] Amongst other principal modifications, Law No. 5/19 of 18 April 2019 (Petroleum Activities Law) changes Sonangol[1320]as the National Concessionaire to the National Agency for Petroleum, Gas and Biofuels or *Agência Nacional do Petróleo, Gás e Biocombustíveis (*ANPG).[1321] So ANPG now holds the petroleum mining rights in trust for the state. At the same time, Law No. 6/19 of 18 April 2019 (Petroleum Taxation Law) has amended Law No. 13/04 of 24 December 2004 (Petroleum Taxation Law) in the light of Law No. 5/19 of 18 April 2019(Petroleum Activities Law), assigning new responsibilities, rates and associated systems.[1322]

[1317] Tiago Machado Graça and Filipa Lima, 'Oil Regulation' (July 2018) < https://gettingthedealthrough.com/area/24/jurisdiction/151/oil-regulation-angola/ > accessed 16 April 2019.

[1318] Petroleum Activities Law 2004, Art 4.

[1319] Miranda, 'Petroleum Activities Law Amended' (Angola, Mirandaalliance, 22 April 2019) < www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/petroleum-activities-law-amended > accessed 24 April 2019.

[1320] Sonangol is NOC.

[1321] ibid.

[1322] ibid.

The transitional arrangement between Sonangol and ANPG is that any company that has contractual rights with Sonangol will continue to have their rights validly exercised.[1323] This assures contractual stability[1324] for petroleum E&P companies in Angola.[1325] The amendment has granted Sonangol rights such as "the benefit of specific preferential rights"[1326] such as right to have participating interest of not more than 20% for production extensions and new petroleum concessions, right to be appointed as an operator in both extensions of production periods and new petroleum concessions.[1327] For example in Article 1(30) of the PSC between Sonangol and CIE Angola Block 20 Ltd and others, Sonangol as the National Concessionaire had up to 30% participating interest. This was more than the 20% minimum required.[1328]

In effect, when all the transfer processes between Sonangol and ANPG have completed, Sonangol will become a state company acting as an operator/contractor and acquiring similar E&P rights as the MNPCs and such other E&P companies in Angola. What this means is that the Angolan state will be participating in the petroleum E&P from two angles – as a private actor through

[1323] See Presidential Decree no. 49/19 of 6 February 2019.

[1324] Wälde, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law' (n 271).

[1325] Miranda, 'Petroleum Activities Law Amended' (n 1319).

[1326] ibid.

[1327] ibid.

[1328] See Production Sharing Contract between Sociedade Nacional De Combustíveis De Angola, Empresa Pública - (Sonangol, E.P.) and Cie Angola Block 20 Ltd; Sonangol Pesquisa E Produção, S.A; BP Exploration Angola (Kwanza Benguela) Limited; China Sonangol International Holding Limited in the Area of Block 20/11< http://downloads.openoil.net/contracts%2Fao%2Fao_Block-20-11_dd20111220_PSC_CIE_Sonangol_BP.pdf > accessed 21 April 2019.

Sonangol and a public actor through ANPG. If the Government does not manage this process well, it can cause some economic and legal challenges in the future.

For instance, Sonangol has to smartly adjust its operational model in order to become an effective operator that can generate good returns on its investments. In the same vein ANPG, as a new entrant, will have to quickly mobilise itself to be able to adequately fill in the huge portfolio left over by Sonangol, with concerns about uncertainties in aligning itself to the new legal regime rather than the old one. Possible misunderstanding of the transitional elements abounds, and disputations thereto are likely to come along as well.

Other key complementary laws to Law No. 5/19 of 18 April 2019 include: Law No. 11/04 of 12 November 2004 (Petroleum Customs Law) which regulates petroleum related customs, incentives and restrictions;[1329] Law No. 2/12 of 13 January 2012 (Law on the Foreign Exchange Regime applicable to the Petroleum Sector) which regulates the foreign exchange activities that are 'applicable to the payment of goods, services and capital operations'[1330] in the petroleum industry; Ministry of Petroleum Order No. 127/03 of 25 November 2003 (Local Content Regulations) which regulates 'the demand and supply of goods and services'[1331] in the petroleum industry; and Decree No. 48/06 of 1 September 2006 (public tendering for the oil sector) which governs how participating interests are awarded in petroleum concessions of Angola.[1332] Some of these complementary laws may have to be adjusted to conform to the amendment to Law No. 5/19 of 18 April

[1329] Graça and Lima, 'Oil Regulation' (n 1317).

[1330] ibid.

[1331] ibid.

[1332] ibid.

2019 (Petroleum Activities Law). These laws and related others govern the entire operations, rights and duties in the Angolan petroleum industry.

The Ministry of Petroleum of Angola is the principal state institution that is charged with the responsibility to regulate and supervise petroleum operations in Angola. It safeguards the ownership title of petroleum on behalf of the government and the state. Title of ownership of the petroleum is not transferrable to operators or contractors due to the constitutional injunction in Article 16 of the Angolan constitution guaranteeing state ownership of petroleum resources and authorisation given to the ANPG to hold the ownership title on behalf of the state.[1333]

8.5.2 Petroleum E&P licensing in Angola

Entry into the Angola's petroleum industry to earn the right and/or interest thereto is made possible by a licence or concession duly granted by the government of Angola acting on behalf of the state through the Ministry of Petroleum. According to Law No. 5/19 of 18 April 2019, it is only when petroleum E&P companies, operators or contractors duly acquire prospecting licence or petroleum concession can they have the right to enter into the petroleum E&P industry of Angola.[1334] The law further goes to require that operators or contractors must always have to operate in partnership with the ANPG[1335] National Concessionaire instead of the

[1333] ibid.

[1334] ibid.

[1335] Miranda, 'Petroleum Activities Law Amended' (n 1319).

Sonangol [1336] which, until recently, was the National Concessionaire. ANPG was especially established by the Presidential Decree No. 49/19 of 6 February 2019 as an autonomous entity with the purpose 'to regulate, supervise and promote the operationalisation of petroleum exploration activities including operations and contracting, in the field of petroleum and biofuels'[1337] in Angola.

The process of awarding prospecting licence is that advertisement is made in the official gazette by the Ministry of Petroleum inviting prospective licensees to apply. The prospective licensees then submit their applications to the Ministry of Petroleum. Each of the applications must be accompanied with the requisite documentation that demonstrates the applicant's financial and technical capacity. Also, each application is expected to articulate 'the objective, intended area, financial and a provisional budget'.[1338] Other requirements are detailed in the invitation to tender document and in accord with the applicable Presidential Decree. The Ministry of Petroleum assesses the applications and award the prospecting licence to competent applicants. The original licence title is held by the National Concessionaire.

Successful applicants then enter into an association arrangement with the National Concessionaire. The association or partnership arrangement which successful applicants must have with the National Concessionaire in a prospecting licence or petroleum concession must be contracted through contractual forms such as 'a PSC, an RSC, or a JVC'. However, PSCs are predominantly used to execute the

[1336] Sonangol, 'About Sonangol EP' < www.sonangol.co.ao/English/AboutSonangolEP/Pages/About-Sonangol-EP.aspx > accessed 15 April 2019.

[1337] ANPG, 'About ANPG' < https://anpg.co.ao/wp/ > accessed 22 April 2019.

[1338] Graça and Lima, 'Oil Regulation' (n 1317).

association between the National Concessionaire and the operators.[1339] The MNPCs in the Angolan petroleum industry include Chevron, ENI, Total, Petrogal, Esso, Statoil, Falcon Oil, Statoil, Petrobras, and BP. The Contracts they enter into with the National Concessionaire are mostly the PSCs. RSCs are also used when needed.[1340]

In the case of award of concessions, the application process is started with a request made to the Ministry of Petroleum by the National Concessionaire making a request to open a tender procedure for a petroleum block or area. If the Ministry of Petroleum agrees to the request, an announcement of the public tender is published in the official gazette, as well as newspapers and on Sonangol's[1341] website.[1342] In terms of duration of the licences upon which the PSC or any of the contracting types are based, while the prospecting licence last for a maximum of three years, concessions usually have a maximum period of twenty-five years. Both may be extended if justified under extraordinary situations in which the National Concessionaire makes a request case for such an extension.[1343]

Petroleum concessions are awarded to the National Concessionaire via the Concession Decree.[1344] Having done this, petroleum E&P companies are now invited to participate in a process that will select competent companies to partner

[1339] ibid.

[1340] OpenOil, 'Angola: Available contracts' (Last updated, 13 February 2015) < https://repository.openoil.net/wiki/Angola > accessed 21 April 2019.

[1341] Now, it is going to be published on the website of ANPG following the ANPG's assumption of duty as the new National Concessionaire; see ANPG, 'About ANPG' (n 1337).

[1342] Graça and Lima, 'Oil Regulation' (n 1317).

[1343] ibid.

[1344] Presidential Decree No. 52/19 of 18 February 2019.

with the National Concessionaire to undertake the petroleum operations. The process of selecting the associates of the National Concessionaire is demonstrated through public tender[1345] which has the following conditions: (i) Sonangol could take up a minimum of 20% share for new concessions and (ii) in the event that Sonangol is not the operator, it is entitled to be financed by a maximum of 20% by the associates in its exploration operations.[1346]

The public tendering procedures, as established in the Presidential Decree No. 86/18 of 2 April 2018 and/or in such other petroleum legal instruments, are also complied with. Financial and technical capabilities of the applicants are keenly considered as part of the essential requirements for selection.[1347] The results of the tender on the companies selected will then have to be approved by the government of Angola through the Ministry of Petroleum. Upon approval, a PSC and JOA are entered into between the National Concessionaire and the approved partnering companies or associates.[1348] The concession that had been granted to the National Concessionaire comes into effect when the PSC and the JOA are signed and published in the official gazette of Angola.[1349]

Apart from the public tender, Presidential Decree No. 52/19 of 18 February 2019, which approved the strategy for the award of petroleum concessions for the period between 2019 and 2025, sets out two additional types of awarding petroleum

[1345] Graça and Lima, 'Oil Regulation' (n 1317).

[1346] Guimarães, Robles and Fernandes, 'General Strategy for the Award of Petroleum Concessions (2019-2025)' (n 982).

[1347] Presidential Decree No. 52/19 of 18 February 2019.

[1348] ibid.

[1349] Graça and Lima, 'Oil Regulation' (n 1317).

concessions to petroleum E&P companies, namely: Limited public tender and direct negotiation.[1350]

With respect to the limited public tender, it is not regularly used but only applied in situations in which national strategic interest is considered to grant award of the 'associate' of the National Concessionaire to limited number of petroleum E&P companies that had been previously selected through the public tender process or such other available process ever used.[1351] Usually, limited public tender targets abandoned areas which had been reverted to the state. Applicants must comply with the dictates of both the Presidential Decree No. 86/18 of 2 April 2018 and the Presidential Decree No. 52/19 of 18 February 2019. This implies that PSC and JOA are applicable in the limited tender too.[1352] However, whereas the public tender process is moderately competitive, the limited tender process is marginally competitive. The ROL is sufficiently expressed in the former than the latter since the latter is less predictable and less fair.

With regards to the direct negotiations, the process is that concessions are directly granted to ANPG. This award is done through a Concession Decree. The National Concessionaire then enters into an RSC with the petroleum E&P companies in accordance with the applicable Presidential Decree.[1353] In collaboration between the Ministry of Petroleum and the ANPG, direct negotiations may be held with the

[1350] Presidential Decree No. 52/19 of 18 February 2019.

[1351] ibid.

[1352] Guimarães, Robles and Fernandes, 'General Strategy for the Award of Petroleum Concessions (2019-2025)' (n 982).

[1353] Presidential Decree No. 52/19 of 18 February 2019.

companies that are being selected to execute the RSC.[1354] The process of this kind of negotiation appears on the low end of ROL since this process lends itself to lack of adequate transparency and predictability of the process and results. Overall, the contractual arrangements yield outcomes that tend to drift away from substantive RAHL, justice and socioeconomic rights.[1355]

8.5.3 Realising petroleum E&P benefits in Angola

Just like Nigeria, the petroleum industry in Angola is the mainstay of the economy.[1356] As of 2017, Angola's crude oil production was about 1.63 million barrels per day.[1357] In 2018, crude oil production per day marginally came down to about 1.4733 million.[1358] In the same year, proven crude oil reserves stood at about 8.160 million barrels while her proven natural gas reserves was about 383 billion cubic metres in Angola.[1359] Angola is second to Nigeria when it comes to proven petroleum reserves and production of oil in Africa. For many years, the petroleum industry has been contributing hugely to the economy of Angola. For instance, the petroleum industry contributed 45% to the GDP of Angola in

[1354] Guimarães, Robles and Fernandes, 'General Strategy for the Award of Petroleum Concessions (2019-2025)' (n 982).

[1355] UNGA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels* (n 409); Nussbaum, 'Capabilities as fundamental entitlements: Sen and social justice' (n 421); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

[1356] AfDB, *African Economic Outlook 2019* (n 1006).

[1357] OPEC, 'OPEC Monthly Oil Report' (Special edn, OPEC Bulletin, March 2019).

[1358] OPEC, 'Angola facts and figures' < www.opec.org/opec_web/en/about_us/147.htm > accessed 24 September 2019.

[1359] OPEC, 'OPEC Monthly Oil Report' (n 1357).

2017.[1360] Most of the Angola's petroleum wealth is located offshore in the EEZ of Angola. So, petroleum E&P activities mainly take place there.[1361]

In the Angolan PSC arrangement, provision is made for social contributions. Production bonus as well as signature bonus are also featured. Royalty is paid by the associate to the National Concessionaire which assumes the form of PPT.[1362] The PPT is "charged on the quantity of crude oil measured at the wellhead deducted from the quantities consumed in nature by petroleum operations".[1363] That is, the PPT is calculated on the net petroleum income after the operations costs have been deducted from the petroleum drawn right at the wellhead. An example can be cited of Article 10 of the RSC between Sonangol and CIE Angola Block 21 Ltd and others which spelt out the tax obligations for the contractors.[1364] The PPT rate has been set at 20%. There is, however, a reduction possibility of the PPT rate to 10% if the government so decides.[1365]

[1360] OPEC, 'OPEC Monthly Oil Report' (n 1357).

[1361] Graça and Lima, 'Oil Regulation' (n 1317).

[1362] ibid.

[1363] Petroleum Activities Law 2004, Art 12; Graça and Lima, 'Oil Regulation' (n 1317).

[1364] Article 10(4) states that, "*Contractor's rate of return shall be determined at the end of each Quarter after the date of Commercial Discovery on the basis of the accumulated compounded net cash flow for the Contract Area, using the following procedure: (a) Contractor's net cash flow computed in U.S. dollars for the Contract Area for each Quarter is: (i) the value received and actually lifted by Contractor for all Crude Oil from the Contract Area in that Quarter at the Market Price; (ii) minus Petroleum Production Tax, Petroleum Income Tax and Petroleum Transaction Tax; (iii) minus all expenditures incurred in respect the Contract Area*"; See Risk Services Agreement between Sociedade Nacional de Combustíveis de Angola - Empresa Pública (Sonangol, E.P.) and CIE Angola Block 21 Ltd and Sonangol Pesquisa e Produção, S.A. and Nazaki Oil and Gáz, S.A. and Alper Oil, Lda in the Area of Block 21/09 < http://downloads.openoil.net/contracts%2Fao%2Fao_Block-21-09_dd20100224_Risk-Service_CIE_Sonangol-P%26P_Nazaki.pdf > accessed 21 April 2019.

[1365] Graça and Lima, 'Oil Regulation' (n 1317).

In addition, there is also a surface fee of US$300 per square kilometre of the concession area and a training contribution to be paid by the associates of the National Concessionaire.[1366] Some concessions may attract 70% transactional petroleum tax.[1367] In PSCs, petroleum transaction tax is not deductible or not applicable per the terms of Article 44.[1368]

The taxation regime in the Angolan petroleum industry especially for E&P of petroleum contracted through a PSC is such that petroleum income tax (PIT) is imposed on the income of petroleum E&P companies or the operators/contractors. The PIT is set at the rate of 50%.[1369] However, PIT rate is set at 65.75% if the National Concessionaire has not entered "into association with any entity, and for business corporations, unincorporated joint ventures or any other type of association, and RSCs entered into with the National Concessionaire".[1370] In effect, this tax is the income tax that is imposed on companies' income generated from 'the exploration, development, and production Petroleum'. It also affects transactional items such as 'storage, sales, export and transportation of petroleum'.[1371] The assessment of the PIT is based on 'ring-fencing,[1372] which corresponds to the crude oil that has been produced net of the cost oil or

[1366] Petroleum Activities Law [2004], Art 52.

[1367] Petroleum Activities Law [2004], Art 48.

[1368] Petroleum Activities Law [2004], Art 44.

[1369] Petroleum Activities Law [2004], Art 41 (a).

[1370] Petroleum Activities Law [2004], Art 41(a).

[1371] Graça and Lima, 'Oil Regulation' (n 1317).

[1372] Petroleum Activities Law [2004], Art 5.

recoverable expense (which is deductible expense) and the share of the National concessionaire'.[1373]

The following taxes may also apply to service payments. These include 6.5% industrial withholding tax, 5% or 10% consumption tax on the acquisition of some services in the petroleum industry. At the same time, capital income payments such as interests and dividends attract rates of investment income tax ranging between 10% and 15%.[1374] The taxes, royalties and other charges and revenue sources generated from the fiscal and legal arrangements do generate huge sums of money that significantly contribute to the economic growth and development of Angola. But the overall income of each petroleum contract and based on the general petroleum regime rarely gets to 60% of the total petroleum income. Of course, with concessions that do not apply to PSCs, the tax rate is fixed at 70% for the PIT.[1375] But this is not widely used in Angola. At the same time, the computation of the concession-based regime is complex with derivatives that end up not yielding as much as the high rate of 70% would have sought to achieve in value.

Ultimately, no matter the permutations, whether in the PSC or the purely concession-based licenses, the value earned from the Angolan petroleum industry is far below the Norwegian petroleum model which generates up to 78% of net petroleum profit. Although the petroleum industry earns a lot for enhancing socioeconomic rights of Angolans,[1376] the petroleum legislation and contracts could

[1373] Graça and Lima, 'Oil Regulation' (n 1317).

[1374] ibid.

[1375] ibid.

[1376] OPEC, 'Angola facts and figures' (n 1358); OPEC, 'OPEC Monthly Oil Report' (n 1357).

have earned higher revenues for the country if stronger pillars of ROL and justice were sufficiently entertained by the legal framework.[1377]

Angola should endeavour to sign on fully to the EITI Principles and effectively implement the Precepts of the Natural Resource Charter 2014. These will effectively enhance the ongoing legal reforms to make the Angolan petroleum industry more transparent, trustworthy, accountable, competitive and investment friendly. These will not only increase confidence in private investors[1378] but also it will help in effectively harnessing the petroleum resources of Angola.[1379] Furthermore, such a move would provide investors a greater level of legal certainty when they are conducting petroleum business in Angola.[1380]

The new Angolan Concession Award Strategy for the 2019-2025 aims to overhaul the competitive and productive frame of the Angolan petroleum industry whereby the following targets are set:

- An increased discovery of hydrocarbons;
- Increasing competitiveness and encouraging fair return on investments in the petroleum industry;

[1377] James, 'Creating Capacities for Human Flourishing: An Alternative Approach to Human Development' in Spinozzi and Massimiliano, *Cultures of Sustainability and Wellbeing* (n 435) 28; Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66); Cass, *The Rule of Law in America* (n 309); Shihata, 'Legal Framework for Development (n 28).

[1378] Flávio G I Inocêncio, 'Benefícios Fiscais e Planeamento Fiscal' (2014) 3 ReDiLP – Revista do Direito de Língua Portuguesa 37.

[1379] Cameron and Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (n 330); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

[1380] ibid.

- Promoting foreign direct investment into the petroleum industry of Angola so as to increase 'local know-how and international governance practices'[1381] in Angolan petroleum industry; and
- Increasing knowledge in the petroleum geology of Angola and the petroleum potential thereto.[1382]

Even though it is not yet comprehensive enough, it is expected that when this strategy is complemented by the ongoing legal reforms, the Angolan petroleum industry will not only create more value for Angola but also establish the enabling environment and taxation system for the country. For now, in the face of extreme poverty that permeates most parts of Angola,[1383] there must be a sense of urgency on the part of Angolan authorities to design and implement legal and fiscal measures that can enable Angola to derive the maximum economic benefits from its impressive petroleum wealth. According to the World Bank, huge "pockets of the population live in poverty without adequate access to basic services".[1384] In the 2018 HDR by the UNDP, Angola was ranked 147 out of 189 Countries on the HDI with just 0.581 score in 2017.[1385]

[1381] Gonçalo Falcão and Norman Jacob Nadorff, 'Angola 2019-2025 New Concession Award Strategy' (Mayerbrown, 27 February 2019) < www.mayerbrown.com/en/perspectives-events/publications/2019/02/angola?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original > accessed 21 April 2019.

[1382] Concession Award Strategy for the 2019-2025; Presidential Decree No. 52/19 of 18 February 2019; Falcão and Nadorff, 'Angola 2019-2025 New Concession Award Strategy' (n 1381).

[1383] The World Bank, 'Overview' (The World Bank in Angola, last updated, 28 March 2019) < www.worldbank.org/en/country/angola/overview > accessed 25 April 2019.

[1384] ibid.

[1385] UNDP, 'Human Development Indices and Indicators' (n 31).

In the absence of the effective remedying instruments, socioeconomic rights such as adequate standard of living and right to development are being undermined.[1386] The question of justice also reasonably pops up because the current legal arrangements do allow more of the proceeds from the petroleum wealth, that ordinarily belongs to the Angolan citizens per Article 16 and PSNR, Article 1 and DRTD, Article 1(2), to stay with private entities (MNPCs and corrupt public officials) instead of being mobilised towards the greater good of harnessing the socioeconomic wellbeing of the ordinary Angolans.[1387]

To make the petroleum wealth in Angola a blessing rather than a curse, therefore, it is imperative that steps are taken to place ROL and justice at the forefront of reforming the legal and fiscal architecture of the petroleum industry. These should be geared towards adequately enhancing the socioeconomic rights of the Angolan people.[1388]

8.6 The Case of Ghana

8.6.1 Current petroleum E&P legislations in Ghana

The key legal instrument that currently drives the legal framework of petroleum E&P in Ghana is the Petroleum (Exploration and Production) Act, 2016 [Act 919]. Ndi asserted that Act 919 has overlaid 'a substantial *corpus juris* of legislative

[1386] Shihata, 'Legal Framework for Development (n 28); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' in Blake and others (eds), *Boundaries and Energy* (n 34); Shihata, 'The Role of Law in Business Development' (n 149).

[1387] The World Bank, 'Overview' (n 1383).

[1388] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66); Cass, *The Rule of Law in America* (n 309); Farlex, 'Rule of Law' (n 307); Shihata, 'Legal Framework for Development (n 28).

enactments which have collectively formed the legal framework that governs petroleum activities in Ghana's upstream petroleum industry'.[1389] In the light of this disposition, Act 919 could effectively be a consolidating statute replicating and reintegrating previous legislations such as PNDC Law 84,[1390] modifying and extending the focus of the petroleum E&P regime in Ghana.[1391]

Act 919 is a landmark legislation[1392] that is set out "to regulate petroleum activities and to provide for related matters"[1393] within 'every part of Ghana's jurisdiction whether in, under and upon its territorial land, inland waters, territorial sea, EEZ and the continental shelf of the country'.[1394] No matter where petroleum activities are carried out in the sovereign territory of Ghana, therefore, this law shall apply.

Petroleum activities in the territorial sea, EEZ and continental shelf[1395] are particularly imperative in the current discourse because the major petroleum activities in Ghana are conducted at offshore. This is especially because these jurisdictional areas of the country quite easily interact with international law – particularly, the international law of the sea which governs the interaction of states

[1389] George Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (2018) 36(1) Journal of Energy & Natural Resources Law 5.

[1390] The Petroleum Exploration and Production Act, 1984 (PNDCL 84).

[1391] ibid.

[1392] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1393] Petroleum (Exploration and Production) Act, 2016 [Act 919]; see Constitution of Ghana [1992], Art 257(6).

[1394] Petroleum (Exploration and Production) Act, 2016 [Act 919], s 1.

[1395] See territorial demarcations of the Sea in: United Nations Convention on the Law of the Sea [Montego Bay, 10 December 1982] 1835 UNTS 3 < https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1835-A-31363-Signature_Pages.pdf > accessed 21 April 2019.

in the sea.[1396] However, although there are some onshore petroleum prospects and deposits, they are currently on the margins. Of Course, per Section 2 of Act 919, the legislation seeks to:

> … provide for and ensure safe, secure, sustainable and efficient petroleum activities in order to achieve optimal long-term petroleum resource exploitation and utilisation for the benefit and welfare of the people of Ghana.[1397]

So, while Act 919 does take care of onshore activities and must be on the watch out for future major petroleum discoveries in order to holistically help achieve the objectives in section 2 of Act 919, the current concern takes vital notice of how Act 919 regulates the upstream petroleum E&P endeavour to enhance the achievement of the object thereto.

Key principles that can be highlighted in the object of Act 919 include health and safety, sustainability, efficiency, optimisation and positive societal impact of Petroleum Resources. For Ndi, it, therefore, suggests that the new petroleum law's 'guiding philosophy is to ensure safe, secure, sustainable and efficient development of petroleum resources, aimed at achieving optimal long-term

[1396] United Nations Convention on the Law of the Sea [Montego Bay 10 December 1982] 1835 UNTS 3; Rothwell and Stephens, *The International Law of the Sea* (n 687); Coalter Lathrop (ed), *International Maritime Boundaries* (Volumes I-VII) (BRILL 2016); Keyuan Zou (ed), *Global Commons and the Law of the Sea* (BRILL 2018); International Ocean Institute-Canada (ed), *The Future of Ocean Governance and Capacity Development: Essays in Honor of Elisabeth Mann Borgese* (BRILL 2018); Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2016); Lilian del Castillo (ed), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea* (Brill 2015).

[1397] Petroleum (Exploration and Production) Act, 2016 [Act 919], s 2.

exploitation of the petroleum deposits'.[1398] Essentially, petroleum resources in Ghana must be sustainably harnessed to enhance the socioeconomic wellbeing and prosperity of the Ghanaian people. This is supported by Article 257(6) of the 1992 Constitution of Ghana.

Indeed, the 1992 Constitution of Ghana provides the foundational legal frame for Act 919 and is superior to the latter and any other statute in the country. The petroleum ownership injunctions provided by the 1992 Constitution is expected to be especially highlighted and demonstrably protected in the provisions of Act 919 and any other petroleum or natural resources law in Ghana. In the light of Article 257(6)[1399] and Section 3,[1400] therefore, the title to petroleum in any part of the sovereign territory of Ghana "is vested in the President on behalf of and in trust for the people of Ghana". This implies that the president of Ghana, while holding this petroleum title in trust for the citizens, must endeavour to account to the Ghanaian people as to how these resources are being managed. This should be done in a transparent manner and in accord with constitutional injunction of ROL and justice.

Section 4 of Act 919, therefore, obliges that the petroleum resources must be managed in accordance with 'principles of good governance such as transparency and accountability and the object of Act 919' as stated beforehand.[1401] This is

[1398] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1399] The Constitution of the Republic of Ghana [1992].

[1400] Petroleum (Exploration and Production), 2016 [Act 919].

[1401] ibid, s 4.

respectively in line with Principles 5[1402] and 4[1403] of the Chatham House on good governance in the petroleum industry.[1404] The Natural Resource Charter 2014 also affirms that the governance of petroleum resources "requires decision makers to be accountable to an informed public".[1405] This implies that the public must be sensitised and made involved in the processes leading to the extraction of petroleum and that public accountability must be rendered thereto. Of course, even though transparency and accountability prevent corruption[1406] and reinforce socioeconomic rights, ROL and justice,[1407] the latter three should have also been distinctively highlighted in Section 4 of Act 919 that states the principles governing the management of the petroleum resources in Ghana. This is so because the 1992 Constitution of Ghana declares and affirms commitment to the ROL and justice as well as to protect and preserve fundamental human rights.[1408]

[1402] Transparency.

[1403] Accountability.

[1404] Glada Lahn and others, 'Good Governance of the National Petroleum Sector' (The Chatham House Document, 2007) < www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/ggdoc0407.pdf > accessed 23 April 2019; See Valérie Marcel (ed), 'Guidelines for Good Governance in Emerging Oil and Gas Producers 2016'(Research Paper, Chatham House, July 2016).

[1405] NRGI, 'Natural Resource Charter' (n 863), Precept 2.

[1406] Kolstad and Wiig, 'Is transparency the key to reducing corruption in resource-rich countries?' (n 853).

[1407] Shihata, 'The Role of Law in Business Development' (n 149) 1577; see Friedman, 'Legal Rules and the Process of Social Change' (n 255); Shihata, 'Legal Framework for Development (n 28); see also Sen, *The Idea of Justice* (n 404); Sandel, *Justice: What's the Right Thing to do?* (n 24); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

[1408] The Constitution of the Republic of Ghana [1992], Preamble.

The key legislations that complement Act 919 include: the Petroleum Revenue Management Act, 2011 [Act 815], which 'sets out the necessary framework for the collection, allocation, and management of petroleum revenue in a responsible, transparent, accountable and sustainable manner for the benefit of the citizens of Ghana in accordance with Article 36[1409] and for related matters';[1410] and the Income Tax Act of Ghana, 2015 [Act 896], which provides for "the imposition of Income Tax and for related matters"[1411] as amended by Act 907.[1412]

The main regulations that support the effective enforcement of the above mentioned legislations include: Petroleum (Local Content and Local Participation) Regulations, 2013 [L.I 2204], which sets out detailed modalities of effectively involving Ghanaians in undertaking petroleum activities; Oil and Gas Insurance Placement for the Upstream Sector, which outlines the relevant insurance provisions available for the actors in the petroleum industry;[1413] Petroleum Commission (Fees and Charges) Regulations, 2015 [L.I 2221], which detail the applicable fees and charges in the petroleum industry;[1414] and Petroleum

[1409] The Constitution of the Republic of Ghana [1992], Art 36.

[1410] Petroleum Revenue Management Act, 2011 [Act 815], Preamble.

[1411] See Income Tax Act of Ghana, 2015 [Act 896] < https://gra.gov.gh/wp-content/uploads/2018/11/INCOME-TAX-ACT-2015-ACT-896.pdf > accessed 23 April 2019.

[1412] Section 7, first schedule, and sixth schedule of Act 896 amended by Act 907: See Income Tax (Amendment) Act, 2016 [Act 907] < https://gra.gov.gh/wp-content/uploads/2018/11/Act-907.pdf > accessed 23 April 2019.

[1413] Ghana Petroleum Commission & National Insurance Commission, 'Protocol - Oil and Gas Insurance Placement for the Upstream Sector' < www.petrocom.gov.gh/wp-content/uploads/2018/12/OIL-GAS-INSURANCE-PLACEMENT-FOR-THE-UPSTREAM-SECTOR.pdf > accessed 12 April 2019.

[1414] Petroleum Commission (Fees and Charges) Regulations, 2015 [L.I 2221] < www.petrocom.gov.gh/wp-content/uploads/2018/12/0-Petroleum-Commission_-Fees-and-Charges.pdf > accessed 12 April 2019.

(Exploration and Production) (Measurement) Regulations, 2016 [L.I 2246], which sets out parameters for effective and efficient measuring of petroleum – ensuring that 'an accurate measurement and allocation of petroleum does form the accurate basis for determining revenue that is accrued to Ghana, a contractor, licensee or the corporation'.[1415] This provision serves distributive justice and is in accord with the ROL because it grants fairness to all the parties regarding the exact petroleum that is brought up the wellhead and what exact petroleum each of the parties receives.[1416]

Other petroleum regulations include: Petroleum (Exploration and Production) (Data Management) Regulation, 2017 [L.I 2257], which regulates data storage, access, transfer and usage; Petroleum (Exploration and Production) (Health, Safety And Environment) Regulations, 2017 (L.I 2258), which sets out rules on how to ensure maximum safety and health of actors and to protect environmental degradation; as well as the Petroleum (Exploration and Production) (General) Regulations), 2018 [L.I 2359], which gives general guide on licensing and tendering and related matters on petroleum activities which have not been effectively covered by Act 919 or other regulations.[1417]

[1415] Petroleum (Exploration and Production) (Measurement) Regulations, 2016 [L.I 2246], s 2.

[1416] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66); Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Gale Group, 'West's Encyclopaedia of American Law' (n 307); also see Rawls, *Justice as Fairness: A Restatement* (n 24); Hooker, 'Fairness' (n 66); Sandel, *Justice: What's the Right Thing to Do?* (n 24); Sen, *The Idea of Justice* (n 404); Fennell and McAdams, *Fairness in Law and Economics* (n 477); Maiese, 'Principles of Justice and Fairness' (n 24).

[1417] Petroleum Register, 'Upstream Petroleum Legislations' < www.ghanapetroleumregister.com/laws > accessed 12 April 2019; Ghana Petroleum

There are also Petroleum guidelines and models such as the Ghana Model Petroleum Agreement (MPA) and JV Guidelines. The JV Guidelines characterise 'a non-binding soft law that supplements the legally binding framework'.[1418] For example, Article 1.0 thereof provides that the intention of the JV Guidelines is 'to guide the upstream industry operators on the formation, structure and activities of JV companies'.[1419] The JV Guidelines mainly 'aspire to establish an enabling environment for effective indigenous participation in the Ghanaian petroleum industry'.[1420] Thus, the JV Guidelines[1421] are intended to support parties to know and follow the standard procedures and requirements in entering into a JV arrangement in the petroleum industry of Ghana – ensuring that local content is promoted.[1422]

The Ghana MPA of 2000 provides a standard draft framework contract that is used to guide Ghana and petroleum E&P companies in concluding petroleum contracts in the country. In the MPA,[1423] GNPC enters into association with petroleum E&P

Commission, 'Laws & Regulations' < www.petrocom.gov.gh/laws-regulations/ > accessed 12 April 2019.

[1418] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1419] ibid.

[1420] ibid.

[1421] Ghana Petroleum Commission, 'Guidelines for the Formation of Joint Venture Companies in the Upstream Petroleum Industry of Ghana: Promoting Local Content and Local Participation' (March 2016) < www.petrocom.gov.gh/wp-content/uploads/2018/12/JV-Guidelines.pdf > accessed 23 April 2019.

[1422] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1423] GNPC, 'Model Petroleum Agreement of Ghana' (17 August 2000) < www.petrocom.gov.gh/wp-content/uploads/2018/12/ghana_model_petroleum_agreement1.pdf> accessed 23 April 2019.

companies (contractor) through petroleum agreement with the right to the E&P of petroleum.[1424]

Ghana National Petroleum Corporation Law 1983, [PNDC Law 64] and Petroleum Commission Act 2011 [Act 821][1425] have respectively established the GNPC and the Ghana Petroleum Commission (GPC). These are the key petroleum E&P Institutions in Ghana. Whereas the former is involved in 'exploration and development of Ghana's petroleum resources',[1426] the latter is tasked "to regulate and manage the utilisation of petroleum resources and, coordinate the policies in the upstream petroleum sector".[1427] The GPC is the current regulator involved in contracting and licensing as well as monitoring of compliance.[1428] Hitherto, GNPC was in charge of both petroleum regulation and E&P as an NOC. These two institutions are overseen by the Ministry of Energy or any such Ministry charged with the responsibility for overseeing the regulation of the petroleum sector.

It can, therefore, be underscored that Act 919 is essentially a consolidating petroleum legislation in Ghana. This is partly so because a number of the principles which are captured by Act 919 do entertain relevant "concepts which had already been enshrined in previous legislative and regulatory instruments, or otherwise

[1424] ibid.

[1425] Petroleum Register, 'Upstream Petroleum Legislations'; Ghana Petroleum Commission, 'Laws & Regulations' (n 1417).

[1426] Ghana National Petroleum Corporation Law 1983, [PNDC Law 64].

[1427] Ghana Petroleum Commission, 'Organizational Brief' < www.petrocom.gov.gh/organizational-brief/ > accessed 12 April 2019.

[1428] ibid.

existed in contracting and licensing practice".[1429] This includes the hybrid system which Ndi has reckoned to 'pre-date the Act 919'. Some of the terms in the preceding legislation also tend to overlap in Act 919. Therefore, Act 919 has three elements.[1430] The first two elements are the antecedents and that of the examples of best practice from countries such as Norway. The third element is the aspirational dimension which has taken cognisance of looking ahead into the future rather than focusing only on the present experiences and that of the preceding petroleum E&P legislations and regulations.[1431]

However, the energy transition[1432] concept which foresees and presents a strategy for energy systems to change from fossil fuels like petroleum to zero-carbon later in the 21st Century,[1433] has not been effectively featured in Act 919 and complementary legislations in a way that clearly sets a revenue stream purposed on developing renewable energy systems in Ghana. The other critical challenge is how Ghana can eventually manoeuvre its way through the maze of uncertainties and 'the oil as curse nature' in Africa and to reverse "the regional trend, by confounding the resource curse syndrome which has become such an endemic

[1429] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389) 30.

[1430] ibid.

[1431] ibid.

[1432] Anais Guerry, 'A reflection on some legal aspects of decision control in the energy transition process: a comparison of France and Germany' in Jordi Jaria i Manzano, Nathalie Chalifour and Louis J Kotzé (eds), *Energy, Governance and Sustainability* (Edward Elgar 2016) 194.

[1433] See IRENA, 'Energy Transition' (International Renewable Energy Agency 2018) < www.irena.org/energytransition > accessed 24 April 2019.

feature of natural resources endowment in [SSA]".[1434] This will be the baseline of real test of greater success in a frontier petroleum market.[1435]

Ndi has observed that, for Ghana to overcome the very challenge, as just articulated, it must 'effectively implement the core principles of sustainability, good governance and utilisation of petroleum income for the benefit of every Ghanaian'.[1436] In particular, the good governance component which resonates with the ROL, justice and socioeconomic rights are tenets that must be effectively implemented. This is because, without these principal tenets, neither sustainability nor responsible use of the petroleum resources can be actualised. Even though Ndi argues that these imperatives are already integrated in the current petroleum legal framework,[1437] it is the argument of this thesis that improving standard of living of the Ghanaian people as an entitlement or legal right has not been clearly articulated in the current petroleum legal framework of Ghana. This is evidenced by the lack of effective integration of socioeconomic rights and ROL in Act 919 or in any of the complementary petroleum regulations. For instance, there is

[1434] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389) 31.

[1435] African Development Bank and the African Union, *Oil and Gas in Africa* (n 13); Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389) 5.

[1436] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1437] Ama Jantuah Banful, 'Ghana's Present Legal Framework for Upstream Petroleum Production' in Appiah-Adu Kwaku (ed), *Governance of the Petroleum Sector in an Emerging Developing Economy* (Gower 2013) 145.

inadequate respect for ROL in relation to the powers granted to the minister in charge of petroleum and the lack of accountability measures in place.[1438]

Any 'robust, effective and efficient petroleum legal framework is an obvious fundamental requirement' which must embed not just ROL and justice but that which also aspires to protect and promote socioeconomic rights. There is the need for continuous adjustment and consolidation of the petroleum legal framework in a way that not only 'reflects the aspirations, ethos and legislative ambitions of Act 919' but also that which reflects the best of industry practice in the petroleum industry.[1439]

8.6.2 Petroleum E&P licensing in Ghana

The petroleum legal regime in Ghana is characterised by the mixture of 'licensing procedures, royalty payments and production sharing. It is a kind of a hybrid system which countries such as Malaysia, Gabon, Vietnam and Pakistan had used before Ghana came on board as a major oil producing country.[1440] It appears to have been derived from the original PSC model in Indonesia. The idea of using the hybrid system is to maximise national benefits from the petroleum resources. Conceptually, the hybrid system is characterised by a blend of elements from 'the concession regime such as acreage fees; administrative licence/permit regime such as through the bidding process; and the PSC regime such as post-bidding

[1438] Act 919 [2016], s 10(4), (5), (9).

[1439] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1440] Ghadas and Karimsharif, 'Types and Features of International Petroleum Contracts' (n 904).

negotiated terms and conditions that are specific to each and every petroleum contract'.[1441]

Before a foreign company can effectively participate in the licensing process, it has to partner with an indigenous Ghanaian firm in a JV arrangement. At the same time, the indigenous Ghanaian firm is required to hold a minimum of 10% of the equity of the JV.[1442] Additionally, before a foreign firm is qualified to enter into a petroleum contract or a petroleum licence with the GNPC / government of Ghana, the foreign firm must ensure that the indigenous firm holds a minimum of 5% interest apart from the interest that is held by the GNPC.[1443] This seeks to reinforce the local content agenda.[1444] It is also a preliminary requirement that each petroleum E&P company acting as contractor must register with the GPC in order to obtain an annually renewable permit to undertake petroleum operations.[1445]

Entry into the petroleum industry in Ghana to explore, develop and produce petroleum is subject to 'a licence or petroleum agreement' that is granted to a petroleum company to 'conduct petroleum activities only in an open area'.[1446] That is, a petroleum area must be declared by the appropriate authorities (the minister in charge of petroleum in particular) as available for petroleum activities to be conducted thereupon before a petroleum licence can be issued out in accord with

[1441] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1442] Bob Palmer and Mick McArdle, 'Conducting oil and gas activities in Ghana' (Information sourced from Kimathi Kuenyehia and Sarpong Odame of Kimathi & Partners, CMS, 2017).

[1443] ibid.

[1444] ibid.

[1445] Act 919 [2016], s 24(1), s 31(1).

[1446] Act 919 [2016], s 5.

the petroleum laws and regulations.[1447] Note that, this provision is subject to Section 11 of Act 919 which grants special rights to the GNPC which may allow GNPC to conduct petroleum activities in an open petroleum area that is not covered by any licence or agreement. GNPC can only exercise the special rights upon the consent of the minister in charge of petroleum and the approval by the parliament of Ghana.[1448] This ensures the serving of best national interest where the GNPC has the needed competence to independently conduct E&P activities in an area where greater sense of probability for success can be articulated by the GNPC.

In consultation with the GPC, the minister in charge of petroleum is entitled to issue a reconnaissance licence to a person. This gives the contractors the exclusive[1449] or non-exclusive[1450] right to collect, process, interpret or evaluate petroleum data[1451] in the licensed area for a maximum period of three years.[1452] A petroleum agreement may be entered with the qualified licensee for the reconnaissance operations to detect petroleum presence.[1453]

In the beginning of the commercial petroleum production, as guided by PNDC Law 84, petroleum licences were granted based mainly on negotiation between the government of Ghana and GNPC on one hand and the petroleum E&P companies

[1447] Act 919 [2016], s 5.

[1448] Act 919 [2016], s 11.

[1449] Act 919 [2016], s 9(3).

[1450] Act 919 [2016], s 9(2).

[1451] Act 919 [2016], s 9(1).

[1452] Act 919 [2016], s 9(5).

[1453] Act 919 [2016], s 9(4).

on the other hand. Until Act 919 came into force, which has introduced greater competitiveness in licensing of E&P companies, the petroleum licensing regime in the upstream sector used to be more "of an open-door negotiated-deal type"[1454] which significantly conflicted with international best practice that generally tends to favour open competitive bidding regime which aligns with ROL. The international practice also recognises that before discovery of petroleum in commercial quantities that is worth attracting substantive investor interests, it is expected that the HS may have to be more flexible and generous in its licensing and, thus, could engage in negotiated type of deals that will unlock the oil potential before allowing for the competitive tendering regime to come in.[1455] So, the PNDC Law 84, which had governed the licensing regime before significant commercial discovery of petroleum, may have been reasonable enough for its adoption of the heavily negotiated type of licensing regime at the time. However, even upon coming into force of Act 919, negotiation[1456] is still being used, *albeit* not intensively in the petroleum contracting process.

To acquire petroleum E&P licence in the terms of Act 919 that is not subject to competition and heavily dependent on negotiation, the prospective contractor makes an application to the minister in charge of petroleum for either onshore or offshore petroleum block. Upon consideration of the application, an invitation could be extended to the applicant to come and inspect data on the petroleum

[1454] John Asafu-Adjaye, 'Oil Production and Ghana's Economy: What Can We Expect?' (2010) 4 Ghana Policy Journal 35.

[1455] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330); EITI, 'The global standard for the good governance of oil, gas and mineral resources' (n 1304).

[1456] Act 919 [2016], ss 10(5), 10(7), 10(9), (1012), 14(1) b, 94(2) l.

blocks that the GPC may make available thereto. If the applicant makes a successful presentation, a non-refundable fee is paid to the GPC.[1457]

Thereafter, the applicant submits a formal application to the minister in charge of petroleum requesting to acquire an interest or right to explore and produce petroleum on the selected petroleum block. Upon submission of the formal application, non-refundable fee will be paid by the applicant or the prospective contractor. At this point, the minister responsible for petroleum then convenes an evaluation committee to assess the merits of the formal application. The evaluation committee makes appropriate recommendations to the minister in charge of petroleum to consider. The minister in charge of petroleum goes to consider the recommendations and indicates whether the applicant is successful or not.[1458]

If the sector minister's consideration of the recommendations of the evaluation committee turns out to be unsuccessful, the sector minister is required to duly notify the applicant about the unsuccessful outcome. In the event that the applicant is successful, the sector minister is required to form a negotiation team that would sit with the applicant to negotiate the details of a petroleum agreement, while having the hindsight of the MPC of 2000. The sector Minister is duly informed about the outcome of the negotiations. Further consideration is given by the sector minister, the minister of justice and attorney general, the minister of finance, the minister of environment, science and technology, and any other relevant minister

[1457] Palmer and McArdle, 'Conducting oil and gas activities in Ghana' (n 1442).

[1458] ibid.

such as minister of natural resources and minister of local government, if it is onshore block that is being applied for.[1459]

If negotiations have been successful, petroleum agreement is drafted to form contractual relations between the applicant and the government of Ghana/GNPC. The cabinet is then required to deliberate on the draft petroleum agreement and possibly make approval thereto. The prospective contractor and the government and other parties forming a JV with the principal contractor then sign the cabinet-approved draft petroleum agreement. At this stage, parliament of Ghana is required, under Article 268(1),[1460] to have a look at the signed draft petroleum agreement between the parties and ratify it. Parliament can choose to cause amendments thereto or reject it entirely if the parliamentarians find something significantly flawed about the signed draft petroleum agreement.

It is rare to experience the latter in the current architecture of parliament where majority members of parliament that forms government always have their way and so would hardly decide to completely reject such an important document from the minister in their government. But amendments are always possible on this score since a degree of tolerance and acceptance is given to the views of the minority and majority members of parliament. For instance, when the Petroleum Contract between GNPC and AGM went to parliament in 2013, the parliamentarians were said to have made some changes to Article 21(2).[1461] It was also reported that the 2019 Amended Contract between AGM and GNPC, as

[1459] ibid.

[1460] The Constitution of the Republic of Ghana [1992], Art 268.

[1461] See Agreement between the AGM Petroleum Ghana Limited, Ghana National Petroleum Corporation, and GNPC Exploration and Production Company Limited, in respect of South Deepwater Tano Contract Area (n 983).

above, was considered by parliament of Ghana in May 2019 but a condition was given that the minister of energy responsible for petroleum should go back and renegotiate the provision relating to the additional or paid participating interest of GNPC of 3%.[1462]

It would be noticed that the process of procuring petroleum contract, as just described above, appears elaborate with some element of transparency, checks and balances as well as collaboration in accord with some degree of ROL. However, everything is just around the minister in charge of petroleum. The minister convenes the evaluation panel – so will likely, in context of predominance of polarised public sector, favouritism and corruption, choose their favourite negotiation team members or those who will go by their dictates or serve their personal interests. If all is done, the minister considers rejecting or to accept the recommendations of the negotiation team.

The other ministers which the petroleum minister is required to consult with are likely not to go against the wishes of the latter or even if they do, it is unlikely that the petroleum minister cannot get it through to parliament and get it ratified, since the minister's submissions would have had the blessing of the president of the Republic. However, Section 10 (5) of Act 919 permits the use of this negotiation medium when the minister responsible for petroleum "determines that it is in the public interest for that area to be subjected to a petroleum agreement" if public tender process has not attracted an investor for an agreement to be reached thereon. Also, Section 10(3) indicates that:

[1462] Myjoyonline.com, 'Parliament orders Amewu to re-negotiate South Deepwater Tano oil deal' (4 May 2019) < www.myjoyonline.com/politics/2019/may-4th/parliament-orders-amewu-to-re-negotiate-south-deepwater-tano-oil-deal.php > accessed 5 May 2019.

> … the Minister [in charge of Petroleum] may, in consultation with the Commission, determine that a petroleum agreement may be entered into by direct negotiations without public tender, where direct negotiations represent the most efficient manner to achieve optimal exploration, development and production of petroleum resources in a defined area.[1463]

Precedent to the promulgation of Act 919 in 2016, the PNDC Law 84, which was mainly a petroleum contractual regime that was anchored on payment of royalty petroleum and production sharing, actually had more negotiations and, therefore, more flexibility. Act 919 has minimised negotiations and added the element of pre-contractual bidding system. What this does usher in is an element of the new petroleum regime which Ndi described as "an administrative licensing component which [effectively] serves the function of pre-qualification for the second phase which comprises a contractually negotiated … [PSC]".[1464] These underlie the hybrid nature of Ghana's petroleum regime.

The danger with negotiations on petroleum contracts is that private interests may override public interest in a country where Corruption Perception Index[1465] is relatively high especially amongst the political leaders, who obviously spearhead

[1463] Petroleum (Exploration and Production) Law, 2016 [Act 919], s 10(9).

[1464] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389) 5; See also Colin Turpin, *Public contracts* (International encyclopedia of comparative law) (Nijhoff 1982); Arthur Taylor Von Mehren (ed), *International Encyclopedia of Comparative Law: Contracts in General* (Volume VII/2, Mohr Siebeck 2008).

[1465] In 2018, for instance, Ghana was ranked 78 out of 180 Countries, with a score of 41/100 (i.e. a fail) in the Corruption Perceptions Index; See Transparency International, 'Ghana: Corruption Perceptions Index' < www.transparency.org/country/GHA > accessed 23 April 2019; see also Transparency International, 'Corruption Perceptions Index 2018' (n 1264).

the negotiation process. The petroleum E&P law actually mandates the minister in charge of petroleum to be the direct representative of Ghana in the negotiation and conclusion of petroleum contracts – of course, with participation of GNPC and in consultation with the GPC. Therefore, apart from a special consideration to promote local content and/or to examine a clear generous offer from a petroleum company to enter into unchartered waters or terrains involving excessive risks where negotiation reasonably appears plausible, a competitive process benchmarked on a designed higher national gain is pretty much a persuasive proposition.

In countries where systems and institutions effectively work and office holders can independently oppose wrongdoing, this process is likely to deliver good results. But a country like Ghana where there is a lot of political patronage and officials usually go with the tide,[1466] a process involving negotiation and elements of authoritarianism should not be countenanced or should only be limitedly tolerated.

It is important to underscore, however, that Section 10(3) of Act 919 gives priority option to competitive process by stating that petroleum agreements "shall only be entered into after an open, transparent and competitive public tender process".[1467] So, the tendering process begins by the minister in charge of petroleum advertising and inviting prospective petroleum E&P companies to put in their bids. Subsection 7 of Act 919 states that prospective petroleum E&P companies or licensees that intend to 'submit a bid or participate in negotiations must first present to the minister in charge of petroleum a prescribed expression of

[1466] Petr Kopecký, 'Political Competition and Party Patronage: Public Appointments in Ghana and South Africa' (2011) 59(3) Political studies 713.

[1467] Petroleum (Exploration and Production) Law, 2016 [Act 919], s 10(3).

interest'.[1468] In the event that more than one prescribed expression of interest is received by the minister of petroleum, Subsection 8 requires that "a tender process in accordance with Subsection (3) shall be undertaken".[1469]

Essentially, licence of upstream petroleum operations is granted through a process that starts with a bidding process that is more like the permit/licensing procedure provided for by the concession regime. Prequalification or preselection criteria usually consider competences such as, financial capability, technical expertise and industry experience – the first two very superior. During the licensing process, key fiscal provisions include royalty, participating interest and rental fees of Petroleum Area or Acreage. Successful bids in the licensing process are now empowered to serve as the platform on which a contractually negotiated PSC is procured or concluded. Before a PSC can be concluded, however, there has to be a JVC that is executed between the MNPC and an indigenous Ghanaian Company in partnering arrangement. The JV Guidelines and the MPA do provide the required guidance and the principal parameters respectively for the JVC and PSC. Thus, if there is a successful bid in the public tendering process, it is a condition precedent for the successful company to enter into a JVC with a partnering local company to secure a licence. Therefore, the JVC relates with the licensing system by way of the vehicle the JVC provides for a key licensing condition to be actualised. Without JVC between an MNPC and an indigenous Ghanaian Company, for instance, a PSC is not required to be concluded.

Therefore, upon coming into force of Act 919, *albeit* limited, a competitive tendering regime has been set. The first licensing round, however, only took place

[1468] Act 919 [2016], s 10(7).

[1469] Act 919 [2016], s 10(8).

in 2018.[1470] Major MNPCs participated in this round, including "Tullow Oil, Total, ENI, Cairn, Harmony Oil and Gas Corporation, ExxonMobil, CNOOC, Qatar Petroleum [QATPE.UL], BP, Vitol [VITOLV.UL], Global Petroleum Group, Aker Energy, First E&P, Kosmos, Sasol and Equinor"[1471] whereof 60 applications were submitted in the round. Out of the 60 applications received, two were disqualified to be considered and deemed invalid because 'they were for a block that has been reserved for the GNPC'.[1472] What this means is that, by far, many of the petroleum contracts that had been in force before the first licensing round and are currently in force did not go through an open licensing round other than closed tendering process and negotiations.

Indeed, at Section 10(4) thereof, the sector minister may, notwithstanding Section 10(3) regarding competitiveness, state reasons and decide that a petroleum agreement will not be entered into even after the prescribed tender process is followed and concluded. There does not appear to be a clear legal right available to applicants to effectively protest against the reasons given by the sector minister refusing to enter into a petroleum agreement after the public tendering process. This disposition does not resonate with the spirit of ROL, neither will it attract the appreciation of procedural justice. There has to be a robust and transparent mechanism for remedies to be sought against decisions

[1470] For documents relating to this 1st Open Round, see Ministry of Energy (Republic of Ghana), 'Ghana 1st Oil & Gas Licensing Round' < www.ghanalr2018.com/downloads > accessed 23 April 2019.

[1471] Lefteris Karagiannopoulos, 'Ghana's first oil exploration licensing round attracts global majors' *Reuters* (Athens, 24 December 2018) < www.reuters.com/article/us-ghana-oil-exploration/ghanas-first-oil-exploration-licensing-round-attracts-global-majors-idUSKCN1ON0XQ > accessed 23 April 2019.

[1472] ibid.

taken by the minister in the tendering process. This should be clearly stated in the law to avoid uncertainties. According to NRGI,[1473] public competitive tendering process is:

> … preferable since competitive bidding should secure greater value for the country and auctions can also help overcome information deficits that the government may have relative to international companies. [They] are … inherently more transparent than direct negotiations, helping to mitigate the risk of inappropriate companies or individuals receiving exploration and extraction rights.[1474]

One of the key requirements of harnessing transparency in the petroleum industry of Ghana is that, the invitation to tender and invitation to engage in direct negotiations are required to be published in, at least, two state-owned national newspapers (or other medium of public communication), and in the Gazette.[1475]

Another key transparency measure in the petroleum law is the requirement that the GPC must establish and maintain a Petroleum Register'.[1476] This measure largely has a way of attracting MNPCs to come into the petroleum industry in Ghana due to the level of confidence it brings. However, sometimes, it can stir unnecessary public agitation that could wrongfully affect the reputation of responsible MNPCs, who mainly are doing their best efforts to make reasonable profits. This happens when the public is feeding on uninformed or self-serving

[1473] NRGI, 'Natural Resource Charter' (n 863), Precept 3.

[1474] ibid.

[1475] Act 919 [2016], s 10(6).

[1476] Act 919 [2016], s 56.

positions of some CSOs, politicians or sections of the public who may not explain petroleum contracts holistically to the general public. Recently, there have been many agitations against AGM Petroleum and Aker Energy that respectively were liaising with the government of Ghana on Aker's Plan of Development (POD)[1477] and that of AGM Petroleum Ghana's contract review.

For starters, it is the contention of this thesis that all the petroleum contracts currently in operation are not fair enough and, therefore, not in accord with complete distributive justice. This is mainly informed by the relative income petroleum sector generates vis-à-vis the income earned by the petroleum E&P companies.[1478] But it is worthwhile to ensure that in seeking for fair deals in the petroleum industry by the citizens, it should not be made to appear that the petroleum companies are criminals or outright cheats, especially based on incomplete or wrong information. This can expose the companies to public ridicule, at the minimum, and their reputation may be dented, even if their staff are not put in harm's way by radically skewed pronouncements.

But then again, two superior benefits, which, in this case, are more real than imagined are that; one, if after all the debates the truth comes out that the accused companies have a clean slate, their reputation is likely to soar, and they may gain more market value. But if the accusations turned to be proved, the

[1477] This was said to have been rejected by the Government, after heat brought upon the Ministry of Energy for the POD to be rejected. The Minority NDC in Ghana's Parliament and CSOs such as IMANI Africa took centre stage in these agitations; see Naa Sakwaba Akwa, 'Energy Ministry's response to Aker Energy deal unsatisfactory - IMANI' (Myjoyonline.com, 26 April 2019) < www.myjoyonline.com/news/2019/April-26th/energy-ministrys-response-to-aker-energy-deal-unsatisfactory-imani.php > accessed 28 April 2019.

[1478] Cotula, *Investment contracts and sustainable development* (n 125); Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66).

companies will be sanctioned by prescribed means and the public will be served the agony of being cheated out. Secondly, the proactive CSOs, citizens and MPs, even if they throw out half-truths or falsehood, are a useful feature of putting government on its toes to be more accountable and responsible to all residents in a resource-rich country.[1479]

So, in effect, transparency must be holistic to ensure that all the necessary information is made available to the public regarding petroleum legislation, contracts and related instruments. In a comment to the government of Ghana during the consideration of the Petroleum Bill in 2015, the NRGI submitted convincingly that Section 56 on Public Register should contain not just the instruments as was first executed but should also clearly require that amendments to the contracts, their appendages and beneficial owners must also be published so that the public can appropriately track the progress and consistency as well as integrity and legitimacy of the instruments so published.[1480]

As it stands now, the petroleum contracts are being published in the petroleum register, at least, 17 petroleum contracts[1481] and appendages have been

[1479] Paul Collier, 'Is aid oil? An analysis of whether Africa can absorb more aid' (2006) 34(9) World Development 1482; Ian Gary, 'Ghana's big test: Oil's challenge to democratic development' (Oxfam America / ISODEC) < www.oxfamamerica.org/static/media/files/ghanas-big-test.pdf > accessed 11 April 2019.

[1480] Natural Resource Governance Institute, 'NRGI Comments on Ghana's Petroleum (Exploration and Production Bill)' (6 July 2015) < https://resourcegovernance.org/sites/default/files/nrgi_comments_GhanaDraft20150714.pdf > accessed 23 April 2019; See also GHEITI, 'Overview' (Last updated, 5 April 2019) < https://eiti.org/ghana > accessed 23 April 2019.

[1481] The Contracts published in 17 Contract Areas are: Deepwater Tano, West Cape Three Points, Offshore Cape Three Points, Deepwater Tano/Cape Three Points, Cape Three Points Block 4, Central Tano Block, Deepwater Cape Three Points West Offshore, East Cape Three Points, East Keta Block, Expanded Shallow Water Tano Block, West Cape Three Points Block 2, Offshore

published.[1482] Even though things such as the beneficial owners do find space and favour in the consideration of the Petroleum Register under Section 56 of Act 919, as expatiated in the Petroleum (Exploration and Production) Regulation 2018, (L.I 2359),[1483] the web hosting of the Petroleum Register has still not made detailed beneficial owners available to the public. The GPC should endeavour to make all details of beneficial ownership of petroleum contractors and licensees available to the public online as prescribed by the petroleum law.

Even at Section 20(1) (p) of the Petroleum Regulations 2018, what constitutes beneficial ownership has not been clearly articulated. Therefore, the GPC may choose to publish anything that may not meet the international standards of beneficial ownership. Even though beneficial ownership is defined in Section 80 of the Petroleum E&P Regulation 2018, the use of 'significant control, substantial control and substantial economic interest or benefits' thereof as qualifying threshold indicators for establishing ultimate beneficial links with individuals does appear to lower the threshold in terms of tracing of any link to someone who can be reasonably believed to have control and ownership links with a petroleum company.[1484] In effect, these qualifiers can form an escape route for beneficial owners to feign culpability. If beneficial ownership is well articulated and executed, it will enable the public to be able to pierce the corporate veil and get to know

South-West Tano Block, Onshore/Offshore Keta Delta Block, South Deepwater Tano, South West Saltpond, Shallow Water Cape Three Points, Offshore Cape Three Points South; see Ghana Petroleum Commission, 'Contract Areas' (n 131).

[1482] See the 17 Contract Areas which have had key information of the Contracts, Contractors and Operators Published at: Ghana Petroleum Commission, 'Contract Areas' (n 131).

[1483] Petroleum (Exploration and Production) Regulation 2018, (L.I. 2359), s 20 (1) p.

[1484] LI 2359 [2018], s 80.

politicians who may be hiding under the corporate image to front for their companies during petroleum contracting.[1485]

Beneficial Ownership imperative is a highly recommended practice to mitigate corruption, tax evasion, money laundering and such related financial crimes which the petroleum industry in Ghana is not immune to. For instance, the Fourth Anti-Money Laundering Directive of the EU[1486] has made mandatory for all EU Member States the publication of Registers not just of beneficial owners but also ultimate beneficial owner (UBO) register of corporations.[1487] The EITI,[1488] Natural Resources Charter[1489] and Chatham House Guidelines for Good Governance[1490] as well as Open Ownership initiative[1491] have all recognised publication of beneficial ownership as a key instrument for enhanced transparency that can help fight misconduct by public officers and the private actors that tend to connive with the former. Ghana has endeavoured, through the implementation of the new

[1485] EITI, 'Beneficial ownership: Revealing Who Stands Behind the Companies' < https://eiti.org/beneficial-ownership > accessed 11 April 2019.

[1486] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC Official Journal of the European Union L 141/73, Arts 3(6), 30, 31 < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ%3AJOL_2015_141_R_0003 > accessed 24 April 2019.

[1487] ibid.

[1488] EITI, 'Beneficial ownership: Revealing Who Stands behind the Companies' (n 1485).

[1489] NRGI, 'Natural Resource Charter' (n 863), Precept 3.

[1490] Marcel (ed), 'Guidelines for Good Governance in Emerging Oil and Gas Producers 2016'(n 1404).

[1491] Open Ownership, 'What is beneficial ownership?' < https://standard.openownership.org/en/v0-1/primer/whatisbo.html > accessed 11 April 2019.

petroleum legal regime, to enhance transparency measures in its petroleum industry by adopting the above international transparency measures. The country could, of course, do more.

In terms of tenure, Act 919[1492] grants a maximum duration of 25 years to a petroleum E&P agreement. This is subject to extension of the valid period upon negotiation by the parties. Extension is plausible in a situation where, for instance, petroleum production from a given field has been projected to exceed the original duration of the petroleum contract.[1493] However, if the Minister in charge of petroleum feels strongly that there is the need for a new petroleum contract to be concluded in that field upon expiration of the original duration thereof, the minister is entitled to do so upon consultation with relevant stakeholders such as the GPC and the GNPC. Any new contractual arrangement thereof must be approved or ratified by the Parliament of Ghana.[1494] This arrangement allows the contractor the needed latitude to be able to maximise the full benefits for itself and the state.

The maximum period allowable for the exploration of petroleum is seven years.[1495] The initial exploration period is three years extendable to the maximum period thereof, and subject to negotiation. The sector minister is entitled to extend the period of exploration beyond the effective seven years only in consultation with the GPC and conditional to discovery of petroleum in the last year of the period of exploration or due to prescribed exceptional situations.[1496] This short duration and

[1492] Act 919 [2016], s 14 (1).

[1493] Act 919 [2016], s 14(2).

[1494] Act 919 [2016], s 14(3).

[1495] Act 919 [2016], s 21(1).

[1496] Act 919 [2016], s 21(5).

possibility for extension is to ensure seriousness in putting the petroleum block to productive use and allowing for continuation of exploration to eventually discover petroleum if initial evidence suggests that to be the case.

Assigning, transfer or disposal of rights and/or interests of a contractor is only permissible upon the consent by the sector minister to a written request by the contractor. Interestingly, per Section 18 of Act 919, pre-emptive right has been granted to GNPC to acquire the petroleum interest that is to be disposed of by the contractor.[1497] This means that, when a contractor wishes to dispose of its interest covered by a petroleum contract, the contractor may enter into a petroleum agreement to dispose of it but must immediately inform the petroleum commission, the GNPC and the sector minister of the consideration in such an agreement.

Upon notification of the consideration put forward, the GNPC "shall have a pre-emption right to acquire the interest on the same terms as agreed with the potential buyer".[1498] Up to 90 days are given to GNPC to elect to exercise this pre-emptive right after notification by the contractor.[1499] In the light of restorative justice, it is only natural that the GNPC or the state is given the first chance to retake the interest take it had transferred to the MNPC. Therefore, the right of pre-emption is logically derived from justice and must be protected in circumstances like these.[1500]

[1497] Act 919 [2016], s 18(1).

[1498] ibid.

[1499] Act 919[2016], s 18(4).

[1500] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Maiese, 'Principles of Justice and Fairness' (n 24).

Per Section 32[1501] and Article 14,[1502] the nature of Ghana's current petroleum regime can be effectively defined within the frontiers of a hybrid system, in which some bespoke special provisions relating to natural gas abound. These provisions are in respect of the production and disposal of associated natural gas. It is instructive to note that the kinds of hybrid system used in countries like Nigeria, Angola and Bangladesh do not have specific obligations on production and disposal of associated natural gas. This results in the flaring of the gas which gets to harm the environment.[1503]

One of the key highlights that have provided a distinction between the Ghanaian petroleum legal regime and other frontier petroleum E&P markets in SSA is the kind of enhanced degree of transparency it has integrated into its legal, regulatory and institutional framework. This is achieved by engaging the public to participate in policy formulation and implementation in the upstream sector. CSOs[1504] are particularly very active in the monitoring of activities of the industry players in the upstream sector.[1505]

8.6.3 Realising value from petroleum E&P in Ghana

Ghana's production level of oil per day is not yet as high as Angola and Nigeria. About 200,000 barrels of oil is produced per day in Ghana, whereby the Jubilee

[1501] Act 919 [2016], s 32.

[1502] MPA [2000], Art 14.

[1503] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1504] For instance, see Natural Resource Governance Institute, 'NRGI Comments on Ghana's Petroleum (Exploration and Production Bill)' (n 1480); see also GHEITI, 'Overview' (n 1480).

[1505] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

field produces about 100,000 barrels of oil per day.[1506] The rest is distributed amongst the other fields including TEN and Sankofa[1507] Gye Nyame.[1508] This makes jubilee field the major oil producing field in the country. Based on the geological composition and available seismic data, there is a huge potential of major petroleum discoveries in Ghana.[1509] A couple of big MNPCs have already expressed confidence in the Ghana's petroleum industry by means of their participation in the 1st bidding round in 2018 and the agreements that have already been signed between these MNPCs to explore and produce petroleum.[1510]

Policy makers in Ghana have a vision to make the country 'a petroleum hub for West Africa by drawing up plans to establish four oil refineries that would each have a production capacity of about 150,000 bopd in the next 12 years'.[1511] If this is materialised, it would really support in harnessing the petroleum wealth. For now, the Tema Oil Refinery[1512] is the only Oil Refinery in Ghana. It is processing about 25,000 barrels per steam day (bpsd) of Oil,[1513] which is deemed to be

[1506] Karagiannopoulos, 'Ghana's first oil exploration licensing round attracts global majors' (n 1471).

[1507] Ghana National Petroleum Corporation, 'First Flow of Oil from the Sankofa Gye Name Oilfields' (7 July 2017) < www.gnpcghana.com/news27.html > accessed 13 May 2018.

[1508] Ghana National Petroleum Corporation, 'Our Business - Oil & Gas Marketing' (n 131).

[1509] Karagiannopoulos, 'Ghana's first oil exploration licensing round attracts global majors' *(*n 1471).

[1510] ibid.

[1511] Tema Oil Refinery (TOR), 'Company Profile' < www.tor.com.gh/about-tor/company-profile/> accessed 13 January 2018.

[1512] ibid.

[1513] Karagiannopoulos, 'Ghana's first oil exploration licensing round attracts global majors' (n 1471).

operating far below the capacity of the refinery with "a 45,000 bpsd capacity Crude Distillation Unit".[1514]

NORAD has estimated that 'Ghana has the fifth-largest oil reserves and sixth-largest natural gas reserves in Africa'.[1515] What this means is that Ghana is one of the best 10 forerunners in petroleum wealth in the region. This is expected to be reflected in the socioeconomic wellbeing or standard of living of the Ghanaian people.[1516] It all depends on the revenues generated from the petroleum resources and how best the petroleum revenues are utilised to avoid the resource curse, to be in tandem with distributive justice, and to be in accord with the ROL. The focus is first on how best to substantially generate the petroleum revenues in the light of these imperatives.[1517]

Act 919 [2016] is a fiscal-based system characterised by minority state participation with minimum initial carried interest of 15%[1518] for the GNPC on exploration and development,[1519] optional production participation stake for

[1514] TOR, 'Company Profile' (n 1511).

[1515] Norad, 'The Oil for Development programme in Ghana' (Last updated, 27 September 2018) < https://norad.no/en/front/thematic-areas/oil-for-development/where-we-are/ghana/> accessed 24 April 2019.

[1516] AfDB, *African Economic Outlook 2019* (n 1006).

[1517] Cass, *The Rule of Law in America* (n 309); NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330); EITI, 'The global standard for the good governance of oil, gas and mineral resources' (n 1304).

[1518] The foundational contracts mainly from the Jubilee Fields have 10% minimum carried interest for the GNPC. Article 2(4) of the MPA prescribes that the initial carried interest of GNPC in the petroleum fields shall be 10% while GNPC's initial interest in all production operations shall be paid interest. This is no longer the case as Act 919 has changed the 10% to 15%.

[1519] Act 919 [2016], s 10 (14) a.

GNPC,[1520] corporate income tax, royalty, and some minor charges. With the optional participation stake, GNPC has the right to acquire paid participating interest as set out in the petroleum contract.[1521] The minimum optional paid participation stake should be fixed at the minimum of between seven and ten instead of set against only negotiation[1522] to earn that right.

This right can be "exercised within a specified period of time following the declaration of commercial discovery".[1523] Such additional participation cannot be used in exploration activities. It "shall be a paying interest in respect of costs incurred in the conduct of petroleum activities".[1524] The participation of GNPC in the petroleum agreements enables it to discharge the obligations of the government of Ghana, thus, representing the interest of the Ghanaian people.

The fiscal regime in the petroleum industry of Ghana entails the application of four principal legal instruments, namely: The Revenue Administration Act, 2016 [Act 915], the Income Tax Act of Ghana, 2015 [Act 896], the Petroleum (Exploration and Production) Act, 2016 [Act 919], and the petroleum contracts between the contractors and the GNPC. From these instruments, the main taxes in the Ghanaian petroleum industry are corporate taxes such as income tax and capital gains tax.[1525] Sections 85 to 89 provide for the governing of the fiscal regime of

[1520] Act 919 [2016], s 10 (14) b.

[1521] ibid.

[1522] ibid.

[1523] ibid.

[1524] ibid.

[1525] Act 919 [2016], s 87.

petroleum E&P operations in Ghana.[1526] They effectively establish "consolidating measures that affirm the fiscal arrangements contained in previous legal instruments"[1527] including the Petroleum Income Tax Law, 1987 [PNDC 188] and the Petroleum Commission (Fees and Charges) Regulations, 2015 (LI 2221).[1528] In essence, except when petroleum E&P companies are exempted in a petroleum contract, all companies in the petroleum industry are expected to pay the corporate tax.

According to the income tax law 2015, petroleum E&P companies are liable to pay 35% corporate income tax.[1529] This 'is applied on the chargeable income that has been earned from the petroleum activities by the petroleum contractor'.[1530] This rate appears to be reasonable since corporate income tax for other industries in the economy is 25%. But in the best scheme of things, this rate appears low. This is because, as long as petroleum companies make profit, the companies must benefit but the Ghanaian people must benefit more because it comes back to

[1526] Act 919 [2016].

[1527] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1528] Francis Mensah Sasraku, 'Petroleum Economics-Ghana's Petroleum Tax Regime and its Strategic Implications' in Kwaku Appiah-Adu (ed), *Governance of the Petroleum Sector in an Emerging Developing Economy* (Gower 2013)163; Ernest Aryeetey and Ishmael Ackah, The boom, the bust, and the dynamics of oil resource management in Ghana (WIDER Working Paper 2018/89 United Nations University, UNU-WIDER, August 2018)< www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2018-89.pdf > accessed 24 April 2019; Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1529] Income Tax Act of Ghana, 2015 [Act 896].

[1530] EY, 'Global oil and gas tax guide' (June 2018) < www.ey.com/Publication/vwLUAssets/ey-global-oil-and-gas-tax-guide/$FILE/ey-global-oil-and-gas-tax-guide.pdf > accessed 23 April 2019; see GHEITI, 'Overview' (n 1480).

support the whole of society which includes the companies as well.[1531] This conscientiously attracts distributive justice.[1532]

Royalties are also paid by petroleum E&P companies in kind except when written cash request by the minister in charge of petroleum is made.[1533] The royalty comes in the form of "gross volume of petroleum produced and saved[1534] and not utilised in petroleum activities from each field".[1535] The calculation of the petroleum portion is done on "gross daily production rates without regard to any prior deductions".[1536] The exact percent of royalty is reached based on the outcome of negotiation between the government of Ghana and the petroleum E&P company in the petroleum agreement.[1537]

Royalty in the petroleum contracts that have been signed, by far, between contractors and GNPC usually range from '3% to 12.5%'[1538] of petroleum. Specifically, it is between 3% to 10% for gas as well as 4% and 12.5% for oil production.[1539] In the mining sector, however, royalty tax is fixed at five percent

[1531] Carole Nakhle, *Petroleum Taxation: Sharing the Oil Wealth: A Study of Petroleum Taxation yesterday, today and tomorrow* (n 1087).

[1532] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Maiese, 'Principles of Justice and Fairness' (n 24).

[1533] Act 919 [2016], s 85 (3).

[1534] Act 919 [2016], s 85(1).

[1535] Act 919 [2016], s 95.

[1536] ibid.

[1537] Palmer and McArdle, 'Conducting oil and gas activities in Ghana' (n 1442).

[1538] EY, 'Global oil and gas tax guide' (n 1530).

[1539] Joe Amoako-Tuffour and Joyce Owusu-Ayim, 'An Evaluation of Ghana's Petroleum Fiscal Regime' (2010) 4 Ghana Policy Journal 7.

ever since it was reviewed in 2010.[1540] The range of the rate of royalty for petroleum is too wide and can be a source for breeding corruption in a country with high political patronage.[1541] It also increases administrative burden.

There are also applicable annual fees[1542] and permit fees payable. But these are marginal. Annual acreage (or surface rental) fee[1543] and bonus payments[1544] as well as additional oil entitlement[1545] are also part of the revenue streams for Ghana in the upstream sector. These streams of revenue are not straightforward as they involve negotiated settlements and complex calculations. They may also be regarded as marginal which, nonetheless, require better clarity than is currently obtained in Act 919.[1546]

Ghana has been building the petroleum legal framework for years, at least since 1983, but the country does not still appear 'to be fully prepared'[1547] due to the lapses in the legal regime and the implementation thereof. The opportunity to tactically link the laws, regulations and institutions in the petroleum transaction chain in order to drive substantial investment flows tends to be evading the authorities.[1548] There is still some degree of inadequacy with respect to the

[1540] ibid.

[1541] Kopecký, 'Political Competition and Party Patronage: Public Appointments in Ghana and South Africa' (n 1466) 713.

[1542] Act 919 [2016], s 86.

[1543] Act 919 [2016], s 86.

[1544] ibid, s 88.

[1545] ibid, s 89.

[1546] EY, 'Global oil and gas tax guide' (n 1530).

[1547] Steve Manteaw, 'Ghana's EITI: Lessons from Mining' (2010) 4 Ghana Policy Journal 96-105.

[1548] Asafu-Adjaye, 'Oil Production and Ghana's Economy: What Can We Expect?' (n 1454).

protection which the current petroleum laws avail to rights of both citizens and investors. In particular, ownership rights of the citizens are not fully protected. Also, the right of investors to fair competition and unimpeded investment has, somewhat, been undermined by the petroleum regulatory framework.[1549]

With all its natural resources such as petroleum deposits which it has exploited for years, Ghana is still a lower middle-income country – simply a poor country with just US$1,641.487 GDP per capita income in 2017.[1550] This amount is far below[1551] the per capita income for Ghana's 'independence' counterparts such as South Korea, Singapore and Malaysia. The president of Ghana was, therefore, right to raise concerns about the low per capita income in Ghana.[1552]

This does not mean that Ghana has not benefited from its petroleum wealth. For instance, the emergence of the petroleum industry in Ghana has had some positive impact on employment and economic growth through the investments and marketing activities in the upstream and downstream chain. In the last quarter of

[1549] Desta, 'Competition for Natural Resources and International Investment Law (n 15).

[1550] World Bank, 'GDP per capita (current US$)' < https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=GH > accessed 13 January 2018.

[1551] Malaysia, Singapore and South Korea (Korea Republic) respectively have per capita income as follows: US$9,944.904; US$57,714.297; and US$29,742.839. These countries, by their income level and socio-economic development, are industrialised higher middle-income countries. Meanwhile, they gained independence from the colonialists in the same period as that of Ghana. Ghana appears to be even relatively more endowed with more natural resources than these countries. Persistence in furthering efficiency and effectiveness of their legal, institutional and governance frameworks is forcefully presented as the energiser of the solution pack; see World Bank, 'GDP per capita (n 1550).

[1552] Daniel Nonor, 'President Decries Low Per Capita Income' *The Finder* (Accra, 7 March 2018) < www.thefinderonline.com/news/item/12061-president-decries-low-per-capita-income>accessed 15 March 2018.

2010, economic growth increased to 9.5% and by the first quarter of 2011, the growth impressively increased to 15% with oil GDP contributing about 5.4% - thus, growth more than doubled and Ghana's economy was one of the fastest growing economies in the world at the time.[1553] This turned out to be a short-term positive gain even though petroleum has still continued to contribute a significant margin to Ghana's economic growth. For instance, according to Tullow, the contribution of the Jubilee and TEN oil fields to Ghana's total GDP is 6% and that Ghana has so far expended about 'US$14.28 billion on contracts that have been awarded to international and local businesses.[1554]

However, the financial contribution from petroleum is relatively marginal because ultimately foreign companies appear to reap most of the benefits. The stark reality is that, by the contractual arrangement between Ghana and the petroleum E&P companies, Ghana technically has less than 50% share from its petroleum wealth, in many of its oil blocks. Collier describes this as one of the two[1555] forms of plunder. That is, whether foreign companies or domestic 'crooks', it turns out that

[1553] Paul Alagidede, William Baah-Boateng, Edward Nketiah-Amponsah, 'The Ghanaian Economy: An Overview' (2013) 1 Ghanaian Journal of Economics 4.

[1554] Joy Online, 'Tullow Ghana invests over $15 billion in economy' (Myjoyonline.com, 17 August 2018) < www.myjoyonline.com/business/2018/August-17th/tullow-ghana-invests-over-15-billion-in-economy.php > accessed 18 August 2018.

[1555] The other form of natural resource plunder, according to Collier, is the expropriation of the petroleum wealth by the present generation against the benefit of future generations.

'few persons tend to expropriate' the petroleum wealth of Ghana against the benefit for the over 28 million[1556] Ghanaians.[1557]

The cardinal consideration is the extent to which a petroleum-rich country continues to detect flaws in the petroleum regulatory architecture. It also has to do with the supply of requisite remedies for the fair benefit of all stakeholders in the upstream. This cardinal requisite can be presented to Ghana as an opportunity if the country challenges itself to evade the oil curse suffered by its African counterparts such as Equatorial Guinea, Gabon, Angola and Nigeria. [1558]

Therefore, with the discovery of huge commercial quantities, attracting significant interest and coming into being a new licensing regime, one would have expected that Act 919 [2016] will tighten up most if not all the loose ends on embarking upon competitive licensing regime to ensure that maxim revenues were obtained to effectively protect socioeconomic rights such as right to adequate standard of living. This has not been the case even though some gains have been made in this direction.

Indeed, Act 919 has been fiercely opposed by some CSOs especially led by the 'Fair-Trade Oil Share Ghana (FTOS-Gh) campaign for the PSC', ever since the law was a bill[1559] in parliament. The principal argument against the law is in respect of

[1556] The World Bank (IBRD, IDA), 'Population, total' (Ghana) < https://data.worldbank.org/indicator/SP.POP.TOTL?locations=GH > accessed 1 March 2018.

[1557] Collier, *The Plundered Planet (*n 812); Collier and Mpungwe (panellists), 'In Focus - Managing Natural Resources in Africa' (n 94).

[1558] Gary, 'Ghana's big test: Oil's challenge to democratic development' (n 1479).

[1559] See FTOS-Gh, 'Withdraw "Ghana Hybrid System" oil bill from Ghana Parliament. Approve Production Sharing Agreement (PSA) for more revenues for Ghana's crude Oil!' (Chanage.org) < www.change.org/p/ghana-fair-trade-oil-share-psa-campaign-ftos-gh-psa > accessed 23 April

the contractual regime it has provided in its terms. The opponents aver that Act 919 provides for royalty/hybrid type of petroleum agreement which does not derive maximum benefits from the petroleum resources for the people of Ghana. They make a case for PSC, arguing that most of the countries in SSA that have discovered economically viable petroleum are using the PSC, and that this contractual type is the most suitable for a developing country such as Ghana.[1560] Nonetheless, this opposition stands in the face of some level of confidence that has been expressed in the petroleum law of 919 by a number of experts rather than completely rubbishing the Act.

For instance, a number of commentators such as Fair-Trade Oil Share-Ghana (FTOS-GH) campaign[1561] and Ghanahero.com[1562] opposed the hybrid system of Act 919 [2016] in favour of the PSCs and had expressed reservations about limited transparency, fiscal and contract award provisions as well as roles of regulators. But the NRGI had observed that the petroleum law, as captured by Act 919 [2016], "is fairly comprehensive in scope"[1563] and that it has "a number of provisions in

2019; See also FTOS-Gh, 'Exciting News - Fair-Trade Oil Share Ghana Campaign' (Petition May 2018 Update) <

www.change.org/p/ghana-fair-trade-oil-share-psa-campaign-ftos-gh-psa/u/22708499 > accessed 23 April 2018.

[1560] Ndi, 'Act 919 of 2016 and its contribution to governance of the upstream petroleum industry in Ghana' (n 1389).

[1561] FTOS-Gh, 'Fair-Trade Oil Share-Ghana (FTOS-Gh)/PSA' <https://ghanahero.com/FTOS_GH.html > accessed 15 July 2018.

[1562] Ghanahero.com, 'Policy Statement' < https://ghanahero.com/ > accessed 15 July 2018.

[1563] Natural Resource Governance Institute, 'NRGI Comments on Ghana's Petroleum (Exploration and Production Bill)' (n 1480); Nicola Woodroffe, 'Ghana's Petroleum Exploration and Production Bill: Steps Forward, But Room for Improvement' (NRGI, 21 July 2015) < https://resourcegovernance.org/blog/ghanas-petroleum-exploration-and-production-bill-steps-forward-room-improvement > accessed 23 April 2019.

keeping with international good practice".[1564] This is not to say that some of the critical points raised by CSOs and others such as FTOS-Gh were or are not valid. For instance, one will be persuaded to agree with them that the current total take or interest for Ghana that is allowable by Act 919 [2016] in petroleum E&P contracts is hardly fair. Take a look at the Table 1 below that illustrates the stake of GNPC in a number of petroleum contracts in Ghana.

Table 1: Fiscal Terms in Petroleum Contracts on Contract Areas

Contract Area/Block	**Interest in Block**			**Observation** (considering additional 35% CIT & minor fees)
	Private share	*Ghana beneficial share*		
	Contracting Parties	GNPC /Ghana	Royalty of Gross Production	
Deepwater Tano	86.0%	14.0%	5.0%	Not fair
West Cape Three Points	87.5%	12.5%	7.5%	Not fair
Offshore Cape Three Points[1565]	80.0%	14.0%	10.0%	Less fair

[1564] ibid.

[1565] 6% interest in the block not accounted for.

Deepwater Tano/Cape Three Points[1566]	80.0%	20.0%[1567]	4.0%	Less fair
Cape Three Points Block 4[1568]	86.01%	14.0%[1569]	10.0%	Less fair
Central Tano[1570]	90.0%	10%	12.5%	Less fair
Deepwater Cape Three Points West Offshore [1571]	82.65%	17.35[1572]	12.5%	Somewhat fair

[1566] The Petroleum Contract on this block was being reviewed.

[1567] Out of the 20% interest in the block for GNPC, 10% is for GNPC Explorco (GNPC Exploration and Production Company Limited – a GNPC subsidiary Company); see GNPC, 'Our Business – Investment' < www.gnpcghana.com/investment.html#explorco > accessed 23 April 2019.

[1568] 0.01 surplus figure due to over accounting/error accounting on this block; see Ghana Petroleum Commission, 'Cape Three Points Block 4' (Petroleum Register) < www.ghanapetroleumregister.com/cape-three-points-block-4 > accessed 23 April 2019.

[1569] Explorco has 4% out of the 14% interest in this block.

[1570] Ghana Petroleum Commission, 'Central Tano Block' (Petroleum Register) < www.ghanapetroleumregister.com/central-tano-block > accessed 23 April 2019.

[1571] Ghana Petroleum Commission, 'Deepwater Cape Three Points West Offshore' (Petroleum Register) < www.ghanapetroleumregister.com/deepwater-cape3points-west-offshore > accessed 23 April 2019.

[1572] GNPC Explorco has 4.35% Interest in this.

From Table 1, the fiscal arrangements of the petroleum contracts in the contract areas do move from being 'not fair'[1573] through 'less fair'[1574] to 'somewhat fair'.[1575] 70% total earnings accruing to Ghana is considered as fair.[1576] None of the petroleum contracts in the above contract areas would generate total income anywhere close to 70%. At least, Norway earns a total of 78%, as long as petroleum companies make profit. However, there have been improvements of the contractual fiscal terms over time in Ghana and, hopefully, efforts will be mobilised towards achieving distributive justice and fair share of profits in this area.

Management and effective use of petroleum revenues is also one of the crucial instruments that are integral to any effective and useful regulatory framework in the petroleum industry. Act 815[1577] is aimed at securing this imperative. However, oil revenue collection measures therein are not comprehensive enough, and revenue is poorly and thinly allocated to segments of the Ghanaian economy. The thinly nature in which the petroleum revenues are spread across are not efficient enough in making landmark impact on projects that can be visibly seen as legacy projects.[1578]

[1573] 'Not fair' means when the GNPC interest in a block, royalty, taxes and fees add up to less than 55% of total expected earnings from the block accruing to the GNPC/Ghana.

[1574]'Less fair' is characterised by a total income of up to 55% but less than 60% accruing to GNPC / Ghana in the life of the block.

[1575] 'Somewhat fair' denotes total earnings accruing to 60% but not up to 70%.

[1576] Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System' (n 34).

[1577] Petroleum Revenue Management Act [2011].

[1578] See Ernest Aryeetey and Ishmael Ackah, 'The boom, the bust, and the dynamics of oil resource management in Ghana' (n 1528).

A great feat for a good prospect in the future of the Ghana's petroleum industry is the desire of the policy makers of the country to continue to take steps to adopt best practice of petroleum E&P and management thereof. Much of the desire has yielded commitments that have produced the current shape of petroleum legal regime in Ghana. One of such commitments is the collaboration Ghana has fostered with the Norwegian Agency for Development Cooperation (NORAD) in order to identify the petroleum policies that are the most effective to harness the petroleum industry in Ghana like Norway has done.[1579] This collaborative arrangement is expected to help Ghana ensure the application of ROL and achievement of justice based on shared-experiences and capacity development.

8.7 Comparative Case Study Analysis

Angola, Ghana, Nigeria, UK and Norway have been compared on the basis of six parameters: Petroleum reserves and production ranking, MPI, HDI, WHI, and ROL index on one hand and the Resource Governance Index (RGI) on the other hand. It can be drawn from Table 2 below that the better the ROL, the better the HDI, the happier the country and the more effective the protection of socioeconomic

[1579] Arne Disch, Ole Rasmussen, and Joseph Kwasi Asamoah, 'Oil for Development Ghana 2010-14: Moving towards a "Second Generation" Programme? - Review of Norway's Support to the Petroleum Sector in Ghana (Norad Collected Reviews 04/2015, Final Draft Report, Norwegian Agency for Development Cooperation, 2015) < www.scanteam.no/images/scanteam/pdfs/reports2014/2014_1408.pdf > accessed 24 April 2019; Arne Disch and others, 'Facing the Resource Curse: Norway's Oil for Development Program (Final Report, Scanteam, January 2013) < www.oecd.org/derec/norway/oilnorway.pdf > accessed 24 April 2019; See also Heikki Holmås and Joe Oteng-Adjei, 'Breaking the mineral and fuel resource curse in Ghana' in J Brian Atwood, *Development Co-operation Report 2012: Lessons in Linking Sustainability and Development* (OECD 2012) 123 - 131 < www.oecd-ilibrary.org/docserver/dcr-2012-en.pdf?expires=1556985996&id=id&accname=guest&checksum=0BBDF406886D4B3DCEF6AFC125A615D7 > accessed 24 April 2019.

rights such as adequate standard of living. There are two exceptions. While Angola has poor standing on the ROL index (i.e. 111th), she has achieved relatively better position (i.e. 145th) on the HDI than Nigeria that achieved relatively better position on the ROL index (i.e. 106th) but earned 156th position on the HDI.[1580]

The other exception is that while Ghana has a lower score of 98th position on the WHI than Nigeria with 85th rank, Ghana scored a relatively good score on the ROL index with 48th rank than Nigeria's 106th rank on the ROL index. These exceptions can be said to be marginal. In fact, Ghana's achievement in the HDI, MPI and ROL index have shown that there is a strong relationship between level of multidimensional poverty and ROL. The better the ROL index, the lower the level of MPI, and the higher the HDI.[1581]

[1580] OPEC, 'Angola facts and figures' (n 1358); OPEC, 'Nigeria facts and figures' < www.opec.org/opec_web/en/about_us/167.htm > accessed 21 September 2019; Ian Tiseo, 'Proved oil reserves in Norway 1995-2018 (in billion barrels)' (last edited, 9 August 2019) < www.statista.com/statistics/447353/proved-oil-reserves-norway/ > accessed 21 September 2019; EIA Beta, 'International Energy Statistics: Total Petroleum and Other Liquids Production 2018' < www.eia.gov/beta/international/rankings/#?cy=2018 > accessed 27 September 2019.

[1581] OPHI and UNDP, 'Global Multidimensional Poverty Index 2019: Illuminating Inequalities' (n 1267) 18.

Table 2: Performance of indicators of socioeconomic rights

Parameters	**Ghana**	**Angola**	**Nigeria**	**UK**	**Norway**
Petroleum reserves and production ranking[1582]	5th	3rd	1st	4th	2nd[1583]
Multidimensional Poverty Index[1584]	0.138	0.282	0.291	-	-
MPI ranking	3rd	2nd	1st[1585]	-	-
Human Development Index[1586]	0.592	0.581	0.532	0.922	0.953
HDI Ranking	140th	145th	156th	14th	1st
World Happiness Index[1587]	4.996	-	5.265	7.054	7.554

[1582] EIA Beta, 'International Energy Statistics: Total Petroleum and Other Liquids Production 2018' (n 1580).

[1583] This ranking is contextualised for the thesis based on the values of petroleum reserves and production in these jurisdictions.

[1584] OPHI and UNDP, 'Global Multidimensional Poverty Index 2019: Illuminating Inequalities' (n 1267) 18.

[1585] This ranking is contextualised for the thesis based on the values of MPI in these jurisdictions; see OPEC, 'Angola facts and figures' (n 1358); OPEC, 'Nigeria facts and figures'; Tiseo, 'Proved oil reserves in Norway 1995-2018 (in billion barrels)' (n 1580).

[1586] UNDP, 'Human Development Indices and Indicators' (n 31).

[1587] Helliwell, Layard and Sachs (eds), *World Happiness Report 2019* (n 492).

WHI Ranking	98th	-	85th	15th	3rd
Rule of Law Index[1588]	0.58	0.41	0.43	0.80	0.89
ROLI Ranking[1589]	48th	111th	106th	12th	2nd

Relative to Angola and Nigeria and most SSA countries, Ghana is more successful in the eradication of poverty, respect for ROL and improvement in human development.[1590] Overall, the three SSA countries have not satisfactorily done well on all the parameters.[1591]

According to Posner, maximisation of wealth "holds that a transaction or other change in the use or ownership of resources is good if it increases the wealth of the society".[1592] This underlies the economic analysis of law.[1593] Utilitarian scholars

[1588] World Justice Project, *World Justice Project Rule of Law Index* (n 41).

[1589] The ROL index provides measurements that factor in elements of justice such as fairness and morality.

[1590] UNDP, 'Human Development Indices and Indicators' (n 31).

[1591] Helliwell, Layard and Sachs (eds), *World Happiness Report 2019* (n 492); World Justice Project, *World Justice Project Rule of Law Index* (n 41); UNDP, 'Human Development Indices and Indicators' (n 31); OPHI and UNDP, 'Global Multidimensional Poverty Index 2019: Illuminating Inequalities' (n 1267) 18.

[1592] Richard A Posner, 'The Justice of Economics, Economia delle scelte Pubbliche, 1, 1987, 15-25' in Richard A Posner, *The Economic Structure of the Law, The Collected Essays of Richard A Posner* (Vol 1, Francesco Parisi [ed], Economists of the Twentieth Century series Edward Elgar 2000)130.

[1593] The law and economics approach has two main schools: The normative school and the positive school. While the normative school is characterised by efforts to enhance legal rules, the positive school advocates for the explanation and understanding of legal rules based on the efficiency imperative. The third school (which draws from the two main schools) is the functional school of law and economics; It is neither fully normative nor fully positive; see Francesco Parisi, 'Positive, Normative and Functional Schools in Law and Economics' (2004) 18(3) European

such as Kahan,[1594] Sima,[1595] and Dworkin,[1596] are critical of the law and economics approach[1597] as consequentialism[1598] in favour of the Austrian school[1599] which argues for interrelating value with utility to achieve best results for consumers.[1600] But the need for petroleum-rich countries to derive the maximum benefits from their petroleum wealth has made the economic analysis of law school adaptively[1601] usable. So, indeed, from pragmatic approach, the two approaches

Journal of Law and Economics 259; Richard A Posner, *The Economic Structure of the Law, The Collected Essays of Richard A Posner* (Vol 1, Francesco Parisi [ed], Economists of the Twentieth Century series Edward Elgar 2000).

[1594] Dan M Kahan, 'The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law' (2004) 1 Ohio State Journal of Criminal Law 643.

[1595] Josef Sima, 'Praxeology as Law & Economics' (2004)18 (2) Journal of Libertarian Studies 73.

[1596] Ronald Dworkin, *Taking Rights Seriously* (1st edn, Duckworth 1977).

[1597] In fact, even though the normative school is equally important as it looks forward to enhancing the law after expository and exploratory analyses, the positive school of thought usually drives the economic analysis of law since this approach is aligned with the disposition that analysis of legal rules should be conducted on the basis of the efficiency imperative – which is the social goal that is based on preference and maximisation of wealth. It is, therefore, imperative that the legal framework in the petroleum industry is striven to maximise the benefit from the petroleum wealth of HS; Francesco Parisi, 'Positive, Normative and Functional Schools in Law and Economics' (n 1593).

[1598] Posner, *The Economic Structure of the Law, The Collected Essays of Richard A Posner* (n 1593); Sandel, Justice: What's the Right Thing to Do? (n 24).

[1599] This school of thought is primarily based on categorical moral reasoning; see Sandel, *Justice: What's the Right Thing to Do?* (n 24).

[1600] The Editors of Encyclopaedia Britannica, 'Austrian school of economics' (Encyclopædia Britannica inc, 4 October 2018) < www.britannica.com/topic/Austrian-school-of-economics > accessed 25 September 2019; The Editors of Encyclopaedia Britannica, 'William Stanley Jevons' (Encyclopædia Britannica inc, 28 August 2019) < www.britannica.com/biography/William-Stanley-Jevons > accessed 25 September 2019; The Editors of Encyclopaedia Britannica, 'Carl Menger' (Encyclopædia Britannica inc, 15 April 2019 < www.britannica.com/biography/Carl-Menger > accessed 25 September 2019.

[1601] Although the two approaches, when used strictly, are opposed to each other, it does not imply that the value and utility achievement that have been advanced by the Austrian school cannot equally be applied to ensure that not only rights are respected but also SSA countries

can harmoniously be deployed in the analysis of the petroleum industry as they are not mutually exclusive under circumstances that require both maximum outcomes and higher satisfaction to achieve ROL and justice.[1602]

Norway, for instance, excels in ROL in petroleum governance. At the same time, she maximises outcomes from her petroleum wealth to harness adequate standard of living of the citizens. In fact, from Table 2 above, Norway has achieved exemplary feat on the HDI, ROL and WHI.[1603] The implication is that the strong pillars of ROL in Norway could be linked to the reason why Norway maximises socioeconomic benefits from its petroleum resources.[1604]

Although Norway is behind Nigeria in petroleum reserves and production, Nigeria[1605] has not been able to effectively leverage ROL in her petroleum industry to significantly enhance adequate standard of living therein. Angola has also performed poorly on the ROL index, which could account for its poor performance on the HDI despite her good position in the ranking of her petroleum reserves and

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derive the maximum benefit from their petroleum wealth. In fact, the challenge arises when one of the approaches is chosen as the only social goal; see Steven Shavell, *Foundations of Economic Analysis of Law* (Belknap Press 2004).

[1602] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' ((n 23).

[1603] Helliwell, Layard and Sachs (eds), *World Happiness Report 2019* (n 492); World Justice Project, *World Justice Project Rule of Law Index* (n 41); UNDP, 'Human Development Indices and Indicators' (n 31); OPHI and UNDP, 'Global Multidimensional Poverty Index 2019: Illuminating Inequalities' (n 1267) 18.

[1604] Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (n 1177); Ryggvik, 'The Norwegian Oil experience: A Toolbox for Managing Resources' (n 920); Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34).

[1605] In 2018, while Nigeria had crude oil reserves of about 36.972 billion barrels, Norway had about 8.6 billion barrels. Thus, Nigeria's reserves are about four times the reserves of Norway; see respectively, Tiseo, 'Proved oil reserves in Norway 1995-2018 (in billion barrels)' (n 1580); OPEC, 'Nigeria facts and figures' (n 1580).

production.[1606] In EIA Beta's estimation,[1607] petroleum production (1000 barrels per day) for 2018 in the five countries were ranked, as can be seen in Table 3 below. It shows therein that Ghana is far behind the other four countries in petroleum production per day while Norway and Nigeria are the top two countries on the scale of petroleum production with Angola following them closely and UK not farther away.

Table 3: Ranking of Daily Petroleum Production for 2018

Country	Global ranking	Production levels in 1000 b/d
Nigeria	12	2057
Norway	15	1864
Angola	16	1655
United Kingdom	19	1163
Ghana	38	174

Just like Norway, UK has performed well on the global ranking of happiness, human development and ROL – an indication of a country that makes significant efforts to effectively harness her petroleum wealth for socioeconomic development.

[1606] World Justice Project, *World Justice Project Rule of Law Index* (n 41); UNDP, 'Human Development Indices and Indicators' (n 31).

[1607] Note that even though these estimates may not be exactly the same as actual figures, they are near approximation and their rankings can particularly be vouched for; see EIA Beta, 'International Energy Statistics: Total Petroleum and Other Liquids Production 2018' (n 1580).

With respect to the RGI, which encapsulates 'value realisation, revenue management and enabling environment' as broad categories of how best a country is deemed to be managing its petroleum, it has been established that there is a positive relationship between ROL indicator in the 'enabling environment category' and that of 'realisation of value' from the petroleum resource.[1608] The RGI provides an interesting framework that supports the understanding and assessment of the other five parameters that have been discussed above. In terms of 'value realisation' indicators, which feature 'taxation, licensing, local impact and state-owned enterprises', Angola did not perform well.[1609] Angola scored 50 points against Ghana and Nigeria which scored 65 and 50 points respectively. Angola is in the same bracket as Nigeria. Meanwhile, UK and Norway respectively scored 70 and 77 on the 'value realisation' composite or comparative score. Norway achieved the highest score than the UK and thought to be realising the greatest value from their petroleum industry.[1610] Ghana appears to have performed well given the fact that it is the youngest petroleum producer with relatively lower daily production and lower scale of proven petroleum deposits.

With respect to taxation too, Angola performed lower not only relative to Norway and UK but also Ghana and Nigeria. However, Angola performed very well on tax authority rules. See Figure 8 below for composite taxation score of the RGI of these countries.[1611]

[1608] NRGI, 'Compare both oil and gas and mining sectors for dual sector countries: 2017 Resource Governance Index, Natural Resources Governance Institute' (n 14).

[1609] ibid.

[1610] ibid.

[1611] ibid.

Figure 8: RGI Score on Taxation Regulation for Angola, Ghana and Nigeria

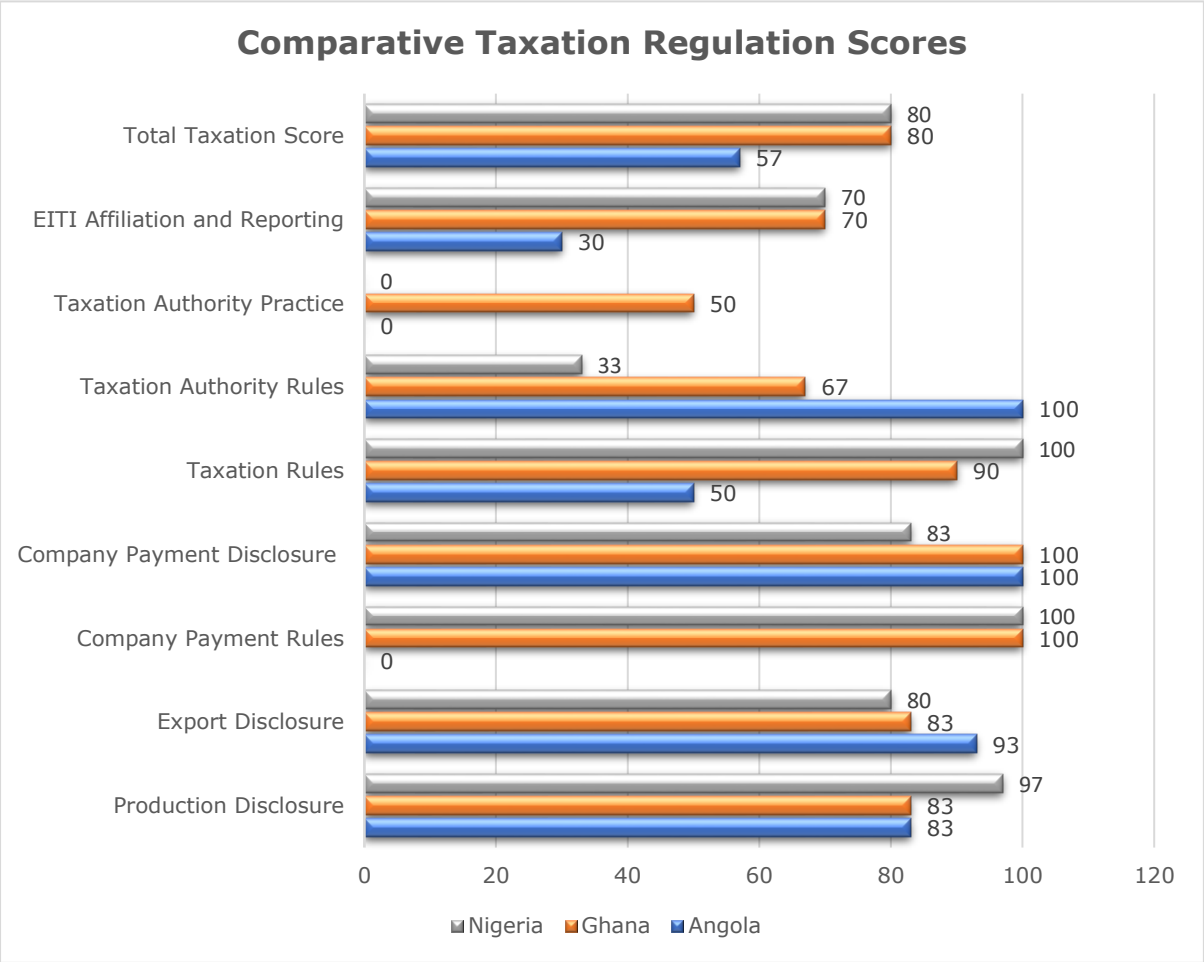
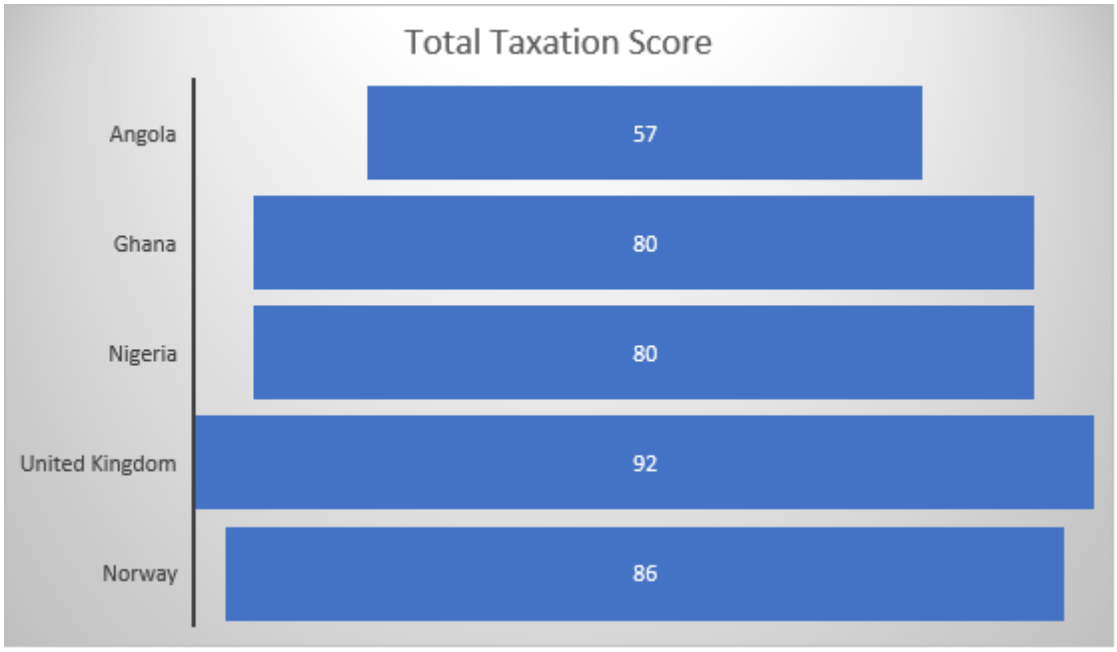


Figure 9: Composite RGI Score on Total Taxation of Angola, Ghana, Nigeria, UK, Norway



On the total taxation score, UK scored higher than Norway while Ghana and Nigeria had the same score points. Angola was behind the other four countries. This brings a mixed result as to which developed country's tax model that is worth emulating by SSA. While the higher score of UK with eight points' margin ahead of Norway, it was the tax rules that significantly accounted for UK's score.[1612] But in terms of the tax rate and quantum, Norway did better than UK. The best tax model will be that which has best of tax rules as well as the reasonable rate of tax and quantum thereof that is informed by the ROL and justice which can enhance socioeconomic rights in SSA.[1613]

In terms of creating an 'enabling environment' of the RGI, which captures 'voice and accountability, government effectiveness, regulatory quality, ROL, control of

[1612] ibid.

[1613] ibid.

corruption, political stability and absence of violence, and open data' as sub-indicators, Angola fared poorly with a total score point of 25 against Ghana and Nigeria which respectively scored 70 and 31.[1614] UK and Norway respectively had 95 and 97 score points, with Norway leading by two points in creating enabling environment for petroleum wealth to be harnessed. Apparently, Nigeria also fared badly with only six points ahead of Angola in creating enabling environment for the petroleum E&P in Nigeria, whereas Ghana perfumed reasonably well.[1615]

Among the key pieces of petroleum legislation which guard against bribery and corruption which can adversely affect contractual arrangements in Angola are: the Public Probity Law 2010 which establishes the legal framework for deterring corruption and ensuring good ethical behaviour and respect for public property amongst officials of the government; and the Angolan Penal Code 2019 which makes bribery and corruption a criminal conduct. Angola has also adopted the following international anti-corruption legal instruments: The Protocol against Corruption of the Southern African Development Community 2001, the African Convention on Preventing and Fighting Corruption 2003, and the United Nations Convention against Corruption 2003.[1616] Angola also has an Anti-Bribery Authority which aims at combating corruption and actions of public offices that go against the public interest. At the same time, Angola is signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The Code of Civil Procedure of Angola is, however, applied when it comes to the recognition of foreign Court decisions or sentences.

[1614] ibid.

[1615] ibid.

[1616] Graça and Lima, 'Oil Regulation' (n 1317).

These legal commitments, at least on the surface, present a legal framework in Angola which generally applies ROL and largely enforce contractual rights. However, a little look below the surface reveals that ROL in Angola's petroleum industry is poor. Indeed, in terms of 'ROL, regulatory quality and control of corruption',[1617] especially, the score line of the 2017 NRGI survey results in Table 4 below did not show any better results for both Nigeria and Angola. While Norway scored a little higher than UK in corruption control and ROL with 99 out of 100 each, Angola scored just 22 points of 100 on the nature and application of ROL in Angola.

With 24 points of 100 on ROL, Nigeria was only two points ahead of Angola on this low score. The state of integrity and scale of application of ROL in Angola is, therefore, almost similar to that obtained in Nigeria – the verdict being a poor performance for both the leading petroleum producing countries in SSA. It appears that commercial rights of investors are reasonably respected according to the ROL. However, in an environment where corruption is pervasive and award processes can be discretionary without clear remedial processes, neither RUL nor RAHL can be adequately complied with. This is an indication of ineffective application of the petroleum laws – some of the formulations of the petroleum laws are also sometimes questionable in the eyes of the ROL due to their internal arbitrariness and uncertainties.[1618] Ghana performed relatively better than its African peers, but

[1617] NRGI, 'Compare both oil and gas and mining sectors for dual sector countries: 2017 Resource Governance Index, Natural Resources Governance Institute' (n 14).

[1618] Cass, *The Rule of Law in America* (n 309); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Farlex, 'Rule of Law' (n 307); Scalia, 'The Rule of Law as a Law of Rules' (n 331); Guimarães, Robles and Fernandes, 'General Strategy for the Award of Petroleum Concessions (2019-2025)' (n 982).

it still has to do more to enhance the performance of the indicators. See Table 4 for the specific details on selected indicators of the enabling environment.

Table 4: Enabling Environment of Resource Governance Index (RGI)[1619]

Enabling Environment Index	**Angola** *Score out of 100 each*	**Ghana** *Score out of 100 each*	**Nigeria** *Score out of 100 each*	**United Kingdom** *Score out of 100 each*	**Norway** *Score out of 100 each*
ROL	22	83	24	95	99
Regulatory Quality	30	76	39	99	95
Control of Corruption	7	79	21	96	99
Total	*59*	*238*	*84*	*290*	*293*
Ranking	**5th**	**3rd**	**4th**	**2nd**	**1st**

8.7.1 Overall comparison of RGI ranking of Angola, Ghana and Nigeria

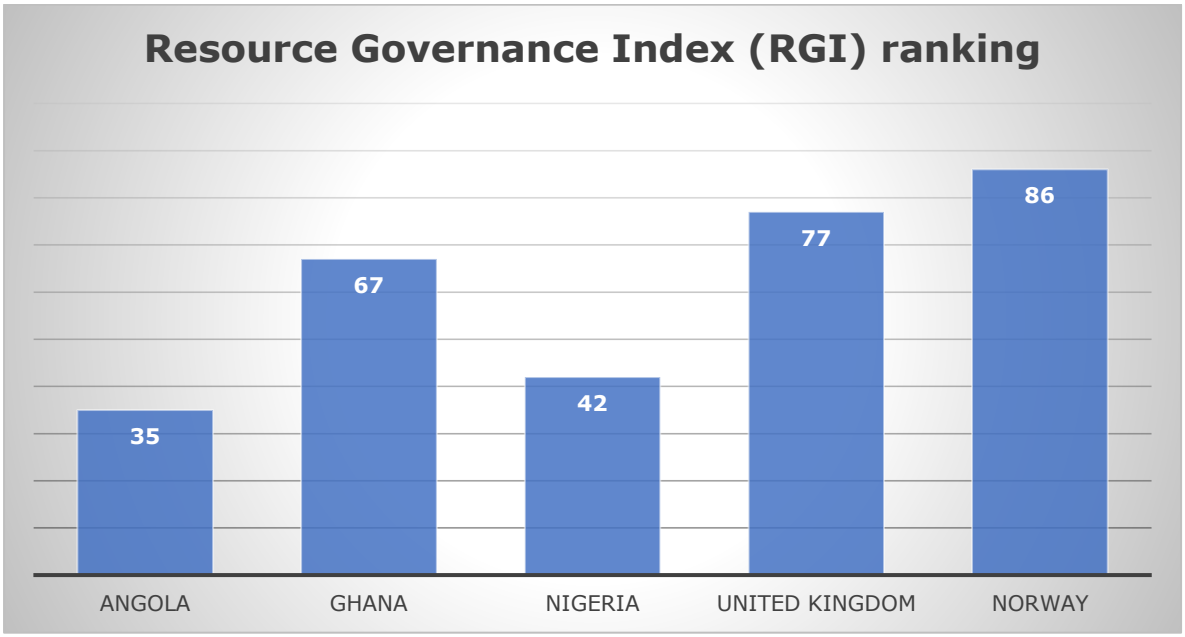
The parameters considered were 'value realisation, revenue management and enabling environment'.[1620] Overall comparative or composite analysis between

[1619] Dataset extracted and adapted from 2017 NRGI Survey; see NRGI, 'Compare both oil and gas and mining sectors for dual sector countries: 2017 Resource Governance Index, Natural Resources Governance Institute' (n 14).

[1620] ibid.

Angola, Ghana and Nigeria is to the effect that while Angola was ranked 70th of 89 for 35 score points of 100, Ghana ranked 13th of 89 for 67 score points of 100 and Nigeria was ranked 55th of 89 for 42 score points of 100 on the RGI ranking scale.[1621] Whereas Ghana remarkably performed on the overall RGI ranking, Nigeria and Angola did not fare well, with Angola falling behind Nigeria. Indeed, on the 'enabling environment indicator where ROL, regulatory quality and corruption control' are featured, Angola merely scored 25 out of 100 and was placed at 72nd position out of 89 countries.[1622]

Figure 10: Overall comparison of RGI ranking of Angola, Ghana, Nigeria, UK and Norway[1623]



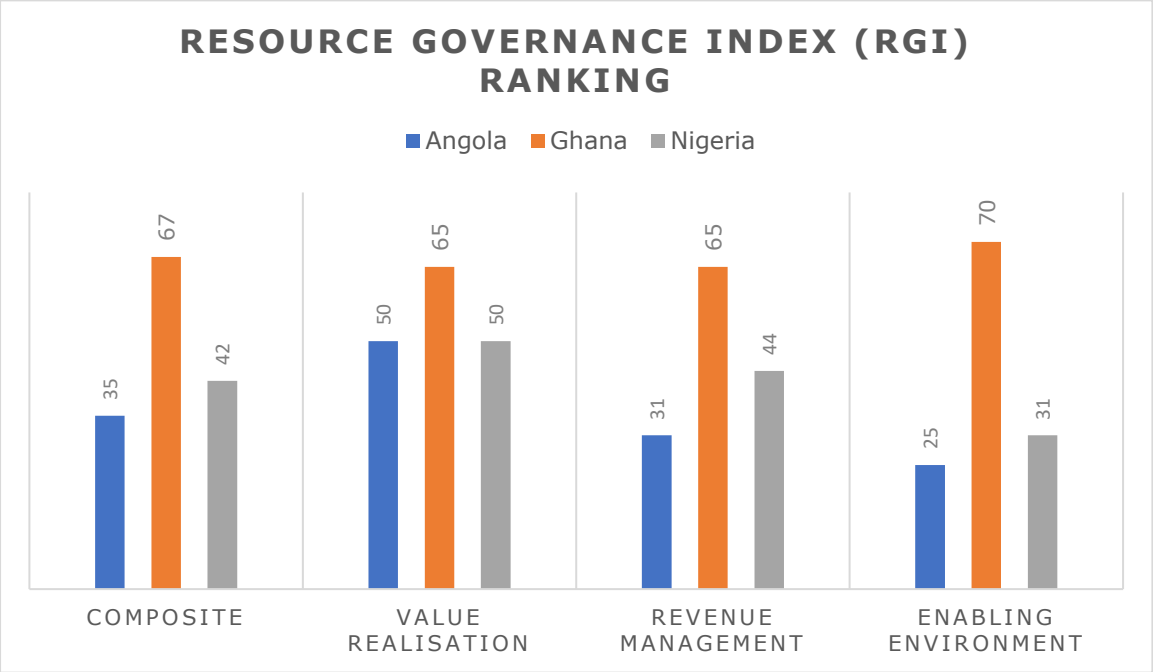
[1621] NRGI, 'Compare both oil and gas and mining sectors for dual sector countries: 2017 Resource Governance Index, Natural Resources Governance Institute' (n 14).

[1622] NRGI, 'Angola, Oil and Gas: 2017 Resource Governance Index, Natural Resources Governance Institute (NRGI)' < https://resourcegovernanceindex.org/country-profiles/AGO/oil-gas> accessed 15 April 2019.

[1623] NRGI, 'Compare both oil and gas and mining sectors for dual sector countries: 2017 Resource Governance Index, Natural Resources Governance Institute' (n 14).

In effect, therefore, Angola still has a long way to go when it comes to generating value out of its petroleum resources, managing the revenues from its petroleum resources and creating the needed enabling environment for investment and prosperity in the Angolan petroleum industry.[1624] See figure 11 below illustrating the score ranking for Angola, Ghana and Nigeria.

Figure 11: Specifics of comparison of RGI ranking of Angola, Ghana and Nigeria[1625]



Although the RGI framework and the measures provided by the HDI, MPI, WHI and ROL index may not necessarily provide outturns without possible weaknesses and challenges, they can be said to provide a solid platform that can be used as a springboard to perfecting instruments that can help to more effectively measure ROL, efficacy of petroleum legal framework, justice and socioeconomic rights. This implies that, these measures can be used by SSA countries as a guide to enhance

[1624] ibid.

[1625] ibid.

their petroleum legal regimes. Whereas Angola, as a civil law country, can easily adapt the Norwegian civil law systems to enhance her petroleum legal framework, Ghana and Nigeria, as common law jurisdictions, could easily adapt the systems and practices of the UK to harness the effectiveness of their petroleum legal regimes.[1626] However, these legal systems in the petroleum industry, which has attraction for *lex petrolea,* have been increasingly bridged.[1627] Therefore, best practices, particularly on ROL implementation in the petroleum industry, can be learnt from Norway and the UK in *mutatis mutandis* by Ghana, Nigeria and Angola as well as other SSA countries.[1628]

8.8 Conclusion

In the petroleum industry, 'rules, rights and obligations of actors such as petroleum companies (e.g. MNPCs), governments such as in SSA, and citizens thereof are set forth in a system of legal documents such as constitutions, legislations, regulations and contracts as well as policies called legal framework'.[1629] An effective legal framework for petroleum E&P must be one that

[1626] Trakman, 'Contracts: Legal Perspectives' in Wright, *International Encyclopedia of the Social & Behavioral Sciences* (n 612); Fairgrieve, *Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction* (n 612); Smyth and Gatto, *Contract Law: A Comparison of Civil Law and Common Law Jurisdictions* (n 612).

[1627] Bowman, 'Lex Petrolea: Sources and Successes of International Petroleum Law' (2015).

[1628] Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred?' (n 612).

[1629] NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14) 1.

has the capacity to generate maximum economic benefits for the HS and deliver reasonable investment returns for petroleum E&P companies.[1630]

With the right legal framework that has strong foundation of ROL of law and justice, opportunities are presented to the citizens and other stakeholders to enjoy their socioeconomic rights as enshrined in national constitutions and legislations[1631] as well as international legal instruments such as DRTD[1632] and ICESCR.[1633] All the five case studies (UK, Norway, Ghana, Angola and Nigeria) appear to have ROL and justice integrated[1634] in petroleum legislation and contracts, to some extent. But socioeconomic rights in the three SSA countries are not effectively protected due to their high poverty levels[1635] that strike a departure from Norway and the UK who are effectively harnessing their petroleum resources to enhance socioeconomic rights of their people.

While ROL and justice are more effective in harnessing petroleum laws in UK and Norway, they are less effective in SSA countries such as Nigeria, Angola and Ghana. But relative to Nigeria and Angola, Ghana has had impressive showing on

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[1630] Shihata, 'Legal Framework for Development (n 28); Ikenna, "International Petroleum Law" (n 33); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (n 34); Al-Kasim, *Managing Petroleum Resources* (n 34); Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System' (n 34)7.

[1631] Such as 'the Public Procurement (Amendment) Act, 2016 (Act 914); Petroleum Exploration and Production Act, 2016 (Act 919); the Petroleum Commission Act, 2010 (Act 821); and Petroleum Revenue Management Act, 2011 (Act 815)'.

[1632] Art 1(1), 1(2).

[1633] Arts 1(2), 2 and 3.

[1634] Barnett, 'Pursuing Justice in a Free Society (n 398); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

[1635] UNDP, 'Human Development Index (HDI)' (n 419); UNDP, 'Human Development Report 2016: Human Development for Everyone' (n 419).

the RGI, particularly in the area of ROL. With 78% benefit sharing formula, Norway is, by far, a very good example for emulation in terms of benefit sharing that resonates with both ROL and justice. But for tax rules and regulatory quality that also have an affection for ROL, UK should be looked up to. Adapting the two models in a synthesised form to achieve excellence should be based on local conditions in SSA and the need for justice in the petroleum industry of SSA.

Enhancing transparency, institutional capacity, competence of public officials, fiscal and legal reforms, and political commitment in the petroleum industry could bring about a game changer in any reasonable probability. Very integral to the enabling environment is ROL and justice.[1636] These must be ensured. The next chapter explores the World Bank's NAS to identify the opportunities and strengths the NAS provides for harnessing ROL, justice and socioeconomic rights in the governance of the petroleum industry in SSA.

[1636] Shihata, 'Legal Framework for Development (n 28); Ikenna, "International Petroleum Law" (n 33); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (n 34); Al-Kasim, *Managing Petroleum Resources* (n 34); Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System' (n 34).

CHAPTER NINE

WORLD BANK NEW AFRICA STRATEGY AND THE LAW

9.1 Introduction

The NAS is the current socioeconomic development framework of the World Bank in SSA which was launched in 2011.[1637] It was built on the experiences of the previous development plans of the World Bank in SSA such as the Africa Action Plan (AAP)[1638] which the NAS succeeded. The NAS denotes a paradigm shift of approach of the World Bank to socioeconomic development intervention in SSA. It is not only a product of greater participation of key stakeholders in SSA but also it provides additional and enhanced perspectives to supporting the socioeconomic development discourse of SSA. For instance, level of engagement with stakeholders has been raised and financing instruments have been enhanced.[1639]

However, it is not clear in the NAS as to the extent to which the socioeconomic development that will be generated from the expected transformations are considered as entitlements in the form of socioeconomic rights. At the same time, ROL and justice do not appear to have been significantly featured in the NAS. The high-impact nature of the petroleum E&P sector has not been highlighted in the natural resource support mechanism of the NAS. The role and inadequacies of

[1637] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1638] Launched in 2005, the AAP is 'a comprehensive strategy paper that presents the plan of the World Bank in order to facilitate country-led socioeconomic development across Africa by collaborating between governments and donors or development partners'; see The World Bank, 'Africa Action Plan' (n 27).

[1639] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

petroleum law in harnessing petroleum wealth for the achievement of socioeconomic rights have been given scant attention in the NAS.

This chapter explores the vision, themes and instruments as well as transitional issues of the NAS in the light of ROL and justice that should be effectively integrated in petroleum laws of SSA to ensure the effective enjoyment of socioeconomic rights of the people therein. Notwithstanding the increasing advocacy against the World Bank's support for fossil fuel generation due to the apparent associated dangers of climate change (considered in Chapter 10 below), this chapter makes a case for the World Bank to also pay special attention to supporting efforts at harnessing ROL and justice in petroleum laws of SSA. This measure is a way of unleashing the full potential and building blocks of achieving socioeconomic rights and hence sustainable development in SSA.[1640]

9.2 The 10-year Vision of NAS and Complementary Aspirations in SSA

The NAS has had a 10-year vision of 'an Africa in which a minimum of 20 countries would have per capita income that is 50% higher than that of 2011'.[1641] What this implies is that these countries would have per capita GDP growth rates of between three and four percent a year by 2020 – less than a year from now. It is within the vision that there would also be 20 other countries in Africa that would experience an average growth rate of between one and two percent. At the same time, the vision is that the 'rate of poverty in this region would decline by 12

[1640] Shihata, 'Legal Framework for Development (n 28); Ikenna, "International Petroleum Law" (n 33); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (n 34); Al-Kasim, *Managing Petroleum Resources* (n 34); Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System' (n 34).

[1641] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

percentage points'.[1642] In the light of this, the SDG 1 reiterates the moral duty of countries to "end poverty in all its forms everywhere" by the 2030. Ending every aspect of poverty everywhere will also mean that hunger and starvation will also be eradicated. Therefore, SDG 1 is linked to SDG 2 which articulates the duty of countries to design and pursue measures that will help in ending "hunger, achieve food security and improved nutrition". Beyond the poverty eradication vision is the hope by the NAS that, a minimum of five countries is expected to attain the status of middle income by 2020.[1643] These are all expected to enhance socioeconomic rights such as rights to education, health, food and adequate standard of living.[1644]

Agricultural productivity is also envisioned to increase in 15 countries wherein a minimum of 5% average annual agricultural GDP growth would be registered. This aspect of the NAS vision is also supported by the SDG 2 which urges countries to "… promote sustainable agriculture" – that is, encouraging climate friendly agricultural practices that can sufficiently produce enough food for the present generation without endangering the food needs of the future generations. This should benefit right to food. At the same time, it is within the vision of the NAS that, Africa's share in world trade would increase to 8% (thus, double of current rate), whereby there would be a "regionally integrated infrastructure"[1645] that 'provides services at globally competitive costs and human development indicators that go beyond the MDGs to attain quality goals in the area of health and

[1642] ibid.

[1643] ibid.

[1644] See UDHR, Art 25; ICESCR, Art 11;

[1645] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

education'.[1646] These should benefit rights to health and education. The "regionally integrated infrastructure" characterises a formation in the infrastructure chain that is able to reduce "the "missing links" in energy, road, rail, and ICT by [at least] 50 percent".[1647]

What this means is that there should be a reasonable linkage between infrastructures on road, railway, energy and ICT. Critical service infrastructures such as schools and hospitals should also be integrated in the regional infrastructure plan. It is envisioned in the NAS that infrastructural access "will have doubled so that, at least, half of households have power".[1648] The SDGs also support[1649] trade and infrastructure development in SSA. These provide the foundation for the effective achievement of socioeconomic rights.[1650]

Moreover, as part of the NAS vision, there will be significant increase in the legal capacity and property rights of women. This proposition is reinforced by SDG 5.[1651] Many African countries will have established or developed measures on climate change adaptation. This aspect of the vison is supported by SDG 13 which urges states to ensure that action is taken "to combat climate change and its

[1646] ibid.

[1647] ibid.

[1648] ibid.

[1649] For trade enhancement see SDGs 8.a and 8.b; for infrastructure development, see SDG 9.

[1650] Shihata, 'Legal Framework for Development (n 28); Eide, 'Economic, Social and Cultural Rights as Human Rights' in Eide, Krause, Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (n 504) 9; Langford, 'The Justiciability of Social Rights' in Langford (ed), *Social Rights Jurisprudence* (n 518) 3; O'Connell, 'The Death of Socio-Economic Rights' (n 380)533; see also O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (n 509).

[1651] SDG 5 is aimed at 'achieving gender equality and empowerment of all women and girls'.

impacts".[1652] The last but not the least component of the strategic vision is that, indicators of governance such as ROL and justice "will be rising, with the ICT revolution strengthening accountability in the public sector".[1653] This imperative can serve as the backbone to the achievement of socioeconomic rights.[1654] It is in line with SDG 16.3 which provides the need to ensure the promotion of "the rule of law at the national and international levels and ensure equal access to justice for all". In line with these aspirations, the third aspiration of Agenda 2063 also envisions the full realisation of an "Africa of good governance, democracy, respect for human rights, justice and the rule of law"[1655] by the year 2063. Essentially, the vision of the NAS fraternises with the essential international mechanisms that enhance the achievement of adequate standard of living as a socioeconomic right.

Whereas the AAG provided the foundation of the NAS, Agenda 2063 and the SDGs have subsequently established provisions that complement and consolidate the NAS. This shows the complementarity of regional and global development imperatives. Of crucial importance, in this context, is the fact that Agenda 2063 and the SDGs have made the ROL and justice as well as the realisation of socioeconomic rights as part of their cardinal provisions. The NAS has also, under the governance and public sector capacity theme, highlighted the need to promote ROL and justice as well as socioeconomic rights. As a matter of fact, this is founded

[1652] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1653] ibid.

[1654] Barnett, 'Pursuing Justice in a Free Society' (n 398); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Shihata, 'Legal Framework for Development (n 28); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (n 34).

[1655] AU, 'Our Aspirations for the Africa We Want' (*Agenda 2063*) < https://au.int/en/agenda2063/aspirations > accessed 25 April 2019.

on the eminent position occupied by the ROL and justice in harnessing socioeconomic development and in the protection of socioeconomic rights[1656] as provided for in international legal instruments such as the UDHR,[1657] ICESCR,[1658] ACHPR,[1659] and DRTD.[1660]

Achieving the vision of the NAS requires a transformative planning which should aim at exploiting the synergies among all the key areas of every sector by organising around critical themes. Effectively, the NAS requires the use of a multidimensional approach. Approaching the NAS with a multidimensionality is informed by the fact that the lessons drawn from past strategies and experiences including the immediate predecessor of the NAS - the AAP – did present a stark reality that using a sector-by-sector approach did not achieve the desired results. For instance, in the area of instruments for harnessing standard of living, the too much focus on the health sector was said to have resulted in the "neglect of other factors, such as water and sanitation"[1661] as well as education. It does not mean, nonetheless, that paying special attention to high-impact areas such as petroleum E&P is not a reasonable proposition as long as it does not neglect other socioeconomic areas and public services.

[1656] Barnett, 'Pursuing Justice in a Free Society' (n 398); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Shihata, 'Legal Framework for Development (n 28); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (n 34).

[1657] Art 25.

[1658] Arts 1, 6, 11, 12, and 13.

[1659] Arts 14, 15, 16, 17, 21, and 22.

[1660] Arts 1, and 2.

[1661] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

The foregoing dispositions informed the organisation of the NAS into two main pillars - with an additional foundational pillar: Competitiveness and employment; vulnerability and resilience; and governance and public sector capacity (foundational theme).[1662] To implement the strategic vision through the three thematic areas, the NAS has three implementation instruments or mechanisms. These are: partnerships, knowledge and finance instruments. While 'partnerships instrument' is a new implementation instrument, knowledge and finance have been the 'traditional implementation instruments' of the World Bank.[1663]

The crux of the strategic vision is that, with the combination of these themes and implementation instruments in the right shape, form and vigour, SSA is expected to make giant strides in socioeconomic development similar to the development success achieved by "China was 30 years ago, and India 20 years ago".[1664] At this point, adequate enjoyment of socioeconomic rights such as access to quality education, food and health would have been significantly achieved. Aware that the geographic and social homogeneity in China and India as individual countries is quite different from SSA as a continental make-up with many countries and significant diversity especially in governments and leaderships, the NAS does not envision that there will be uniform growth across all the countries in the sub-region. Therefore, it is expected that some SSA countries would still be left behind the target of the vision.[1665] But no SSA country should be left farther behind the

[1662] ibid.

[1663] ibid.

[1664] ibid.

[1665] ibid.

vision 2020 and most SSA countries should have gotten closer to or realised this vision by the due date.[1666]

One of the common challenges faced by international development frameworks is that commitment of states to implementing their objectives with a sense of rigour and urgency is lacking.[1667] It remains to be seen whether the NAS will evade this notorious challenge. Based on the current socioeconomic development situation of SSA, it does not seem likely that the NAS will evade this challenge. Mainstreaming these development frames into binding legal instruments, even though difficult to achieve, is one of the best remedies for this challenge.

Given the limited outturns of the AAP[1668] and the MDGs,[1669] the vision of the NAS and the related SDG provisions such as SDGs 1 and 2 can best be described as

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[1666] ibid.

[1667] Nagy Hanna, 'Implementation Challenges and Promising Approaches for the Comprehensive Development Framework' (OED Working Paper Series, No. 13, World Bank Operations Evaluation Department, 2000) < http://documents.worldbank.org/curated/en/294911468761428989/016824232_2003092750500937/additional/multi0page.pdf > accessed 15 December 2016; Raymond C Offenheiser and Susan H Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32(2) Nonprofit and Voluntary Sector Quarterly 268 < https://journals.sagepub.com/doi/pdf/10.1177/0899764003032002006 > accessed 15 December 2016.

[1668] Independent Evaluation Group (IEG), *The Africa Action Plan: An IEG Evaluation* (The World Bank 2011) < http://siteresources.worldbank.org/EXTOED/Resources/AfricaActPlan.pdf > accessed 12 November 2016; also see The World Bank, 'Meeting the Challenge of Africa's Development: A World Bank Group Action Plan' (Africa Region, Updated, 26 September 2005) < http://web.worldbank.org/archive/website01010/WEB/IMAGES/AAP_FINA.PDF > accessed 12 November 2019.

[1669] Emmeline Booth, 'Millennium Development Goals - An Uneven Success' (IRIN, 7 July 2015) < http://newirin.irinnews.org/dataviz/2015/7/7/millenium-development-goals-success-failure > accessed 10 November 2019; Drusilla Gibbs, 'MDG failures'< https://borgenproject.org/mdg-failures/ > accessed 10 November 2016; Alberto Cimadamore, Gabriele Koehler and Thomas Pogge, *Poverty and the Millennium Development Goals: A Critical Look Forward* (International

overambitious. Since 2011, the signs are already clear that the vision of the NAS on poverty mitigation and socioeconomic development has already run out of steam. The poverty reduction vision of the NAS will not be achieved just as many SSA countries are behind meeting their SDG targets relating to poverty.[1670]

9.3 Themes of the NAS

9.3.1 Competitiveness and employment

'Competitiveness and employment' is the first thematic area of the NAS. It characterises the way in which private sector growth is harnessed "for sustainable poverty reduction and, ultimately, wealth creation".[1671] The definition of competitiveness used by the NAS is broad. It encapsulates not only competitive cities whereby productive and sustainable urban development is harnessed to create wealth and jobs but also includes:

> … all traded goods and service sectors (for example, light manufacturing, agribusiness, mining, ICT, and tourism) as well as key domestic sectors that are pillars of competitiveness (for example, agriculture, transportation, utilities, construction, and retail).[1672]

The featuring of mining (which includes petroleum E&P) in the definition of competitiveness is instructive since it is one of the areas that local private

Studies in Poverty Research, 1st edn, Zed Books 2016); Hany Besada, Leah McMillan Polonenko and Manmohan Agarwal (eds), *Did the Millennium Development Goals Work? Meeting Future Challenges with past lessons* (Policy Press 2017).

[1670] Kharas, Hamel and Hofer, 'Rethinking global poverty reduction in 2019' (n 120).

[1671] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1672] ibid.

companies really have low capacity to compete with MNPCs. The challenge is that the growth of private sector in SSA has been noted to be contributing less to the reduction of poverty and is also seen to be unclear about its sustainability. Essentially, due to their small and low productivity nature, most African firms are small and medium-sized enterprises (SMEs) and are not able to mobilise sufficient capital needed to enter into high-risky ventures such as petroleum E&P. They are also less capable to expand in ways that can generate more jobs for many young graduates coming out from the universities every year.[1673] This situation undermines the achievement of socioeconomic rights because local enterprises, for instance, in the petroleum E&P industry that could have generated more opportunities for employment which will help in enhancing adequate standard of living of as many people as possible in the sub-region lack the needed capacity to favourably compete. It is, therefore, in the right direction that the NAS work towards helping to build the competitiveness of these small businesses in SSA.[1674]

The NAS has diagnosed SSA as having a weak investment climate which has been occasioned by key factors such as 'poor infrastructure, poor business environment (policies and access to finance) and insufficient technical skills'.[1675] Addressing each of these factors are significant in harnessing petroleum resources for enhancing the socioeconomic rights of the citizens. For instance, the less developed petroleum infrastructure in the upstream sector requires a lot more than necessary to attract huge investments into the upstream industry. There is a huge infrastructure gap in almost all the industries – thus, even beyond the

[1673] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1674] ibid.

[1675] ibid.

petroleum industry. The infrastructure gap makes infrastructure more expensive and investments related thereof less competitive.[1676]

At the same time, most companies have limited access to requisite finance. In the petroleum industry, for instance, the limited access to finance in SSA means that governments have to depend on foreign capital from MNPCs in order to conduct effective petroleum E&P operations. This comes with demands that would otherwise not be demanded by the local companies such as requests for special rebates or incentives. In an effort to attract MNPCs, coupled with limited capacity and dubious conduct of HS, some provisions are sometimes inserted in petroleum contracts that make the fiscal regime unfavourable to the HS in SSA.[1677] In Ghana, for instance, none of the petroleum contracts in the Jubilee field can boast of a total earning for the Ghana that realistically achieves up to 60% of total revenue of the life of the petroleum contracts. As discussed earlier in chapter eight, this unfair earning by the HS was largely occasioned by the overwhelming capital power of the MNPCs that took huge risks[1678] to enter into the E&P space of Ghana. This kind of low earning from the petroleum wealth by the HS usually flies in the face of justice and the effort to significantly achieve socioeconomic rights.

Additionally, there is low skillset in most of the companies and the general job market. The upstream petroleum industry, for example, requires specialised skills in law, geology, engineering, management and related areas.[1679] The inadequacy

[1676] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1677] Yihdego, Desta and Merso (eds), *Ethiopian Yearbook of International Law 2016* (2017) 117; Cameron, 'Investment Cycles and the Rule of Law in the International Oil and Gas Industry' (n 271) 755.

[1678] Taylor, 'Methods of Exploration and Production of Petroleum Resources' (n 93) 107.

[1679] ibid.

of this skillset in SSA means, therefore, that assistance has to be sought from foreign companies to be able to effectively extract the petroleum resources. In the end, these factors get to make the upstream sector in SSA to be foreign owned or dominated whose actors would end up dictating the pace of developments and repatriating the income they generate to their countries of origin. This not only adversely affects ability of the HS in SSA to generate fair share from their petroleum resources by the HS but also economic indicators such as exchange rate and inflation get to be negatively affected.[1680]

In the NAS, the World Bank will be:

> … developing a new breed of operations - to help African countries deploy a critical mass of reforms, infrastructure investments, and skills building for the industries and locations of highest potential.[1681]

It is underscored that these projects are 'strategically targeted interventions that have the capacity to effectively promote socioeconomic development'. The NAS proposes that these projects 'should be complemented by deeper and broader interventions that target three key investment climate constraints, namely: infrastructure gap (about US$93 billion infrastructure deficit), poor business environment, and limited skills'.[1682]

[1680] Cotula, *Investment contracts and sustainable development* (n 125); Desta, 'Competition for Natural Resources and International Investment Law (n 15).

[1681] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 11.

[1682] ibid, 12.

The NAS hopes to get the infrastructure deficit redressed by taking critical steps to address policy and institutional constraints that serve as baseline for resource wastage and investment deterrence. Policy measures can be used to 'address the inefficiencies that unite to cause haemorrhage of money amounting to US$17 billion of infrastructure resources in the region almost every other year'.[1683] This requires a number of actions to be carried out including, in particular, 'careful attention to policy and institutional reforms such as improvement in the management of utilities, better maintenance of assets, and greater cost recovery, as well as enhanced selection of investment, allocation of budget, and execution arrangements'.[1684]

Any policy measure aimed at mitigating or eliminating inefficiency is expected to be capable of contributing to 'a more favourable investment climate for infrastructure, improvement of the prospects for private investment and successful Public Private Partnerships (PPPs)'.[1685] At the same time, the policy and institutional constraints will be addressed by sufficiently utilising processes that help to improve the overall public finance framework. This would include planning of infrastructure, as well as screening and execution of projects.[1686]

The NAS also focuses on ensuring that, having recognised that investment in infrastructure has the higher tendency to produce "deleterious environmental effects - both globally and locally", [1687] the NAS will put emphasis on sustainable

[1683] ibid.

[1684] ibid.

[1685] ibid.

[1686] ibid.

[1687] ibid.

infrastructure which represents an approach that includes development of clean energy strategies that choose the appropriate product mix, technologies, and location to promote both infrastructure and the environment. What this means is that in executing infrastructure projects, it is not just about complying with the existing environmental safeguards but also going beyond that to really be proactive and more deliberate in harnessing clean energies. This provision is aligned to the SDG 7.[1688]

In respect of the constraint of poor business environment, the NAS locates its relevance in generating appropriate measures for the improvement of 'policies and institutions that are focused on protecting property rights and promoting fair competition'.[1689] In the petroleum E&P industry where there is complex mix of ownership rights and high level of competitive forces relating to sub-soil petroleum, it is imperative that property rights are clearly defined and fairness is promoted in the competition between the HS on one hand and the petroleum E&P companies on the other hand. Importantly, the petroleum legal framework must make provision for the protection of ownership rights and that competition for petroleum is founded on ROL and justice whereby principles of justice such as equity, equality and need are effectively appropriated for the benefit of all stakeholders.

The third factor of 'competitiveness and employment' is the need to have "a healthy and skilled workforce".[1690] It emphasises the significance of concentrating on the improvement of overall quality of education while at the same time

[1688] SDG 7.a.

[1689] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1690] ibid.

expanding "access to secondary and tertiary education and better skills training".[1691] According to the NAS, one of the areas of better skills training should be on specialised skills in areas such as management, law, geology and engineering in the petroleum industry of SSA.[1692] This has been put forward to improve the existing training programmes and courses in specialised fields. In the area of petroleum E&P, for instance, dedicated petroleum revenue could be set aside to build a specialised institution of higher learning that not only trains new graduates but also acts as an in-service centre for refreshing and upgrading the competence of petroleum workers. [1693]

Beyond addressing the business environment, infrastructure and skills constraints of 'competitiveness and employment', which are all real issues that send scaring signals to investors, there is the need to get hold of perception about issues that are not grounded on hard facts.[1694] In the petroleum industry, for instance, misconceptions such as total lack of investment climate, persistent conflict and unstable and/or bad governance sometimes scare petroleum investors away from certain countries such as Ghana. A closer look at the reality would reveal how these indicators have improved over time not just in Ghana but also in most SSA countries with the exception of some few countries such as South Sudan, Sudan and Somalia.[1695] Conscious efforts must be made to ensure that the promotion of competitiveness in the petroleum industry is in consonance with equivalent efforts to ensuring that petroleum laws meet the highest standards of ROL and justice so

[1691] ibid.

[1692] ibid.

[1693] ibid.

[1694] ibid.

[1695] ibid.

much so that the petroleum laws will have a yield that does not fall short of enhancement of adequate standard of living as a socioeconomic right in SSA.

9.3.2 Vulnerability and Resilience

The NAS has recognised that many SSA countries are prone to "a large number of shocks, such as droughts and floods; food shortages; macroeconomic crises [like from terms of trade]; HIV/AIDS, malaria, and other diseases; conflict; and climate change".[1696] The shocks not only have direct consequences on the 'competitiveness and employment' above but also do "have an immediate effect of lowering living standards", thus affecting adequate standard of living of the people therein.[1697]

The NAS has actually placed a lot of emphasis on this vulnerability and resilience theme primarily due to the fact that Low Income Countries (LICs) in SSA tend to "have fewer options in responding to shocks" and pressures from economic imbalances and natural occurrences.[1698] Of particular interest is the weaknesses of most petroleum-rich countries in SSA to effectively design appropriate petroleum legislation and contracts that are in the best interests of their citizens.[1699] The NAS underscores that, because there are only limited possibilities in existence to protect them against such shocks, the African poor get to embrace behaviours that are risk averse. These include conduct such as continuous

[1696] ibid, 15.

[1697] ibid.

[1698] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 9.

[1699] ibid.

accumulation of livestock regardless of the low returns therefrom. A behaviour like this could most likely retain such people in perpetual poverty.[1700]

By extension, in the petroleum E&P arena, it is not unusual for poor SSA countries to either leave their natural resources such as petroleum unexplored and not produced or underexplored and under-produced. It is, for instance, widely acknowledged that Africa's petroleum resources are the most underexplored resources in the world since the potential of huge deposits do exist theoretically.[1701] Leaving these resources not effectively explored and produced while being heavily dosed with poverty does make one wonder why this would not be a deep-seated weakness that is exposing SSA to poverty and deprivation.[1702]

In effect, this is a vulnerability that disempowers some countries with the ability to actualise ROL and justice for all due to several inadequacies to establish not only the requisite procedures but also the relevant institutions and administrative framework that have the capable workforce to effectively protect ROL and justice.[1703] It is imperative that this vulnerability is reduced or eliminated, and a solid resilience[1704] is built against the exposure to the above shocks.

[1700] ibid.

[1701] Paul Collier, *The plundered planet* (n 812); Paul Collier, 'The Case for Investing in Africa' in McKinsey & Company, *McKinsey on Africa: A Continent on the move* (June 2010).

[1702] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1703] Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329).

[1704] Due to the broad nature of resilience, it is often contextualised by scholars based on their research questions as 'to what, by whom, and how the concept is being addressed'. In this thesis, resilience is referred to 'the ability of SSA countries to harness their environment and resources in order to foresee, endure, recuperate, adapt and innovate to mitigate natural and economic risks and disasters; see Joie D Acosta, Anita Chandra and Jaime Madrigano, 'An Agenda to Advance Integrative Resilience Research and Practice: Key Themes From a Resilience

Building resilience is referred to a strategy aimed at preventing or trying to mitigate the effects of the shocks. This strategy must be based on the nature of the shock. For instance, with respect to macroeconomic shocks, providing social safety nets can be presented as "a powerful remedy".[1705] Macroeconomic shocks could be shouldered if adequate measures were to be put in place to unlock the potential of petroleum E&P in SSA and to harness the significance of getting the petroleum legal frameworks adequately right.[1706]

Even though disasters and risks have adverse effects on socioeconomic rights,[1707] it is challenging to build resilience against the shocks from these exposures.[1708] The governance and response mechanisms to strengthen resilience against shocks in SSA have particularly been weak. There have been resilience concerns such as 'lack of effective political leadership, financial wherewithal, appropriate skills, inter-sectoral coordination, effective communication, and effective risk and hazard assessment'.[1709] However, from the year 2000, there has been considerable progress in "developing policies, strategies, [plans] and institutional mechanisms

Roundtable' (2017) 7(1) Rand Health Quarterly 5; Arabella Fraser and others, 'Africa's urban risk and resilience' (2017) 26 International Journal of Disaster Risk Reduction 1-6; Joseph K Kamara and others, 'Resilience to climate-induced disasters and its overall impact on well-being in Southern Africa: a mixed-methods systematic review protocol' (2018) 127(7) Systematic Review < https://systematicreviewsjournal.biomedcentral.com/track/pdf/10.1186/s13643-018-0796-4 > accessed 21 September 2019.

[1705] ibid.

[1706] ibid.

[1707] Kamara and others, 'Resilience to climate-induced disasters and its overall impact on well-being in Southern Africa (n 1704).

[1708] Dewald van Niekerk and Livhuwani David Nemakonde, 'Natural Hazards and Their Governance in Sub-Saharan Africa' (Oxford Research Encyclopedia of Natural Hazard Science, September 2017)1.

[1709] ibid.

to advance disaster risk reduction and disaster risk management".[1710] For instance, The Regional Economic Communities (RECs)[1711] is a mechanism that supports efforts to "build an enabling environment to better address risk in the development sectors"[1712] in SSA. Although implementation constraints such as finance exist, RECs has provided a good framework that has significant prospects for success in strengthening resilience against shocks in SSA.[1713]

Another resilience mechanism is the Africa Disaster Risk Financing (ADRF) Initiative[1714] which seeks "to support African countries develop national risk financing tools and strategies that have the potential to significantly reduce

[1710] Niekerk and Nemakonde, 'Natural Hazards and Their Governance in Sub-Saharan Africa' (n 1708)1.

[1711] Five of the eight RECS that have been recognised by the AU are in SSA. The RECS in SSA include: ECOWAS, the Economic Community of Central African States (ECCAS), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East Africa Community (EAC), Southern African Development Community (SADC), and the Intergovernmental Authority for Development (IGAD). In fact, ECOWAS, IGAD, ECCAS, SADC and EAC have established 'disaster risk management policies and strategies'; see Niekerk and Nemakonde, 'Natural Hazards and Their Governance in Sub-Saharan Africa' (n 1708)13.

[1712] Niekerk and Nemakonde, 'Natural Hazards and Their Governance in Sub-Saharan Africa' (n 1708)13.

[1713] ibid.

[1714] Global Facility for Disaster Reduction and Recovery (GFDRR), 'Building Disaster Resilience in Sub-Saharan Africa Program: Result Area 5, Africa Disaster Risk Financing Initiative' (2014-16 Activity Report)1 < www.preventionweb.net/files/submissions/52669_acpeuresult5adrffy16aren.pdf > accessed 21 September 2019; GFDRR and World Bank Group, 'Striving Toward Disaster Resilient Development in Sub-Saharan Africa: Strategic Framework 2016–2020 < www.gfdrr.org/sites/default/files/publication/disaster-resilient-development-sub-saharan-africa.pdf > accessed 21 September 2019.

disaster losses,[1715] speed recovery and build resilience to natural hazards".[1716] A recent report has shown positive outturns in the support the initiative has provided for "governments with efforts to strengthen capacity to design and implement risk financing strategies at regional, national and local levels".[1717]

Regarding petroleum E&P, the resilience strategy should also include the building of capacity of institutions and public officials involved in the petroleum industry. Developing innovative financing strategies and building a knowledge bank of petroleum seismic data are important steps to building the capacity of institutions and personnel. This should enable poor SSA countries to withstand pressures that may come from distortions in the petroleum industry such as lack of interest of MNPCs in the area or their unfavourable dictates thereof.[1718] Chhibber and Laajaj argue for the development of "a more robust adaptation and response capability to disasters as part of development planning"[1719] such as the development of 'market-based financing mechanisms than have, hitherto, been used and to emphasise on forecasting research'.[1720]

The 'Building Disaster Resilience to Natural Hazards in Sub-Saharan African Regions, Countries and Communities Programme' is also a resilience mechanism

[1715] ibid.

[1716] GFDRR, 'Building Disaster Resilience in Sub-Saharan Africa Program: Result Area 5, Africa Disaster Risk Financing Initiative' (n 1714)1.

[1717] ibid.

[1718] ibid.

[1719] Ajay Chhibber and Rachid Laajaj, 'Disasters, Climate Change and Economic Development in Sub-Saharan Africa: Lessons and Directions' (2008)17(2) Journal of African Economies ii7.

[1720] ibid.

for containing vulnerabilities in SSA.[1721] This aims at providing an effective platform for implementing the African comprehensive disaster risk reduction (DRR) and disaster risk management (DRM) framework.[1722] The Programme focuses on five resilience building areas which are anchored on multi-stakeholder[1723] approach involving the World Bank: "Strengthening regional DRR monitoring and Coordination;[1724] Enhancing DRR coordination, planning and policy advisory capacities of Regional Economic Communities;[1725] improving the capacities of national and regional climate centres for weather and climate services;[1726] Improving risk knowledge through disaster loss databases for future risk modelling;[1727] [and] Developing disaster risk financing policies, instruments and strategies at regional, national and local levels".[1728] These and other resilience mechanisms should be leveraged by the World Bank in the implementation of the NAS to build and sustain resilience in SSA.

[1721] UNDRR, 'Building Disaster Resilience to Natural Hazards in Sub-Saharan African Regions, Countries and Communities programme - Update 1' < www.unisdr.org/we/inform/publications/55071> accessed 21 September 2019.

[1722] ibid; Workshop Concept Note, 'Building Disaster Resilience in Sub-Saharan Africa' < www.preventionweb.net/files/60420_workshopconceptnoteangola.pdf > accessed 21 September 2019.

[1723] The stakeholders include: The World Bank's GFDRR, the ADBG's Climate Development Special Fund (ADBG/CDSF), the African Union Commission (AUC), and the United Nations Office for Disaster Risk Reduction (UNISDR); see ibid.

[1724] Workshop Concept Note, 'Building Disaster Resilience in Sub-Saharan Africa' (n 1722).

[1725] ibid.

[1726] ibid.

[1727] ibid.

[1728] ibid.

At the same time, there is the need for SSA countries to pay special attention to the diversification of their economies in anticipation of the depletion of their petroleum resources in the long run. Countries such as United Arab Emirates (UAE)[1729] and Qatar[1730] have been diversifying their economies away from their hitherto overconcentration on their petroleum wealth.[1731] In the UK[1732] and Norway,[1733] as well, deliberate policies have been designed to ensure that they

[1729] For instance, about 70% of GDP of the UAE came from the non-oil segments of the economy such as "media, telecom, tourism, manufacturing and commercial aviation"; see Embassy of the UAE, 'UAE Economic Diversification Efforts Continue to Thrive' < https://www.uae-embassy.org/news-media/uae-economic-diversification-efforts-continue-thrive> accessed 21 September 2019.

[1730] For instance, the non-oil segments increased its contribution to GDP from 44.3 % in 2013 to 67.3% in 2017; see Sachin Kumar, 'Economic diversification drive yields august results' *The Peninsula* (30 August 2018) < https://thepeninsulaqatar.com/article/30/08/2018/Economic-diversification-drive-yields-august-results> accessed 17 July 2019; see also Yesenn El-Radhi, *Economic Diversification in the Gulf States: Public Expenditure and Non-Oil Economic Growth in Bahrain, Oman and Qatar* (Gerlach Press 2018).

[1731] Joerg Beute, 'Economic diversification and sustainable development of Gulf Cooperation Council countries' in Oxford Institute for Energy Studies, *Economic Diversification in the MENA* (June 2019) 118 Oxford Energy Forum 14 < www.oxfordenergy.org/wpcms/wp-content/uploads/2019/06/OEF-118.pdf?v=7516fd43adaa > accessed 22 August 2019.

[1732] Florian Heydenreich, 'Economic Diversification: Evidence for the United Kingdom' (2010) 16(1) The Journal of Real Estate Portfolio Management 71; Alonso Segura and others, 'Inter-Sectoral Linkages and Local Content in Extractive Industries and beyond' (IMF Working Paper WP/07/213, 2007).

[1733] See Øystein Noreng, 'The Norwegian Experience of Economic Diversification in Relation to Petroleum Industry' (2004) 2(4) OGEL; Yousif M Mohammad Alameen, 'The Norwegian Oil Experience of Economic Diversification: A Comparative Study with Gulf Oil' (2016) 8(15) European Journal of Business and Management 94; see also Sami Mahroum and Yasser Al-Saleh (eds), *Economic Diversification Policies in Natural Resource Rich Economies* (Routledge 2017); OECD, 'OECD Economic Surveys, Norway: Overview' (January 2018) < www.oecd.org/eco/surveys/norway-2018-OECD-economic-survey-overview.pdf > accessed 10 April 2019.

can be resilient enough to contain an economy without petroleum.[1734] Although with weak pillars, Ghana,[1735] Nigeria[1736] and Angola[1737] have also been developing policies and petroleum legal frameworks to help them not only to move away from the Dutch disease and resource curse which expose them to vulnerabilities.[1738] They are also taking steps to cushion them against the shocks of depletion of their

[1734] See Nouf Alsharif, Sambit Bhattacharyya and Maurizio Intartaglia, 'Economic Diversification in Resource Rich Countries: Uncovering the State of Knowledge' (CSAE Working Paper WPS/2016-28, Oxford University, 13 October 2016) < http://sro.sussex.ac.uk/id/eprint/64986/1/csae-wps-2016-28.pdf > accessed 24th September 2017.

[1735] Elijah Acquah-Andoh and others, 'Oil and Gas Production and the Growth of Ghana's Economy: An Initial Assessment' (2013) 4(10) International Journal of Economics & Financial Research 303; David Pilling, 'Ghana's oil holds promise to enrich the economic mix' *Financial Times* (8 October 2018) < www.ft.com/content/c10e6314-c1ad-11e8-84cd-9e601db069b8 > accessed 13 June 2019.

[1736] See Sunday A Eko, Clement A Utting and Eteng U Onun, 'Beyond Oil: Dual-Imperatives for Diversifying the Nigerian Economy' (2013) 4(3) Journal of Management and Strategy 81 < www.sciedu.ca/journal/index.php/jms/article/view/3171/1867> accessed 26 November 2016; Pwc, 'Nigeria: Looking beyond Oil' (March 2016) < www.pwc.com/ng/en/assets/pdf/nigeria-looking-beyond-oil-report.pdf > accessed 15 November 2017; see also Ngozi Okonjo-Iweala*, Reforming the Unreformable: Lessons from Nigeria* (MIT Press 2012).

[1737] Paul Akiwumi, 'Why Angola must foster entrepreneurship and diversify its economy' (United Nations Conference on Trade and Development, 13 August 2019) < https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2165 > accessed 21 September 2019; Diogo José Paulo Cristiano and others, 'Angola Forum 2017: Economic Diversification, Development and Strengthening Democracy' (Chatham House, 1 June 2017) < www.chathamhouse.org/sites/default/files/Angola%20Forum%202017%20-%20First%20Session.pdf > accessed 11 March 2019; see also Justin Schuster and Eric Stern, *Diplomatic Discourse: Interviews with US Ambassadors from around the World* (Lulu Press 2015).

[1738] Christina Malmberg Calvo, 'Lessons from the continent and beyond: Can oil diversify Uganda's economy?' (World Bank Blogs, 23 June 2016) < https://blogs.worldbank.org/africacan/lessons-from-the-continent-and-beyond-can-oil-diversify-ugandas-economy > accessed 12 February 2017.

petroleum resources.[1739] In the three SSA countries aforementioned, even though their legal frameworks anticipate depletion[1740] of their petroleum resources in the long run, their governments have been caught up in the web of weak commitments and corruption particularly Angola and Nigeria.[1741] Ghana is the youngest in petroleum production amongst the three countries and, therefore, has had the benefits of inadequacies in Nigeria, Angola and other matured petroleum-rich SSA countries. Ghana is likely to suffer the same fate as her predecessors if the political actors are not committed to amending questionable legal provisions and enforcing the best legal provisions in her petroleum legal framework including the petroleum revenue management regime[1742] which has created opportunities such as the heritage fund[1743] for future generations to benefit from the petroleum wealth.[1744]

What this theme of the NAS has overlooked is the role played by ROL and justice as stitching mechanisms for ensuring that the critical programmes rolled out to build resilience and reduce vulnerability are done properly and orderly without discrimination, inconsistency and unpredictability. Improving practices of ROL and

[1739] ibid.

[1740] Act 919 [2016], s 26.

[1741] NRGI, 'Angola, Oil and Gas: 2017 Resource Governance Index, Natural Resources Governance Institute' (n 1622).

[1742] Act 815 [2011].

[1743] See ibid, s 10.

[1744] Calvo, 'Lessons from the continent and beyond: Can oil diversify Uganda's economy?' (n 1738).

justice in the petroleum legal architecture can significantly help in building resilience in the petroleum industry of SSA.[1745]

9.3.3 Governance and Public Sector Capacity

The theme of 'governance and public sector capacity' is seen in the NAS as 'the binding constraint to progress on 'vulnerability and resilience' as well as 'competitiveness and employment' thematic areas'.[1746] The World Bank has observed that this theme was identified as the main challenge that underlie the socioeconomic development of SSA.[1747]

For instance, as a result of vested interests of political leaders in SSA, some regulations of businesses (including energy/petroleum) are intentionally promulgated to constrain competition. At the same time, poor infrastructure is a binding constraint that is occasioned by bad governance and low capacity of the public sector to effectively function.[1748] The bad governance and low capacity are demonstrated in:

> … [weak pillars of ROL and justice,] poor public investment choices, weak budget management, corrupt or lethargic

[1745] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329); Gale Group, 'West's Encyclopaedia of American Law' (n 307); Sandel, *Justice: What's the Right Thing to Do?* (n 24); Sen, *The Idea of Justice* (n 404).

[1746] ibid.

[1746] ibid.

[1747] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1748] ibid.

> procurement practices, inefficient public utilities, and regulations that [undermine socioeconomic development and rights].[1749]

The quality of public services is generally poor, and haemorrhage of public funds are a consequence of accumulated "failures in accountability of civil servants and politicians to the public".[1750] These pose a huge governance challenge in SSA.

Hitherto the launch of the NAS, the World Bank has been working in a number of areas of 'governance and public sector capacity'. For instance, there has been the World Bank's support for a 'high-level dialogue on governance and accountability in Congo and advising on transparent petroleum revenue laws in Ghana'.[1751] Dialogue, transparency and accountability are all shared requirements of ROL and justice. They are also facilitating tools for the protection of socioeconomic rights which are still relevant in the NAS.[1752]

Natural resources such as petroleum, due to poor governance especially, can create toxic competition to gain access to resource rents which could result in significant revenue leakages and prolonged conflict that would have disastrous implications for socioeconomic development and hence socioeconomic rights.

[1749] ibid.

[1750] ibid.

[1751] ibid.

[1752] Shihata, 'The Role of Law in Business Development' (n 149) 1577; Friedman, 'Legal Rules and the Process of Social Change' (n 255); Shihata, 'Legal Framework for Development (n 28); see also Talus (ed), *Research Handbook on International Energy Law* (n 337); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

Therefore, as aptly identified by Collier, the continued discoveries of petroleum resources in many parts of SSA,[1753] present both opportunities and challenges.

The 'governance and public sector capacity' theme addresses itself to the need to 'deepen the approach of EITI that takes into consideration the value chain of the management of natural resources such as petroleum',[1754] right from:

- initial discovery of petroleum,
- transparent contractual arrangement to extract petroleum,
- transparency in reporting and management of petroleum revenues, to
- the effectiveness in the management of public expenditure and investment as well as beneficiation of communities in which the resources are deposited.[1755]

The World Bank is expected to support these four processes in order to help manage the resources effectively. In the nutshell, the theme is approached from the perspectives of demand and supply.[1756] Looked from the demand side perspective, this thematic area is aimed at strengthening voices of the citizens. This measure is a civil right which is supported by provisions of UDHR particularly Article 19, ICCPR[1757] and ACHPR.[1758] These can foster the protection of

[1753] Paul Collier, 'The Case for Investing in Africa' in McKinsey & Company, *McKinsey on Africa:* (n 1701).

[1754] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1755] ibid.

[1756] ibid, 1.

[1757] Right to freedom of expression, Art 19.

[1758] Right to freedom of expression, Art 9.

socioeconomic rights in UDHR,[1759] ICESCR[1760] and ACHPR[1761] as well as DRTD[1762] and Aspiration 1 of Agenda 2063 which focuses on an Africa that is prosperous "based on inclusive growth and sustainable development".[1763] This connectivity underlies the complementarity of international legal instruments.

Observed from the perspective of supply, however, the thematic thrust is focused on enhancing the capacity of political leaders of SSA to provide good governance for strengthening public sector delivery capacity to provide critical services that enhance the socioeconomic wellbeing of citizens and all residents alike. This resonates with the capability approach advanced by Sen and Aristotle about achieving the right of standard of living.[1764]

In effect, ensuring good governance and enhancing the delivery capacity of the public sector provide a sound footing for the effective functionality of every other sector of any country. At the heart of achieving this sound footing is to ensure that ROL and justice have visible presence in institutions and operations of the

[1759] Right to own property, Art 17; Right to work, Art 23; Right to adequate standard of living, Art 25; Right to education, Art 26.

[1760] Right to self-determination and natural resources, Art 1; Right to work, Art 6; Right to adequate standard of living, Art 11; Right to health and wellbeing, Art 12; Right to education, Art 13.

[1761] Right to Property, Art 14; Right to Work, Art 15; Right to Health, Art 16; Right to Education, Art 17; Right to Free Disposal of Wealth and Natural Resources, Art 21; and generally, Right to Economic, Social and Cultural Development, Art 22.

[1762] Right to full sovereignty and control of natural resources, Art 1; and Right to better wellbeing, Art 2.

[1763] See AU, 'Our Aspirations for the Africa We Want' (*Agenda 2063*) Goals 1 -7 of Aspiration 1; < https://au.int/en/agenda2063/aspirations > accessed 25 April 2019.

[1764] Anand and Sen, 'Human Development and Economic Sustainability' (n 252); Treddenick (ed), *Aristotle, the Nicomachean Ethics* (n 480).

state. In the petroleum industry, especially in formulating and enforcing petroleum legislation and contracts, it is crucial to effectively integrate ROL and justice in every step of the way. In the consolidation of *lex petrolea,* this theme is important because it is a fulcrum around which universal petroleum law can be effectively achieved.

9.4 Instruments for the Implementation of the New Africa Strategy

9.4.1 Partnerships instrument

The first instrument of the NAS is Partnership, which is crucial to ensure that a sound foundation of stakeholder engagement in SSA is procured to generate the needed support and consensus for the implementation of the NAS. The partnerships will be actualised through intra-World Bank collaboration and the World Bank's inter-collaboration with other stakeholders. The inter-collaboration of the World Bank is with "the African society, the private sector, the African Union Commission, the African Development Bank (AfDB), and other development actors"[1765] such as the ECOWAS Bank for Investment and Development,[1766] IMF, the UN and CSOs such as EITI and NRGI. The sub-regional organisations of Africa

[1765] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 1.

[1766] ECOWAS, 'ECOWAS Bank for Investment and Development (EBID)' < www.ecowas.int/institutions/ecowas-bank-for-investment-and-development-ebid/ > accessed 25 April 2019.

such as ECOWAS[1767] institutions,[1768] Intergovernmental Authority on Development (IGAD),[1769] East African Community (EAC),[1770] Southern African Development Community (SADC),[1771] and Economic Community of Central African States (ECCAS)[1772] as well as the institutions of Agenda 2063 such as the African Union Development Agency (AUDA) - the New Partnership for Africa's Development

[1767] ECOWAS is aimed at the promotion of "co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations-among Member States and contribute to the progress and development of the African Continent"; see Economic Community of West African States (ECOWAS), *Revised Treaty* (ECOWAS Commission 2010), Art 3(1) < www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf > accessed 10 October 2017; ECOWAS, 'Treaty' < www.ecowas.int/ecowas-law/treaties/ > accessed 26 April 2019.

[1768] See ECOWAS, 'Institutions' < www.ecowas.int/institutions/ > accessed 25 April 2019.

[1769] IGAD is focused on the promotion of "regional cooperation and integration to add value to Member States' efforts in achieving peace, security and prosperity" in the Eastern Africa region; see IGAD, 'What we do' < https://igad.int/about-us/what-we-do > accessed 25 April 2019.

[1770] EAC aims at developing "policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit"; see *EAC Treaty: Treaty for the Establishment of the East African Community* [1999], Art 5 < www.eac.int/documents/category/key-documents > accessed 25 April 2019; East African Community, 'About EAC' < www.eac.int/about-eac > accessed 25 April 2019.

[1771] SADC, aims, amongst others, at the promotion of "sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration"; see Consolidated Text of the Treaty of the Southern African Development Community [2009], Art 5 (1)a < www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf > accessed 26 April 2019.

[1772] ECCAS of the AU seeks to promote 'regional economic cooperation in Central Africa that is geared towards achieving collective autonomy and increase standard of living of the people therein'; see ECCAS, 'Overview' < www.ceeac-eccas.org/index.php/fr/ressources/telechargement > accessed 26 April 2019.

Planning and Coordinating Agency (NEPAD)[1773] [i.e. AUDA-NEPAD][1774] are imperative, in this regard. They should all be made to have a buy-in for the operationalisation of NAS even beyond the 10-year vision in 2020. This will ensure stronger partnership across the nooks and crannies of Africa's socioeconomic development agenda.

With respect to the intra-World Bank collaboration, the World Bank will ensure that there is close collaboration and coordination between selected arms of the World Bank, consisting of the 'IFC, MIGA, the Development Economics Vice Presidency (DEC)[1775] and the World Bank Institute (WBI).[1776] This intra collaboration would help the World Bank and the other stakeholders to 'capture synergies and expertise that have been accumulated in the World Bank' over the years. It is imperative that the NAS is able to form a synergetic relationship with all the key players in the socioeconomic development front of SSA.

The 'partnerships instrument' provides guiding structures that are supported by the provisions of a number of international cooperation instruments that advance socioeconomic rights. International legal instruments such as ICESCR,[1777]

[1773] AUDA is a new AU agency in charge of supporting the implementation process of Agenda 2063.

[1774] AUDA-NEPAD Agency, 'NEPAD Transforms into the African Union Development Agency' < www.nepad.org/nepad-transforms-african-union-development-agency > accessed 25 April 2019.

[1775] DEC is the World Bank's research and data unit.

[1776] WBI is the arm of the World Bank that partners with IOs and World Bank's operations to give support to efforts at improving governance and controlling corruption in almost 30 Countries.

[1777] Art 23.

ACHPR,[1778] DRTD[1779] and UDHR[1780] do all provide the need for states to form useful partnerships in advancing socioeconomic rights and in championing universal principles such as ROL and justice. For instance, DRTD provides that: "States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development".[1781] In the same vein, Article 8 of DRTD urges states to push through measures that enhance justice. What these provisions suggest is that there is international legal basis for the kind of partnerships the World Bank is leveraging as an instrument for the implementation of the NAS.

9.4.2 Knowledge instrument

The NAS recognises the 'knowledge instrument' as the second instrument to be utilised for its implementation. 'Knowledge' denotes the generation and dissemination of ideas "to nourish evidence-based debate and capacity building".[1782] This strategic 'knowledge instrument' equips the World Bank with the needed expertise to provide accelerated support to states. It puts emphasis on generating development solutions from regional basis, as well as gives the relevant knowledge support to Middle Income Countries (MICs) to progress to the next level of development.[1783] This is where the experiences and stock of understanding and literature, gathered over the years up to the present, are brought to bear on designing, shaping and operationalising of regional and

[1778] Art 21(3).

[1779] Art 3.

[1780] Art 1.

[1781] DRTD, Art 3(3).

[1782] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 2.

[1783] ibid.

country-level policies, plans, programmes and projects in SSA. Embedded in this is also about dispensing knowledge for the establishment and strengthening of relevant institutions and processes (including legal institutions, law enactment and enforcement) that can stand the test of time to effectively help in the realisation of the 10-year vision of the NAS.[1784]

For instance, the World Bank has, for years, gathered a huge amount of experience and literature on petroleum E&P regimes across the world, including SSA. The World Bank has provided technical support to various countries and witnessed how the petroleum E&P regimes have fared globally – and somewhat performed badly in SSA.[1785] Through the NAS, it should be possible for the World Bank to genuinely share experiences with SSA as to how to avoid the pitfalls that have almost succeeded in branding most countries in SSA as suffering from the resource curse and Dutch disease phenomena.[1786] The technical expertise of the World Bank can best be useful, in this regard, through the heavy deployment of the 'partnership instrument'. Thus, the 'knowledge instrument' can become more potent if it is deployed as a way of gathering and sharing information and expertise with the governments of countries in SSA but not as a form of imposition of know-how as if the World Bank were a superpower in knowledge. It is especially important that, in sharing technical expertise with SSA on petroleum E&P, attention is paid to ensuring that ROL and justice principles are sufficiently featured in petroleum E&P legislation and contracts as well as with the institutions and personnel thereof.

[1784] ibid.

[1785] ibid.

[1786] ibid; African Development Bank and the African Union, *Oil and Gas in Africa* (n 13).

9.4.3 Finance instrument

The 'finance instrument' consists of diverse financing arrangements which the World Bank can provide from its own internal resources or leverage its financial capacity to pool funds from private and public entities to support the implementation of the NAS. The financial support that is given to SSA to mitigate the development challenges that these countries are encumbered with, does get to "serve only as a catalyst for greater leveraging".[1787] A critical goal in the NAS is 'to leverage the World Bank's financing to crowd in other sources of financing, with greater focus on high-impact operations in key strategic sectors."[1788]

The World Bank will embark on the promotion of "catalytic mechanisms that take limited IDA funding and generate large amounts of private investment"[1789] using products such as guarantees[1790] as, for example, applied in the IFC and MIGA's "commitment of $517 million in debt and guarantees to support Ghana's [US$7.7 billion] Sankofa Gas Project"[1791] in 2016. This followed an earlier "investment [approval] of $700 million in guarantees for Ghana's Sankofa Gas Project"[1792] in 2015. Petroleum E&P is, undoubtedly, a high impact operation because it not only

[1787] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1788] ibid.

[1789] ibid, 29.

[1790] ibid.

[1791] MIGA, 'IFC and MIGA Support Sankofa Gas Project to Help Ghana Shift Power Generation to Natural Gas' (Press Release, Washington, 15 December 2016) < www.miga.org/press-release/ifc-and-miga-support-sankofa-gas-project-help-ghana-shift-power-generation-natural > accessed 14 March 2017.

[1792] IBRD-IDA of the World Bank Group and The World Bank, 'World Bank Approves Largest Ever Guarantees for Ghana's Energy Transformation' (Press Release, Washington, 30 July 2015) < www.worldbank.org/en/news/press-release/2015/07/30/world-bank-approves-largest-ever-guarantees-for-ghanas-energy-transformation > accessed 14 March 2017.

generates huge financial resources but also it addresses the needs of investors and HS alike.[1793] It, therefore, should continue to attract the focus of the NAS.

The other sources of financing which the World Bank will leverage do primarily characterise the country's own resources, which has already been the leading source of financing. Th country's own resources do have the potential to grow; the implications of which is that there will be "greater linkage to country and sector budgets in the [World] Bank's interventions".[1794]

Under the NAS, the World Bank is expected to accelerate the support it gives to states associated with fragility. This will include the more effective implementation of "partnership agreements and trust funds"[1795] in the fragile countries[1796] such as South Sudan and Somalia.[1797] Fragile states usually have their situation worsened

[1793] Talus (ed), *Research Handbook on International Energy Law* (n 337); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330); Cotula, *Investment contracts and sustainable development* (n 125).

[1794] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 29.

[1795] ibid.

[1796] According to the Centre for Systemic Peace, in 2009, about 23 countries in Africa were in "extreme" or "high" fragility. At the same time, 13 African countries were classified as within the "serious" fragility zone. This classification is a measure that makes assessment on countries' level of "effectiveness and legitimacy along four dimensions: security, political, economic, and social performance"; see updates at: Centre for Systemic Peace, 'Virtual Library' < www.systemicpeace.org > 24 April 2019; recently 18 SSA countries were identified by the World Bank as fragile while 13 small other SSA countries were said to have "limited human capital, and a confined land area" thus making 31 of 46 countries in SSA having different levels of vulnerabilities; The World Bank, 'Overview: Strategy' (The World Bank in Africa, Last Updated: 11 April 2019) < www.worldbank.org/en/region/afr/overview#2 > accessed 24 April 2019; see also The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 20.

[1797] Tim Glawion, Lotje de Vries and Andreas Mehler, 'Handle with Care! A Qualitative Comparison of the Fragile States Index's Bottom Three Countries: Central African Republic, Somalia and South Sudan' (2018) 50(2) Development and Change 277.

by their "exceptionally weak capacity of the public sector".[1798] Extending effective support to fragile states will significantly promote distributive justice since those countries in higher need will be given greater attention while, at the same time, not unduly sacrificing the needs of non-fragile countries in SSA which are also poor, anyway.[1799]

The World Bank will, through the 'finance instrument', work towards the maximisation of "the impact of other capabilities of its treasury [such as] insurance intermediation, commodity price hedging, and debt management".[1800] The World Bank has tagged itself as different from other financial institutions because of its "true advantage" of being 'financially flexible and innovative'. This is arguable because the other Bretton Woods' Institutions such as IMF[1801] and other international institutions such as the UN[1802] may also claim such innovativeness and flexibility.[1803] Flexibility and innovation that generate positive impact on socioeconomic development, and hence socioeconomic rights, do carry along with it effective allocation of resources to meet the needs of a society, which is characteristic of the application of distributive justice.[1804]

[1798] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 20.

[1799] Sen, *The Idea of Justice* (n 404); Sandel, *Justice: What's the Right Thing to Do?* (n 24); Maiese, 'Principles of Justice and Fairness' (n 24).

[1800] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1801] IMF, 'Balancing Act: Managing the Public Purse' (2018) 55(1) F&D Finance and Development < www.imf.org/external/pubs/ft/fandd/2018/03/pdf/fd0318.pdf > accessed 15 February 2019.

[1802] Philippe Douste-Blazy, *Innovative Financing for Development* (The I – 8 Group, September 2014) < www.un.org/esa/ffd/wp-content/uploads/2014/09/InnovativeFinForDev.pdf> accessed 17 March 2017.

[1803] Paul Turner, *Organisational Communication: The Role of the HR Professional* (CIPD 2003).

[1804] Maiese, 'Principles of Justice and Fairness' (n 24).

Finance can be used to facilitate operations of corporations such as MNPCs across the globe. Finance can be a medium through which SSA countries can seek remedies from MNPCs. Therefore, the World Bank through its MIGA, should intensify the use of the 'finance instrument' to provide guarantees and financing leverages for foreign firms including MNPCs that operate in SSA. This measure could allow MNPCs to operate within reasonable limits of risk portfolios, so that they may not have to insist on contractual terms that seek to guarantee a redress for their risks, but which impose adverse revenue consequences for the HS resulting in limitation on financing for socioeconomic programmes that harness socioeconomic rights. This measure should be advanced through synergising with the 'partnership instrument'.[1805] In collaboration with MNPCs, the World Bank should enhance its efforts to effectively and proactively incorporate, in its operations, requirements of human rights law instruments such as UDHR, ACHPR, DRTD and ICESCR that articulate socioeconomic rights.[1806] Indeed, any financial support by the World Bank to enhance the capacity of the HS in SSA, in increasing revenues and ensuring accountability measures such as ROL and justice thereof, does go a long way to harness socioeconomic rights.[1807]

It is, therefore, in the right direction that SSA will have the opportunity to receive 'capacity support and advice on risk-sharing instruments', under the NAS. Furthermore, the World Bank has been focused on achieving results. This

[1805] Mac Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (Studies in International law, Hart Publishing 2003).

[1806] ibid.

[1807] Shihata, 'The Role of Law in Business Development' (n 149) 1577; Friedman, 'Legal Rules and the Process of Social Change' (n 255); Shihata, 'Legal Framework for Development (n 28); Maiese, 'Principles of Justice and Fairness' (n 24).

inclination is to be further improved through the World Bank's current work on "results-based financing".[1808] Furthermore, the NAS allows the World Bank to help in preparing countries on IDA financing to move to the category of countries qualified to be on IBRD financing. In order to achieve this, the World Bank will undertake steps such as "instituting enclave IBRD projects and strengthening public management reforms".[1809] Additionally, the World Bank is to use the NAS instrument to "selectively mobilize trust funds that have strong strategic alignment, leverage its capacity and development knowledge, and complement IDA and IBRD financing at the regional and national levels".[1810]

The idea is that trust funds will be mainstreamed in the operations of IDA and IBRD. This will help in building the strength of strategic integration of financing platforms. At the same time, emphasis will be placed on ensuring that development objectives are clear, results are tangible and risk mitigation strategies are made effective.[1811] The World Bank will position itself to only accept financing products over which the World Bank recognises its comparative advantage thereof. At the same time, in accepting any of such financing products, the World Bank will take into consideration "the accountability and responsibility associated with mobilizing trust funds".[1812] Accountability and responsibility measures are strong pillars of ROL and justice.[1813]

[1808] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1809] ibid.

[1810] ibid, 29.

[1811] ibid.

[1812] ibid.

[1813] WJP, 'The Four Universal Principles' (n 35); Friedman, 'Legal Rules and the Process of Social Change' (n 255); Shihata, 'Legal Framework for Development (n 28).

The use of innovative financial solutions such as "partial credit guarantees, debt drawdown options, and possible local currency lending"[1814] will be extensively explored with the support of the IBRD and IDA because they have been successfully used in Southern Africa. These innovative financial products established financing framework that 'crowded in large amounts of financing from the other sources'. In fact, expansion of the application of these innovative financial solutions have been the major driver of the recent 'World Bank's success in the southern African MICs'.[1815] However, these countries such as Mozambique and South Africa in Southern Africa are still bedevilled with high incidence of extreme poverty,[1816] hence, low standard of living which endangers the enjoyment of socioeconomic rights such as right to quality education and health as provided in ICESCR.[1817] This suggests that more effective financing instruments will have to be deployed than those utilised in the Southern Africa region. One will have to do with the scale or scope of deployment of these products and the other will have to do with the effectiveness of the products.[1818]

In addition, the NAS engages the World Bank to explore "innovative risk-management instruments to support PPPs".[1819] In particular, the IFC is tasked to "continue to deepen mobilization initiatives to leverage further direct IFC funding,

[1814] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 29.

[1815] ibid.

[1816] Alex Porter, 'Extreme poverty set to rise across Southern Africa' (Institute for Security Studies, 5 April 2017) < https://issafrica.org/iss-today/extreme-poverty-set-to-rise-across-southern-africa> accessed 8 January 2018.

[1817] Art 12 (Right to health), Art 13 (Right to Education).

[1818] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1819] ibid, 2.

bringing in new partners and facilitating new products".[1820] At the same time, the MIGA is charged to 'continue to provide support and catalyse investment with its traditional political risk guarantee product'.[1821]

It is imperative that more innovative financing products are deployed to cover a lot more people. In doing so, the World Bank must consider achieving distributive justice whereby the allocation of the finance products to individual countries in SSA is fair and especially in tandem with the principle of need. Fragile states in SSA must get more of the support but, at the same time, high impact sectors of SSA economies such as the petroleum sector[1822] must receive the greater share to achieve greater good for the society. Furthermore, effective financial regulations and laws must be enhanced by ROL wherein no one is allowed to misapply, squander or misappropriate project funds with authoritative impunity[1823] or without being penalised because of the higher positions they may occupy. The World Bank should strengthen and effectively apply its sanctioning regime such as enhancing its scope and transparency.[1824] Financial accountability

[1820] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 29.

[1821] ibid.

[1822] Talus (ed), *Research Handbook on International Energy Law* (n 337); Desta, 'Competition for Natural Resources and International Investment Law (n 15).

[1823] For the 38 UN principles against impunity, see UN, *Promotion and Protection of Human Rights: Updated set of principles for the protection and promotion of human rights through action to combat impunity* (Economic and Social Council, E/CN 4/2005/102/Add 1, 8 February 2005) < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement > accessed 6 January 2018; see also Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press 2018).

[1824] Manacorda and Grasso, *Fighting Fraud and Corruption at the World Bank: A Critical Analysis of the Sanctions System* (n 147).

must be taken seriously in order to weed out and prevent the prevalence of dubious characters and processes. [1825]

Essentially, therefore, with the 'finance instrument', the World Bank is expected to 'promote catalytic mechanisms which should be able to leverage the financing of the Bank in order to crowd in other sources of private investments, link to the resources of SSA, and make use of other instruments of innovative financing and risk management to support PPPs'.[1826] Thus, the World Bank will facilitate processes that will use its financing toolkits as a springboard to attract more private resources to SSA, especially, for engendering PPPs.[1827]

In this regard, this thesis argues that the World Bank's 'financing instrument' can make huge impact on the petroleum E&P industry in SSA countries that make provision in their petroleum contracts to have a paid participating interest in a petroleum field when a discovery of petroleum is made. This arrangement accrues minimal risks because petroleum would have been discovered in commercial quantities before funds are called for. However, because SSA countries are highly constrained financially,[1828] it can sometimes be difficult for the HS to honour its payment obligation when a call is made to do so.

[1825] Ewa Karwowski and Stephany Griffith-Jones, 'Can the Financial Sector Deliver Both, Growth and Financial Stability in Sub-Saharan Africa?' in Joseph E Stiglitz and Akbar Noman, *Industrial Policy and Economic Transformation in Africa* (Initiative for Policy Dialogue at Columbia, Columbia University Press 2015) 197.

[1826] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1827] ibid.

[1828] Karwowski and Griffith-Jones, 'Can the Financial Sector Deliver Both, Growth and Financial Stability in Sub-Saharan Africa?' (n 1825).

Ghana is a typical case. The petroleum Act 919 provides for this paid participating interest by the HS upon the discovery of petroleum in commercially viable quantities. Meanwhile, the country is struggling to make use of this provision because of financial constraints as well as public sector capacity and governance issues[1829] such as poor government decision-making but partly also due to inadequacy of faith for the full application of ROL and protection of distributive justice in the petroleum industry.[1830] The World Bank could arrange a PPP financing for petroleum-rich countries that need such a support to derive maximum economic benefits from their petroleum resources. This should come with a condition of setting aside about two percent of the yield from such financing to finance clean energy projects in order to harness energy justice which applies the justice principles such as need, equity, fairness and equality to sustainability in the petroleum industry.[1831]

The effectiveness of the 'finance instrument' is influenced by how the 'partnerships and knowledge instruments' are pursued by the World Bank. There is, therefore, expected to be a strong synergy between 'partnerships and knowledge as well as finance'. The World Bank places significance on this synergy because the resources of the IDA are limited. This is exemplified by the fact that for the ten-year period of the vision of the NAS, it has been estimated that only 50% of the resources of

[1829] Hanson, Owusu and D'Alessandro (eds), *Managing Africa's Natural Resources* (n 431); The World Bank, 'Ghana's 2018 Economic Outlook Positive but Challenges Remain' (n 137).

[1830] WJP, *World Justice Project Rule of Law Index* (n 41).

[1831] Kirsten Jenkins and others, 'Energy justice: A conceptual review' (2016) 11 Energy Research & Social Science 174.

IDA16[1832] (without more) – i.e. US$25 billion[1833] - will be transferred to SSA to get the NAS implemented. This is inadequate considering the targets of the NAS and the huge financial demands from SSA. Beyond the limited financial resources as the need for the synergy between these strategy implementation instruments is to the effect that, the three instruments play interconnected roles and so putting them in synergy means that they are to reinforce the vitality of both individual functionality and collective delivery of good outputs and outcomes.

The World Bank has been urged by the NAS to continue to enhance its communication with its clients and staff on treasury products.[1834] This is significant because without effective information flow, it is difficult to meaningfully connect the aims of the NAS, the World Bank's clients and its staff on one hand and the deliverables and impact thereof on the other hand.[1835] Communication promotes the right to freedom of expression[1836] and ROL because better communication channels will allow clients and staff of the World Bank not only to voice out their views and concerns to the World Bank's authorities but also it engenders participation in decision making.[1837]

[1832] IDA, 'IDA16 Replenishment' (World Bank Group) < http://ida.worldbank.org/replenishments/ida16-replenishment > accessed 18 March 2017

[1833] The World Bank, 'World Bank's Fund for The Poorest Receives Almost $50 Billion in Record Funding' (Press release No. 2011/248/EXT, Brussels, 15 December 2010) < http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22790700~pagePK:64257043~piPK:437376~theSitePK:4607,00.html > accessed 18 March 2017.

[1834] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1835] Turner, *Organisational Communication: The Role of the HR Professional* (n 1803).

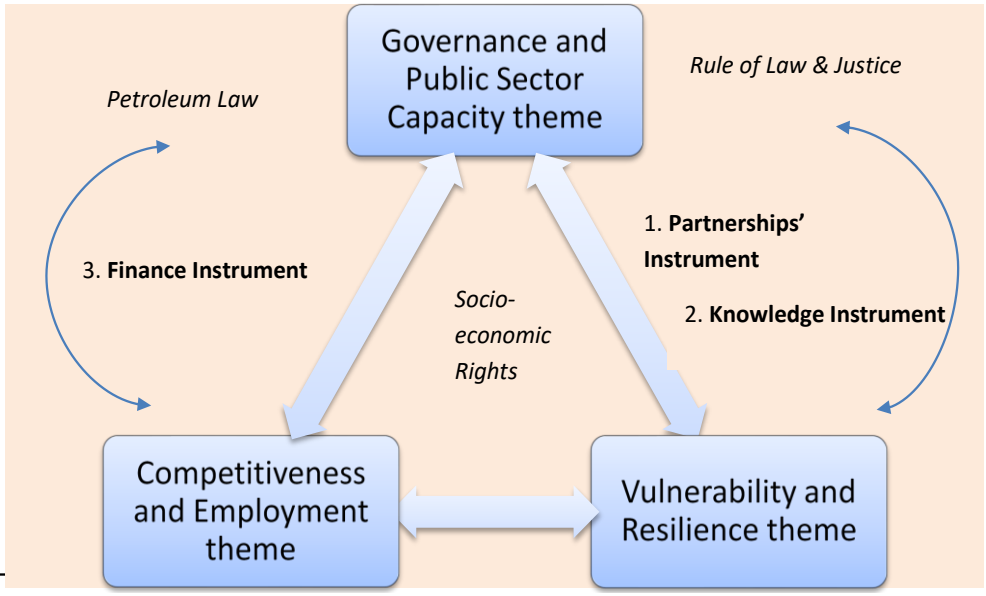
[1836] UDHR, Art 19; ICCPR, Art 19.

[1837] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

9.5 Operationalising the monitoring framework of the New Africa Strategy

At the heart of all the strategic pillars is that governments in SSA must not only establish laws and regulations as well as institutional and administrative arrangements on harnessing 'competitiveness and employment' but also it is critical that they implement and enforce them for the benefit of the people.[1838] The NAS has been positioned to be implemented within home strategies of each of the SSA countries in order to serve as the catalyst required to achieve its 10-year vision.[1839] Countries that have petroleum E&P as cardinal to their strategic socioeconomic development can effectively utilise the vision of the NAS to harness their petroleum laws and socioeconomic rights along with ROL and justice. Figure 12 below shows interconnections of the themes and the instruments of the NAS as they relate to petroleum law, ROL and justice as well as socioeconomic rights.

Figure 12: Themes and Instruments of the NAS



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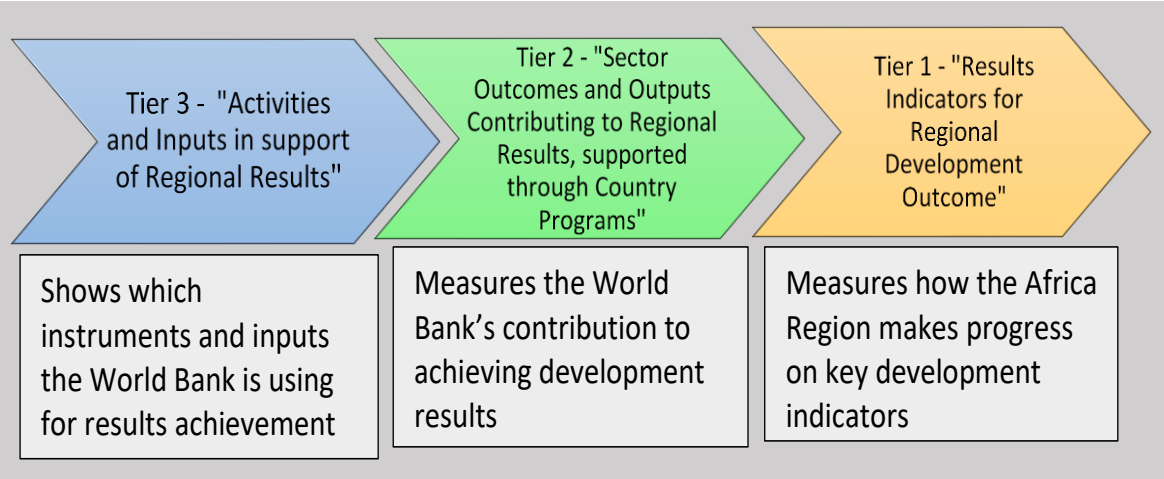
[1838] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1839] ibid.

Tracking the achievement of the NAS thematic areas to country level strategies can be a cumbersome and nebulous process due to differences in country-level strategic frameworks and commitments.[1840] However, the NAS is being monitored and evaluated every five years using the framework in Figure 13 below:

Figure 13: Africa Strategy three-tier monitoring framework



The flow chart in figure 13 provides elements that can be used to determine the role the World Bank would have played to achieving the NAS (tier 2),[1841] the specific inputs and instruments the World Bank would have provided to supporting regional programmes that enhance the achievement of the NAS (tier 3),[1842] and as to whether key indicators of development have really been impacted by the NAS to evince progress thereof (tier 1).[1843]

This framework has been built on the systems of monitoring that existed before the NAS was launched in 2011. The framework provides for automatic updates of

[1840] ibid.

[1841] ibid.

[1842] ibid.

[1843] ibid.

data "to the extent possible by leveraging links to IDA16, the corporate scorecard,[1844] and the Bank-wide core sector indicators".[1845] To make the framework function effectively, the NAS also provides that capacity of statistical monitoring and evaluation should be built and strengthened. This is characterised as an existing priority of the World Bank, but it is expected to be 'reinforced through the NAS'.[1846] Because of the challenges relating to availability and reliability of data in SSA, the process of executing this priority of building and strengthening of the monitoring framework is a process that appears to be "a long-term undertaking".[1847] The framework has been positioned to utilise a "pragmatic approach". It also embraces the only measuring indicators from which "a baseline could be established and where the frequency of data collection is appropriate".[1848] This is used to ensure that costs of transactions are reduced.

Allowance is also made for the use of the quarterly business review mechanism 'to track and review the progress on implementation of the NAS and alignment of country and sector strategies and programmes'.[1849] There will be an annual update of the NAS that will be submitted to the World Bank's board. This update contains elements such as progress of implementation and any possible adjustments needed. A provision has also been made for public disclosure of full annual

[1844] Corporate scorecards are performance indicators of the World Bank Group; see the World Bank, 'About the Corporate Scorecards' < https://scorecard.worldbankgroup.org/node/129 > accessed 26 April 2019.

[1845] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 36.

[1846] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 2.

[1847] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143) 36.

[1848] ibid.

[1849] ibid.

progress reports on the implementation of the NAS. 'IDA at work results stories' is an annual exercise of the World Bank, which will be deployed to add to the publicity media about the implementation of the NAS. This exercise is expected to "show a strong link to the areas of the [NAS] to complement numeric results with tangible tales of results on the ground".[1850]

These measures will enable the public to have a full picture about the progress of implementation of the NAS. They, therefore, ensure transparency and accountability as well as elicit public participation and confidence – thus, being in consonance with the ROL, which could also help in harnessing justice due to the accountability and transparency measures which could make it unconscionable for actors to misconduct themselves in the face of public scrutiny. In effect, the monitoring and evaluation mechanism entails measures that are aligned to the tenets of ROL such as transparency, predictability, consistency and accountability.[1851] These tenets, especially accountability, transparency and consistency also inure to the benefit of justice.[1852]

However, it is not clear whether the measures in the monitoring and evaluation framework are effectively being translated into tangible outputs that harness ROL and justice in SSA. Another challenge is about whether the public has sufficient interest to access annual reports and whether those that access the accountability documents can and/or are willing to raise a strong voice that can make a positive change in the operations of the World Bank under the NAS. Additionally, the NAS

[1850] ibid.

[1851] Bingham, *The Rule of Law* (n 23); Cass, *The Rule of Law in America* (n 309); Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

[1852] Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23).

has not been able to carry the momentum that came with its launch and the effectiveness of the framework for monitoring and evaluation is in doubt. It is imperative for the World Bank to come out with a document that clearly states, for instance, that 'in 2011, we launched "Africa's Future and the World Bank's Support to It",[1853] this is how far we have gone'! As far as the research and contacts of this PhD study are concerned, there is no single document which clearly articulates the successes and failures of the NAS.

9.6 Transitional Issues about the New Africa Strategy

Without clear reference to the NAS, the World Bank states its current strategy for Africa is being 'built on growth and poverty reduction opportunities geared towards supporting structural transformation, economic diversification, resilience, and inclusion'.[1854] In the light of this, the World Bank has urged SSA countries to frontally and concurrently pursue four specific actions:

1. Invest more and better in its people;
2. Leapfrog into the 21st Century digital and high-tech economy;
3. Harness private finance and know-how to fill the infrastructure gap; and
4. Build resilience to fragility and conflict and climate change.[1855]

All of these action points align with the NAS and are connected to seven priority areas:

1. 'Maximizing finance for development;[1856]

[1853] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1854] The World Bank, 'Overview: Strategy' (n 1796).

[1855] ibid.

[1856] ibid.

2. Empowering women to change fertility dynamics and accelerate human capital gains;
3. Accelerating Africa's digital economy;
4. Boosting resilience to conflict and violence;
5. Climate change;[1857]
6. Regional integration; and
7. Knowledge'.[1858]

Essentially, these priorities are geared towards harnessing opportunities to enhance economic growth and societal security as well as mitigation of poverty which undermines the effective enjoyment of socioeconomic rights such as adequate standard of living in many SSA countries. The strategic thrust highlights the need to diversify the economies of these countries, ensure that structural constraints are addressed and strengthen resilience of poor African countries as well as imbibe inclusive development. These elements, of course, are and have been part of the core challenges and response mechanisms that have been thrown up for consideration.

However, they are not as carefully organised as the NAS which has had 'governance and public sector capacity, competitiveness and employment, as well as vulnerability and resilience' as the key thematic areas wherein all the above seven priority areas and tenets were captured.[1859] The priority areas under the current dispensation are merely a long list of considerations that have been appropriated or captured by the three thematic areas of the NAS. For instance,

[1857] ibid.

[1858] ibid.

[1859] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

priorities '1' and 7' above are merely part of the three instruments used by the three thematic areas of the NAS.[1860] They represent respectively 'finance and knowledge' of the NAS instruments.[1861] These have been the traditional instruments used by the World Bank to implement its strategies such as the AAP.[1862]

Surprisingly, the 'partnership instrument' which was an additional strategic implementation instrument of the World Bank have been implicitly left out or integrated into other priority areas without the serious attention that had been given to it in the NAS. The foundational theme of the NAS, 'governance and public sector capacity', which has captured many areas of fundamental concerns that challenge the progress of SSA, has been somewhat vitiated by the isolation of few elements of the NAS to prioritise such as women empowerment (priority '2' above) and regional integration (priority '6' above).

It can, therefore, be submitted that the transition process of the World Bank's NAS to a successor strategy after 2020 is unclear. It has only shown signs that the organised nature of the NAS, instead of being strengthened, appears to be fragmented and vitiated by the way the current approach of the World Bank is being designed and communicated. It would be useful for a more robust coordinated action to be put in place to stocktake the deficits of the NAS and roll out a more interconnected African strategy that is not only robust and measurable but that which also strongly highlights socioeconomic rights and the effective

[1860] ibid.

[1861] ibid.

[1862] IEG, *The Africa Action Plan: An IEG Evaluation* (n 1668).

promotion of ROL and justice tenets in petroleum legislation and contracts that remain cardinal to the sustainable development of the petroleum industry in SSA.

9.7 Conclusion

Even after the implementation of the NAS since 2011, there are still many socioeconomic challenges that continue to undermine the enjoyment of socioeconomic rights such as adequate standard of living in SSA.[1863] These challenges, according to the World Bank, include:

> … the availability of good jobs has not kept pace with the number of entrants in the labour force; fragility is costing the subcontinent a half of a percentage point of growth per year; and poverty is widespread…Total poverty headcount at the international poverty line ($1.90/day in 2011 PPP) is projected to decline only marginally.[1864]

The 'competitiveness and employment, and vulnerability and resilience' themes have, from this finding, directly shown that the strategies have so far not lived up to their expectations. The 'governance and public sector capacity' has also witnessed limited progress and should well be a foundational contributory factor to the underperformance of the other two themes. Indeed, of particular importance amongst the thematic areas is the 'governance and public sector capacity' that can be harnessed to deliver the appropriate legal and contractual

[1863] UNDP, 'Human Development Indices and Indicators' (n 31).

[1864] The World Bank, 'Overview: Context' (The World Bank in Africa, Last Updated, 11 April 2019) < www.worldbank.org/en/region/afr/overview > accessed 24 April 2019.

framework for petroleum E&P in SSA.[1865] This strategic theme has to be taken more seriously than limited attention it is currently receiving from the implementation of the NAS. The World Bank appears to be moving on with some highlights of the NAS without clear reference to the NAS that had been carefully drafted and widely publicised in 2011.[1866]

With respect to the implementation instruments of the NAS, it can be said that the 'partnerships instrument' has been one of the highpoints of the NAS. But it has not been adequately leveraged to harness the 'finance and knowledge instruments' in a way that can effectively mobilise forces under the three thematic areas of the NAS to make greater impact on socioeconomic rights such as obtained in UDHR,[1867] ICESCR,[1868] ACHPR[1869] and DRTD.[1870] A key remedy for this is to, amongst others, harness greater transparency, equality, accountability, cooperation, consistency and participation in leveraging partnerships to

[1865] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1866] ibid.

[1867] Right to own property, Art 17; Right to work, Art 23; Right to adequate standard of living, Art 25; Right to education, Art 26.

[1868] Right to self-determination and natural resources, Art 1; Right to work, Art 6; Right to adequate standard of living, Art 11; Right to health and wellbeing, Art 12; Right to education, Art 13.

[1869] Right to Property, Art 14; Right to Work, Art 15; Right to Health, Art 16; Right to Education, Art 17; Right to Free Disposal of Wealth and Natural Resources, Art 21; and generally, Right to Economic, Social and Cultural Development, Art 22.

[1870] Right to full sovereignty and control of natural resources, Art 1; and Right to better wellbeing, Art 2.

implement the NAS. These tenets resonate with the promotion of ROL and justice to protect socioeconomic rights.[1871]

In the petroleum E&P sector, for instance, the World Bank must endeavour to form partnerships with MNPCs and the local or indigenous petroleum E&P companies including the NOCs to ensure that economic benefits from the petroleum resources are maximised in accord with the tenets of ROL and justice. In the operational arrangement of the framework of partnerships, there should be a point where the petroleum E&P companies are supported to make reasonable returns from their investments. But the HS must equally be made to maximise economic benefits from revenues and profits generated from the petroleum E&P enterprise, taking into consideration the fact that the earning by the HS is going to be distributed to thousands if not millions of citizens through public expenditure management as against the earning of the petroleum E&P companies that is only distributed to few shareholders and other investors.[1872]

Essentially, while the NAS has not actually lived up to expectation - so far, it should be acknowledged that some limited progress has been made in countries such as Ghana, Angola and Nigeria especially spurred by their petroleum industries. One cannot be so sure whether the NAS significantly contributed to this limited progress. However, the NAS has necessary elements that could be utilised to

[1871] Shihata, 'The Role of Law in Business Development' (n 149) 1577; Friedman, 'Legal Rules and the Process of Social Change' (n 255); Shihata, 'Legal Framework for Development (n 28).

[1872] Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34); Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791); Talus (ed), *Research Handbook on International Energy Law* (n 337); NRGI, 'Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries' (n 14); EISB, *Good-fit practice activities in the international oil, gas & mining industries* (n 330).

enhancing ROL and justice in petroleum law for the protection of socioeconomic rights in SSA. If a sense of urgency, clarity of purpose and high level of commitment are not utilised in the NAS, the 10-year vision of achieving the socioeconomic development success made by India and China will be a cynical mirage by 2020 when the vision would have reached its tenure.

To the extent that the World Bank is an IO with legal personality that is 'accountable to the law',[1873] it behoves on the World Bank to ensure that its strategies are designed according to the ROL both in process and impact. [1874]In effect, not only the World Bank but also companies such as MNPCs and the HS are encouraged to consider the consequences of their operations on the environment and the people while trying to earn revenues and profits. This aligns to the three Ps of sustainability (i.e. planet, people and profits) which form the triple bottom-line.[1875] The next chapter seeks to explore the challenge of protecting the planet and the people while trying to generate revenues and profits from petroleum E&P for socioeconomic development that enhances socioeconomic rights in SSA.

[1873] *Jam and others v International Finance Corp.* certiorari to the united states court of appeals for the district of Columbia circuit No. 17–1011. Argued October 31, 2018 - Decided 27 February 2019 < www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf > accessed 14 March 2019.

[1874] Shihata, 'Legal Framework for Development (n 28); Shihata, 'The Role of Law in Business Development' (n 149) 1577; see also Friedman, 'Legal Rules and the Process of Social Change' (n 255).

[1875] John Elkington, 'Enter the Triple Bottom Line' in Adrian Henriques and Julie Richardson, *The Triple Bottom Line: Does It All Add Up? Assessing the Sustainability of Business and CSR* (1st edn, Earthscan 2013) 1; Carol Adams, Geoff Frost and Wendy Webber, *'Triple Bottom Line: A Review of Literature' in Adrian Henriques and Julie Richardson, The Triple Bottom Line: Does It All Add Up? Assessing the Sustainability of Business and CSR* (1st edn, Earthscan 2013)17.

CHAPTER TEN

SUSTAINABILITY, PETROLEUM AND SOCIOECONOMIC RIGHTS

> Humanity has to make development sustainable to ensure that it meets the needs of the present, without compromising the ability of future generations to meet their own need.[1876]

10.1 Introduction

Petroleum exploitation serves as a pivot around which socioeconomic rights can be harnessed in many SSA countries including Ghana, Nigeria and Angola. But in trying to extract and use the petroleum, a heavy price such as environmental degradation can be paid – that ironically goes back to adversely affect not only the enjoyment of socioeconomic rights but also environmental rights[1877] such as right to clean and safe environment.[1878] This disposition poses a delicate challenge

[1876] World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 8.

[1877] Environmental rights denote "any proclamation of a human right to environmental conditions of a specified quality" such as right to safe environment; see UNEP, 'What are environmental rights?' < ww.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what > accessed 3 June 2019; Stephen Turner, *A Global Environmental Right* (Routledge 2014) 6; IUCN & World Commission on Environmental law, 'IUCN World Declaration on the Environmental Rule of Law' (2016); UNEP, 'What are your environmental rights?' < www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0 > accessed 13 July 2019.

[1878] IUCN & World Commission on Environmental law, 'IUCN World Declaration on the Environmental Rule of Law' (2016) < www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf > accessed 3 June 2019.

for sustainability.[1879] But no matter how sustainability is understood, it provides a framework for reconciling environmental rights and socioeconomic rights in petroleum E&P.[1880] Therefore, petroleum E&P must be carried out in ways that foster sustainability in order to reasonably get these competing rights reconciled.[1881] This process must take into consideration the interfacing between legal tenets such as ROL, justice, petroleum law, environmental law and human rights law. This chapter explores the above relationships to establish the pathways of realising socioeconomic rights and sustainability in petroleum exploitation in SSA.

10.2 The Legal Dilemma of Petroleum Exploitation

One of the critical issues of concern facing the international community is 'the unprecedented degradation of the essential ecosystems of the planet'.[1882] This includes the environmental degradation caused by petroleum E&P. Petroleum is a finite natural resource which, when discovered and exploited, is expected to be depleted in the future.[1883] If the petroleum is completely used up, future

[1879] Klaus Bosselmann, *The Principle of Sustainability: Transforming law and governance* (2nd edn, Routledge 2017); Liam Magee and others, 'Reframing social sustainability reporting: Towards an engaged approach' (2013) 15(1) Environment, Development and Sustainability 225.

[1880] Manuel Peter Samonte Solis, 'Human rights versus human needs: debating the language for universal access to modern energy services' in Jordi Jaria i Manzano, Nathalie Chalifour and Louis J Kotzé (eds), *Energy, Governance and Sustainability* (Edward Elgar 2016) 56.

[1881] Sustainability primarily relates to the ability of states to avoid natural resource depletion in order to ensure that ecological balance is maintained; see Bosselmann, *The Principle of Sustainability: Transforming law and governance* (n 1879).

[1882] Shawkat Alam and others (eds), *International Environmental Law and the Global South* (1st edn, Cambridge University Press 2015).

[1883] Lakshman D Guruswamy and Mariah Zebrowski Leach, *International Environmental Law in a Nutshell* (5th edn, West Academic Publishing 2017).

generations may not have the opportunity to effectively benefit from this natural resource endowment since the present generation could, arguably, use proceeds from the petroleum resource, for example, on projects that may not directly meet the prioritised needs of future generations. For instance, in SSA, because of poor governance, deficits in the ROL and justice, the petroleum resource has mostly become a curse rather than a blessing for the present generation – never mind the future generation.[1884]

However, future generations would be confronted with the degradation caused by the petroleum E&P. For instance, because of its chemical composition as fossil fuel, the extraction, refinement, transportation and utilisation as well as disposal of petroleum do emit greenhouse gasses which contribute to the fostering of climate change.[1885] The negative impact of petroleum E&P is also highlighted by the toxicity[1886] of petroleum chemicals which helps to cause acid rain that harms the physical environment and pollution of the air which endangers human health.[1887] Thus, petroleum E&P can have harmful effects on the integrity of the

[1884] Holmås and Oteng-Adjei, 'Breaking the mineral and fuel resource curse in Ghana' *(*n 1579); see also Sachs and Warner, 'Natural Resources and Economic Development: The Curse of National Resources' (n 813); Humphreys, Sachs and Stiglitz, *Escaping the Resource Curse* (n 813).

[1885] Carbon dioxide (CO2), Methane (CH4), Nitrous oxide (N2O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), and Sulphur hexafluoride (SF6) are the main greenhouse gases; See UN Climate Change, 'Kyoto Protocol - Targets for the first commitment period' < https://unfccc.int/process/the-kyoto-protocol > accessed 27 April 2019.

[1886] Renato Nallin Montagnolli, Paulo Renato Matos Lopes and Ederio Dino Bidoia, 'Screening the Toxicity and Biodegradability of Petroleum Hydrocarbons by a Rapid Colorimetric Method' (2015) 68(2) Environmental Contamination and Toxicology 342.

[1887] Dominic M Di Toro, Joy A McGrath and William A Stubblefield, 'Predicting the toxicity of neat and weathered crude oil: Toxic potential and the toxicity of saturated mixtures' (2007) 26 (1) Environmental Toxicology and Chemistry 24.

environment and the people, which equally go to adversely affect both the present and future generations.[1888] This situation can be an affront to justice – both energy and environmental but it attracts environmental justice more because the damage of the environment caused by the petroleum activities today, if not soundly mitigated, can have adverse consequences on future generations.[1889]

At the same time, respect for EROL, which acts as the legal foundation for achieving environmental justice,[1890] has been challenged due to some level of uncertainty and weak formulation and enforcement of environmental rules and rights.[1891] This challenge has adverse consequences on environmental rights,[1892] socioeconomic rights and sustainability of petroleum in SSA.[1893]

10.3 Socioeconomic Rights and Climate Change

Environmental degradation, which showcases phenomena such as climate change, has been a huge international challenge.[1894] Climate change is characterised by 'a

[1888] ibid.

[1889] Faure and Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (n 437).

[1890] IUCN and World Commission on Environmental law, 'IUCN World Declaration on the Environmental Rule of Law' (n 1878).

[1891] David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press 2007); UNEP, *Environmental Rule of Law: First Global Report* (January 2019) < https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y > accessed 28 June 2019.

[1892] See Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019).

[1893] Carmen G Gonzalez, 'Food Justice: An Environmental Justice Critique of the Global Food System' in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (1st edn, Cambridge University Press 2015)19.

[1894] Faure and Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (n 437); Environmental Treaties and Resource Indicators (ENTRI), 'Treaty Locator' < https://sedac.ciesin.columbia.edu/entri/treatySearch.jsp > accessed 27 April 2019.

range of global phenomena including increased temperature trends identified in global warming,[1895] and changes such as sea level rise (ice mass loss in Greenland, Antarctica, the Arctic and mountain glaciers worldwide), shifts in flower/plant blooming, and extreme weather events which add heat-trapping gases to Earth's atmosphere.[1896] As the current popular scientific evidence demonstrates, these phenomena are predominantly created by burning fossil fuels'[1897] that emit carbon dioxide and other chemicals into the atmosphere.[1898]

The huge challenge posed by climate change has, especially, called for climate action. The Intergovernmental Panel on Climate Chane (IPCC)[1899] and UN Secretary General (Antonio Guterres)[1900] as well as the Climate Emergency Institute,[1901] amongst others, are even calling for climate emergency to be

[1895] Global warming denotes 'long-term planet warming from the early 20th Century, especially since the late 1970s, as a result of the increase in fossil fuel emissions since the Industrial Revolution'; see NASA, 'What's in a name? Weather, global warming and climate change' (Resources, updated, 12 July 2019) < https://climate.nasa.gov/resources/global-warming/ > accessed 14 July 2019; see also IPCC, 'Global Warming of 1.5 ^{O}C: An IPCC Special Report' (2018) < https://www.ipcc.ch/sr15/ > accessed 13 July 2019.

[1896] NASA, 'What's in a name? Weather, global warming and climate change' (n 1895).

[1897] ibid.

[1898] Patrick Brandful Cobbinah and Michael Addaney (eds), *The Geography of Climate Change Adaptation in Urban Africa* (Palgrave Macmillan 2019); Paul G Harris (ed), *Climate Change and Ocean Governance: Politics and Policy for Threatened Seas* (1st edn, Cambridge University Press 2019).

[1899] IPCC, 'The Intergovernmental Panel on Climate Change' < www.ipcc.ch/> accessed 13 July 2019; IPCC, 'Activities' < https://archive.ipcc.ch/activities/activities.shtml > accessed 13 July 2019.

[1900] UN, 'Climate Change' < www.un.org/en/sections/issues-depth/climate-change/ > accessed 13 July 2019.

[1901] Climate Emergency Institute, '2020 Deadline: Emissions Decline - For a chance of 1.5 ^{o}C for our common future survival' < www.climateemergencyinstitute.com/ > accessed 13 July 2019.

declared by governments and the international community.[1902] The UN leads this call. For instance, Patricia Espinosa (the Executive Secretary for UN Climate Change) recently observed that 'the current situation of climate change is a climate emergency'.[1903] It is a serious challenge because the current commitments in the 'Nationally Determined Contributions' of states are "falling far short of the target"[1904] of carbon neutrality[1905] and achieving 1.5 degrees Celsius[1906] of global warming by 2050, as provided in the Paris Agreement 2015. For example, Kottasová reported that EU recently 'could not agree on the deadline of net zero emissions where four countries[1907] vetoed[1908] while Donald Trump (USA President)

[1902] ibid.

[1903] UN Climate Change, 'UN Climate Chief Urges Action on Climate Emergency' (18 June 2019) < https://unfccc.int/news/un-climate-chief-urges-action-on-climate-emergency > accessed 23 June 2019.

[1904] ibid.

[1905] Paris Agreement [2015], Art 4.

[1906] Paris Agreement [2015], Art 2.

[1907] Poland, Estonia, Czech Republic and Hungary vetoed even a less stricter version of the earlier EU agreement on net zero emissions target by 2050 where Poland argued that there will be unacceptable economic consequences on countries especially those relying on fossil fuels such as petroleum; see Ivana Kottasová, 'An EU proposal to slash carbon emissions to net zero by 2050 was blocked by four countries' *CNN* (Updated, 21 June 2019) < https://edition.cnn.com/2019/06/20/europe/eu-net-zero-emission-intl/index.html > accessed 28 June 2019.

[1908] Kottasová, 'An EU proposal to slash carbon emissions to net zero by 2050 was blocked by four countries' (n 1907).

took his country out of the Paris Agreement 2015.[1909] In addition, the G20 appeared to be rolling up its sleeves to water down its climate promises'.[1910]

Espinosa has averred that the target of 1.5 degrees Celsius can only be achieved if 'carbon emissions can be reduced to by 45% by 2030'.[1911] Although Alston sees this target as an 'unrealistic best-case scenario of global warming even by 2100, achievement of this aim is likely to see extreme temperatures in many regions'.[1912] This will impose threats on socioeconomic rights of poor countries including rights to food, employment and health. At that point, Alston predicts, poor people in countries such as in SSA 'will either have to stay and starve or to migrate to liberate themselves'.[1913] Espinosa has, therefore, urged that everyone should participate in efforts to address the situation because it affects everyone.[1914] The call to consider global warming and reduction of CO_2 gases and investment in renewables should, therefore, be taken seriously by all. This can have implications for SSA and petroleum industries therein such as reduction in demand for petrol, increase in the use of solar and wind power. There is the need for thinking through diversification of energy supply mix in SSA for resilience in socioeconomic development and sustainability.[1915]

[1909] Ivana Kottasová, 'Climate apartheid' to push 120 million into poverty by 2030, UN says' *CNN* (Updated, 27 June 2019) < https://edition.cnn.com/2019/06/25/world/climate-apartheid-poverty-un-intl/index.html?no-st=1561905743 > accessed 28 June 2019.

[1910] ibid.

[1911] UN Climate Change, 'UN Climate Chief Urges Action on Climate Emergency' (n 1903).

[1912] ibid.

[1913] ibid.

[1914] ibid.

[1915] Chhibber and Laajaj, 'Disasters, Climate Change and Economic Development in Sub-Saharan Africa: Lessons and Directions' (n 1719).

Meanwhile, the call to address climate change concerns has been going on for decades,[1916] but with limited successes.[1917] There have been many domestic and international legal instruments aimed at addressing the environmental concern. At the international level, mostly under the auspices of the UN Commission on Sustainable Development and the UN Environment Program (UNEP), hundreds[1918] of multilateral and bilateral treaties on environmental protection have been concluded between states.[1919]

Key international environmental law instruments relating to multilateral treaties have historically been largely set based on weak enforcement framework[1920] due to a lot of soft and/or inadequate water-tight rules or discretional provisions therein.[1921] These treaties include: the Vienna Convention for the Protection of the

[1916] James Rodger Fleming, *Historical Perspectives on Climate Change* (Oxford University Press 1998); Hervé Le and others, 'Historical Overview of Climate Change Science' in S Solomon and others, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2007); SOAS, 'Unit 1 Climate Change and Development Challenges' < www.soas.ac.uk/cedep-demos/000_P524_CCD_K3736-Demo/unit1/page_14.htm >accessed 13 July 2019.

[1917] Human Rights Council, 'Climate change and poverty' (Report of the Special Rapporteur on extreme poverty and human rights, unedited version, A/HRC/41/3, 25 June 2019) < www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E > accessed 28 June 2019.

[1918] For extensive list of treaties on environment, see Wikipedia, 'List of international environmental agreements' < https://en.wikipedia.org/wiki/List_of_international_environmental_agreements > accessed 27 April 2019.

[1919] UNEP*, Environmental Rule of Law: First Global Report* (n 1891).

[1920] ibid.

[1921] UNEP, 'Dramatic growth in laws to protect environment, but widespread failure to enforce, finds report' (Press Release, Environmental Rights and Governance, 24 January 2019) <

Ozone Layer 1985; Montreal Protocol on Substances that Deplete the Ozone Layer 1987; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989; Convention on Biological Diversity 1992; Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2000; United Nations Framework Convention on Climate Change 1992 (UNFCCC); [1922] Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997; Paris Agreement 2015 (replacing the Kyoto Protocol, 1997),[1923] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994; and Convention on the Law of the Non-Navigational Uses of International Watercourses 1997.[1924]

Most SSA countries are party to all these instruments and have made efforts to domesticate them in national environmental laws and/or regulations, including petroleum laws and/or regulations or contracts.[1925] There is hardly any country in SSA without any environmental law and/or regulation aimed at protecting

www.unenvironment.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce > accessed 28 June 2019.

[1922] UN, 'United Nations Framework Convention on Climate Change' [1992] < https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf > accessed 27 April 2019.

[1923] UN, Paris Agreement [2015] < https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf > accessed 27 April 2019.

[1924] ECOLEX, 'Treaties' < www.ecolex.org/result/?type=treaty > accessed 27 April 2019; Environmental Treaties and Resource Indicators (ENTRI), 'Treaty Locator' (n 1894).

[1925] Raphael J Heffron and others, 'The global future of energy law – 2017 review' (2017) International Energy Law Review 291.

environmental degradation.[1926] In all the five case studies of the thesis including Ghana,[1927] Nigeria,[1928] Angola,[1929] UK,[1930] and Norway, the petroleum legislations have health, safety and environmental measures as key responsibilities of parties. These countries also have legal regimes that articulate how the environment should be protected from harm right from plan of development, petroleum activities, emergency situations, petroleum disposal to decommissioning. [1931]

The fluid nature of such international instruments is similarly found in the national or municipal environmental laws. Most of these laws do not meet the highest standards required when it comes to frontally mitigating greenhouse gas emissions and climate change, in particular. The extent to which there is commitment to rigidize and strictly enforce higher environmental standards in these frameworks is limited by the competing desire to pursue robust petroleum E&P agenda that can generate sufficient revenues to aid in the socioeconomic

[1926] Faure and Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (n 437); Environmental Treaties and Resource Indicators (ENTRI), 'Treaty Locator' (n 1894).

[1927] Petroleum (Exploration and Production) Act, 2016 [Act 919]; Petroleum (Exploration and Production) (Health, Safety And Environment) Regulations, 2017 (L.I 2258); see also Environmental Impact Assessment Act [Cap E12 LFN 2004]; Harmful Waste (Special Criminal Provisions etc) Act [Cap H1 LFN 2004]; Nigerian Minerals and Mining Act [2007]; Endangered Species (Control of International Trade and Traffic) Act [Cap E9 LFN 2004]; Water Resources Act [Cap W2 LFN 2004]; Associated Gas re-injection Act [1979]; Oil in Navigable Waters Act [No. 34, 1968].

[1928] The Petroleum Act [1969].

[1929] Law No. 5/19 of 18 April 2019(Petroleum Activities Law), assigning new responsibilities, rates and associated systems.

[1930] Petroleum Act [1998] c 17 < www.legislation.gov.uk/ukpga/1998/17/contents > accessed 13 February 2019.

[1931] Act 29 November 1996 No. 72 relating to petroleum activities [Last amended by Act 19 June 2015 No 65, Last translated 5 January 2018] < www.npd.no/en/regulations/acts/act-29-november-1996-no2.-72-relating-to-petroleum-activities/ >accessed 13 April 2019.

transformation process. This applies to most if not all petroleum-rich countries in SSA.[1932]

An instance of weak formulation and enforcement provision can be seen in Article 3 of the Paris Agreement 2015 on climate change, which provides that: In order to achieve Article 2[1933] thereof, every state is required to determine its "contributions to the global response to climate change".[1934] Thus, states are responsible for making available what they deem to be their own measures towards mitigating the global climate change. This kind of state responsibility can create reluctance amongst states in the implementation of the Paris Agreement 2015. Although the national contributions mechanism is a bottom-up approach of emission reduction that could be regarded as a positive, the cautious or suspicious approach in making commitments by states to address climate change demands

[1932] Faure and Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (n 437); Environmental Treaties and Resource Indicators (ENTRI), 'Treaty Locator' (n 1894).

[1933] Article 2 of Paris Agreement [2015] states that: "1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

[1934] Paris Agreement [2015], Art 3.

makes it a possible hideout for states to generate weak measures which they can easily pursue.[1935]

Furthermore, Article 3 provides that "all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13".[1936] If the demands in Articles 4, 7, 9, 10, 11 and 13 are closely examined, it would be plausible to conclude that success of the aims of the Paris Agreement 2015, as stipulated in Article 2,[1937] is largely dependent upon "ambition" which requires greater efforts than could possibly be accommodated by the existing strengths and commitments in the climate change discourse.

For instance, "too many countries are taking short-sighted steps in the wrong direction"[1938] regarding climate change and, therefore, 'even meeting of the current reduction targets of carbon emissions will still leave tens of millions of people impoverished which will result in widespread displacement and hunger',[1939] most of whom will be in SSA.[1940] Another demonstration of the weakness of the

[1935] Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (1st edn, Oxford University Press 2017); Todd Stern, 'The Paris Agreement and its Future' (Paper 5, Brookings, October 2018) < www.brookings.edu/wp-content/uploads/2018/10/The-Paris-Agreement-and-Its-Future-Todd-Stern-October-2018.pdf > 2 June 2019.

[1936] Paris Agreement [2015], Art 3.

[1937] Halldor Thorgeirsson, 'Objective (Article 2.1)' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (1st edn, Oxford University Press 2017).

[1938] Human Rights Council, 'Climate change and poverty' (n 1917); OHCHR, 'UN expert condemns failure to address impact of climate change on poverty' (Geneva, 25 June 2019) < www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E > accessed 28 June 2019.

[1939] ibid.

[1940] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

current climate change legal regime is that there is the failure of states "to meet even their current inadequate commitments to reduce carbon emissions and provide climate financing".[1941] A UN report[1942] has found that states continue "to subsidise the fossil fuel industry with $5.2 trillion per year".[1943] The estimation by the UN is that this trajectory is unsustainable since keeping the "current course is a recipe for economic catastrophe".[1944] The implication is that given that the Paris Agreement 2015 is an enhanced version of the Kyoto Protocol 1997 and UNFCCC 1992, it is reasonable to aver that if the commitments therein can still be regarded as inadequate, the fight against climate change is an arduous one.[1945]

However, climate change that has been occasioned by socioeconomic activities such as petroleum exploitation has a boomerang effect on the socioeconomic wellbeing of human beings in the long run.[1946] The UN has recently observed that climate change, for instance, is more likely not only to "have the greatest impact on those living in poverty [while likely to drive over "120 million more people into poverty by 2030"],[1947] but also [it] threatens democracy and human rights"[1948]

[1941] ibid.

[1942] ibid.

[1943] ibid; OHCHR, 'UN expert condemns failure to address impact of climate change on poverty' (n 1938).

[1944] Human Rights Council, 'Climate change and poverty' (n 1917); OHCHR, 'UN expert condemns failure to address impact of climate change on poverty' (n 1938).

[1945] Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (n 1935).

[1946] Paul Q Watchman, *Climate Change: A Guide to Carbon Law and Practice: A Guide to Carbon Law and Practice* (Globe Law and Business 2008).

[1947] OHCHR, 'UN expert condemns failure to address impact of climate change on poverty' (n 1938).

[1948] ibid.

such as adequate standard of living. If drastic measures are not taken, the UN avers, there is the risk of "climate apartheid' scenario where the wealthy pay to escape overheating, hunger, and conflict while the rest of the world is left to suffer".[1949]

SSA countries are torn 'between the deep blue sea and the devil'; a catch-22 situation where a very inconvenient dilemma is presented to SSA as to whether to intensively exploit their petroleum resources, potentially become rich and be ready for the consequences of climate change; or they should underexploit their petroleum resources, potentially remain poor and be ready for the consequences of climate change. Lomborg provides a radical solution reflecting an inconvenient reality, that:

> We need to solve climate change, but we also need to make sure that the cure isn't more painful than the disease.[1950] Abandoning fossil fuels as quickly as possible … would slow the growth that has lifted billions of people out of poverty.[1951]

The climate crises and the dilemma thereof ought to be presented as 'a catalyst for states especially in SSA to fulfil the long ignored and overlooked socioeconomic rights of the people.[1952] Therefore, the need to develop new technologies that may make it possible to phase out fossil fuels such as petroleum in the distant future,

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[1949] ibid.

[1950] Bjørn Lomborg, 'The Danger of Climate Doomsayers' (Project Syndicate, 19 August 2019) < www.project-syndicate.org/commentary/climate-change-fear-wrong-policies-by-bjorn-lomborg-2019-08 > accessed 20 August 2019.

[1951] ibid.

[1952] ibid.

is, for instance, highly commendable. But as long as petroleum remains an expensive commodity that can generate significant revenues for undertaking social and economic projects, SSA has not transformed its socioeconomic conditions of its people to the level of developed countries, agricultural transformational opportunities have not been effectively tapped, and it is even possible to develop technology that can neutralise the toxicity in petroleum products or that which can prevent global warming, among others, there does not seem to be any legitimate basis to unduly restrict poor SSA from effectively benefiting from its petroleum resources in a responsible way – that is guided by the principles of EROL and justice.[1953]

10.4 Environmental Law and the SDGs

Defined as a set of international rules and regulations that is aimed at controlling environmental degradation such as 'pollution of the environment and the depletion of natural resources like petroleum within a framework of sustainable development',[1954] international environmental law is an international public law discipline that can be harnessed by the SDGs.[1955] This is because the SDGs have a number of pertinent provisions which urge countries to establish measures (including legal steps) to protect the environment from degradation even when countries have to pursue socioeconomic development that harnesses socioeconomic rights.

[1953] Gonzalez, 'Food Justice: An Environmental Justice Critique of the Global Food System' (n 1893) 19.

[1954] Guruswamy and Leach, *International Environmental Law in a Nutshell* (n 1883).

[1955] ibid.

With 17 goals and 169 targets of the SDGs under implementation, the collective pledge by states in the "new universal agenda"[1956] not to leave anyone behind in the sustainable development discourse has been activated and being redeemed, regardless of any challenges. The SDGs not only build on the nine MDGs but also to ensure that the aims that were left unattained in the MDGs[1957] are pursued. At the same time, the SDGs, amongst others, aim at realising "the human rights of all" including socioeconomic rights.[1958] The NAS also fosters efforts towards achieving socioeconomic rights and sustainable development. The NAS is one of the instruments of implementing the SDGs not just because the two imperatives share similar objectives but also the NAS had integrated a number of the aims of the MDGs especially on poverty eradication.[1959]

The operational logic of the SDGs is that all the 17 goals "are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental"[1960] which also characterise sustainability. It recognises the fact that achieving goals from the economic dimension without achieving the goals in the social and environmental dimensions will cause

[1956] UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (Sustainable Development Goals, knowledge platform) < https://sustainabledevelopment.un.org/post2015/transformingourworld > accessed 15 February 2019.

[1957] Nathan Andrews, Nene Ernest Khalema and N'Dri T Assié-Lumumba (eds), *Millennium Development Goals (MDGs) in Retrospect: Africa's Development Beyond 2015* (Springer 2015); Booth, 'Millennium Development Goals - An Uneven Success' (n 1669); Gibbs, 'MDG failures' (n 1669).

[1958] UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (n 1956).

[1959] Andrews, Khalema and Assié-Lumumba (eds), *Millennium Development Goals (MDGs) in Retrospect: Africa's Development Beyond 2015* (n 1957); The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[1960] *UN, 'Transforming our world: the 2030 Agenda for Sustainable Development'* (n 1956).

imbalances in ways that would hinder the attainment of sustainable development.[1961] In effect, the SDGs and their targets are expected to "stimulate action … [for 15 years in five] areas of critical importance for humanity and the planet".[1962] These are: people, planet, prosperity, peace and partnership. These areas serve as the pillars for enhanced sustainable development in the world.[1963]

As part of the determination of states, the 'planet' will be protected from degradation by ensuring, among others, that there is 'natural resource sustainable consumption and production, natural resources such as petroleum will be managed sustainably and urgent action will be taken on climate change in ways that support the needs of the present and future generations'.[1964] Petroleum laws that govern the management of petroleum E&P in SSA must take cognisance of the need to more sustainably exploit the resource. This requires the continuous integration of energy justice and environmental justice in the petroleum laws of SSA.[1965] By so doing, socioeconomic rights of the present generation can be enhanced and those of the future generations can be harnessed.[1966]

There is also the determination to make sure that "all human beings can enjoy prosperous and fulfilling lives".[1967] In achieving this 'prosperity', steps must be

[1961] ibid.

[1962] ibid.

[1963] ibid.

[1964] ibid.

[1965] Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (n 1891); Jenkins and others, 'Energy justice: A conceptual review' (n 1831) 174.

[1966] Shihata, 'Legal Framework for Development (n 28); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (n 34); Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (n 34).

[1967] UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (n 1956).

taken to ensure that 'economic, social and technological progress are harmonised with nature or the planet.[1968] The process of achieving prosperity requires the effective application of ROL and justice in order to enhance tenets such as socioeconomic rights due to the standard of living that would be improved.

With respect to the area of 'peace', it is recognised in the SDGs that it is not possible to realise sustainable development without peace and the vice versa. States have, therefore, resolved to "foster peaceful, just and inclusive societies which are free from fear and violence".[1969] This again highlights the need for justice in the sustainable development process in order to avoid conflicts in petroleum exploitation.[1970]

With regards to the area of 'people', there is the determination by states to use the SDGs to marshal forces in ending "poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment".[1971] Despite the IMF's observation that the macroeconomic outlook in SSA has continued to strengthen,[1972] the World Bank's projections have shown that 'extreme poverty in SSA does not show many

[1968] ibid.

[1969] ibid.

[1970] Ian Bannon and Paul Collier, *Natural Resources and Violent Conflict: options and actions* (The World Bank/IBRD 2003); Avery Kolers*, Land, Conflict, and Justice: A Political Theory of Territory* (Cambridge University Press 2009); Helen Hintjens and Dubravka Zarkov (eds), *Conflict, Peace, Security and Development: Theories and Methodologies* (1st edn, Routledge 2015).

[1971] UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (n 1956).

[1972] IMF, *Regional Economic Outlook: Capital Flows and The Future of Work: Sub-Saharan Africa Capital Flows and the Future of Work* (World Economic and Financial Surveys, International Monetary Fund October 2018).

signs of improvement, which may keep it away from achieving the SDG[1973] target of ending extreme poverty by 2030'.[1974] Given the current state of affairs, this goal is overambitious in the context of SSA. It means that the consequences on achieving socioeconomic rights will continue to be adverse on SSA.

In terms of 'partnership', there is the determination of states that they will 'mobilize the needed means to get the SDGs implemented through a revitalised global partnership for sustainable development, which is based on a spirit of strengthened global solidarity'.[1975] These should particularly focus on "the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people".[1976] In effect, global collaboration is required to mobilise energies, resources and skills to ensure that the commitments in the areas of planet, people and prosperity are harnessed for the achievement of the SDGs.[1977] This is in sync with the partnership instrument of the NAS.[1978]

The implication of the foregoing dispositions of the new agenda is that the SDGs provide a framework that should be able to remove the obstacles to the realisation of socioeconomic rights, ROL, justice and sustainability in the petroleum industry. The commitments that have underpinned the implementation of the SDGs are shared commitments of human rights law and environmental law. These

[1973] SDGs [2015], Goal 1.

[1974] Patel, 'Figure of the week: Understanding poverty in Africa' (n 119).

[1975] UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (n 1956).

[1976] ibid.

[1977] ibid.

[1978] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

commitments include 'universality, indivisibility and leaving no one behind'.[1979] For example, this disposition is recognised by the Brundtland Commission's report on environment and development,[1980] Agenda 21, Paris Agreement 2015 and environmental law instruments in-between.[1981] The commitments are also recognised by human rights law such as enshrined in ACHPR, DRTD and ICESCR.

Reinforcing these commitments means that SDGs, together with their broader, interdisciplinary and intersectoral nature, presents a significant global mobilising force of action in furthering the achievement of global development goals including environmental goals.[1982] However, much as the SDGs come with transformative force, they have been criticised as that which "present complex and problematic agenda of transformative social change"[1983] due to, sometimes, slightly conflicting nature of environmental goals and development goals, say SDG 9 regarding sustainable industrial and infrastructural development as against SDG 13 on climate change, for instance.[1984] So, although SDGs provide a huge leverage for environmental law, the SDGs can, if not approached well, serve as a source of frustration for environmental law.

[1979] Graham Long, 'Underpinning commitments of the Sustainable Development Goals: indivisibility, universality and leaving no one behind' in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Publishing 2018) 91.

[1980] World Commission on Environment and Development, *Our Common Future* (n 1876).

[1981] OECD, *Development Co-operation Report 2018: Joining Forces to Leave No One Behind* (OECD Publishing 2018) < https://doi.org/10.1787/dcr-2018-en > accessed 1 May 2019.

[1982] French and Kotzé, 'Introduction' in French and Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (n 256).

[1983] ibid, 2.

[1984] ibid, 1.

A lingering impediment is the constellation of disputations that have raged between developed and developing countries (thus, North-South divide).[1985] The centre of divergence in fossil fuel exploitation has been on why the North had used the so-called 'dirty energy source' (fossil fuel) and are still using to push through their industrial complexes while appearing to frustrate the South especially of SSA the opportunity from effectively using the 'dirty energy' to assist them in their industrial development processes. In fact, there have been fundamental disagreements amongst countries even in the North because some countries (if not most) therein are struggling[1986] to come to terms with the call to adjust their systems to conform to clean energy requirements.[1987]

The disputations between the South and the North 'have compromised international environmental law, which has resulted in deadlocks with respect to negotiations of environmental treaties and non-compliance with existing environmental agreements'.[1988] These have adversely affected the effectiveness of environmental norms including energy justice, environmental justice, human rights and climate change as well as sustainability in the petroleum industry. Integral in these effects is inequality. Alam and others have argued that 'inequality

[1985] Alam and others (eds), *International Environmental Law and the Global South* (n 1882).

[1986] Kevin McKenna, 'Promises of a green energy jobs boom in Scotland are proving to be so much hot air' *the guardian* (23 June 2019) < www.theguardian.com/commentisfree/2019/jun/23/promises-of-green-energy-jobs-boom-in-scotland-so-much-hot-air > accessed 18 July 2019.

[1987] Kottasová, 'An EU proposal to slash carbon emissions to net zero by 2050 was blocked by four countries' (n 1907); OHCHR, 'UN expert condemns failure to address impact of climate change on poverty' (n 1938); Ahmad Masum and others, 'The Right to Development versus Environmental Protection: With Special Reference to the Malaysian Federal Constitution' (2017) 23(9) Advanced Science Letters 9072-9075.

[1988] Alam and others (eds), *International Environmental Law and the Global South* (n 1882).

in the world and profligate consumerism do threaten a sustainable planet'.[1989] This is so because, unchecked production in the interest of consumers will lead to undermining the integrity of the environment and wanton depletion of the planet's resources. Global inequality, with its low standard of living, makes victims hardly able to pursue measures that effectively protect the environment.[1990] Inequality and the desire to satisfy human needs provide the underlying force for the inadequacies in achieving the aims of sustainable development especially the challenge of 'participation, sustainability and poverty'.[1991] These are briefly explored in turn below.

Participation of stakeholders such as MNPCs in driving the aims of sustainable development is a challenge because of the diverse graduated interests and capacities involved. But it is an important feature of sustainable development since it brings all stakeholders on board to pursue collective goals for humanity.[1992] Although poverty is easily defined and agreed upon by states, for instance by using international poverty line of between US$1.90[1993] and US$3.20[1994]

[1989] ibid.

[1990] ibid.

[1991] Shawkat Alam and Jona Razzaque, 'Sustainable Development versus Green Economy: The Way Forward?' in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (1st edn, Cambridge University Press 2015).

[1992] Karin Buhmann, *Power, Procedure, Participation and Legitimacy in Global Sustainability Norms: A Theory of Collaborative Regulatio*n (Globalization: Law and Policy, 1st edn, Routledge 2019).

[1993] This is the standard poverty line provided by the World Bank in 2015. It is usually recognised internationally; see the World Bank, 'Principles and Practice in Measuring Global Poverty' (13 June 2016) < www.worldbank.org/en/news/feature/2016/01/13/principles-and-practice-in-measuring-global-poverty > accessed 13 July 2019.

[1994] This is a second poverty line established by the World Bank.

dependable daily income,[1995] it has also formed a pillar of sustainable development that undermines sustainable development and environmental law. Mitigation of poverty can significantly contribute to the reduction of greenhouse gas emissions in order to minimise the impact of climate change.[1996]

The evasive nature of the defining limits of sustainability,[1997] due to inequality between and within the North and South as well as the urge to be meeting consumers' interests, have particularly presented a point of departure by states.[1998] However, sustainability can be an interlocking pillar that attempts to harmonise environmental law principles, models and activities with other considerations such as socioeconomic rights, ROL and justice.

Inspired by the environmental protection instruments such as the SDGs,[1999] sustainability recognises the need for the interactions between social, economic, and environmental realms to be harmonised.[2000] So, sustainability[2001] of petroleum

[1995] Bill & Melinda Gates Foundation, 'Goalkeepers: The Stories Behind the Data' (n 32) 38.

[1996] Tol, 'The Economic Impacts of Climate Change' (2018) 4; Alam and Razzaque, 'Sustainable Development versus Green Economy: The Way Forward?' (n 1991).

[1997] Some scholars limit sustainability to environmental concerns while others do not; see Waas and others, 'Sustainable Development: A Bird's Eye View' (n 264).

[1998] Paul James and others, *Urban Sustainability in Theory and Practice: Circles of sustainability (*Advances in Urban Sustainability, 1st edn, Routledge 2014); Magee and others, 'Reframing social sustainability reporting: Towards an engaged approach' (n 1879).

[1999] UN, *Achieving Sustainable Development and Promoting Development Cooperation* (n 264).

[2000] R Hansmann, 'Principal sustainability components: empirical analysis of synergies between the three pillars of sustainability' (2012) 19(5) The international journal of sustainable development and world ecology 1.

[2001] For divergent debates on sustainability and sustainable development, see Colin C Williams and Andrew C Millington, 'The diverse and contested meanings of sustainable development' (2004)170(2) The Geographical Journal 99; Mohamed El-Kamel Bakari, *The Dilemma of*

E&P in SSA can be assessed through the following three realms: social sustainability, economic sustainability and environmental sustainability.

While social sustainability addresses or manages the impact of business operations on human beings or society,[2002] economic sustainability involves evaluating and balancing 'financial costs and benefits' of business operations in a way that does not compromise future economic needs.[2003] Environmental sustainability advocates that nature should not be dangerously harmed by the demands and actions from the social and economic realms of sustainability.[2004] It encompasses factors such as "ecosystem integrity, carrying capacity and biodiversity"[2005] as well as intergenerational equity[2006] which seek for fairness in the use of the environment. Environmental sustainability requires that 'the natural capital or physical environment should be maintained as a source that provides economic inputs such as petroleum and as a sink that can accommodate wastes'[2007] such as

Sustainability in the Age of Globalization: A Quest for a Paradigm of Development (Lexington Books 2017); see also Waas and others, 'Sustainable Development: A Bird's Eye View' (n 264).

[2002] UN Global Compact, 'Do business in ways that benefit society and protect people: Social Sustainability' < www.unglobalcompact.org/what-is-gc/our-work/social> accessed 2 June 2019.

[2003] Khan, 'Sustainable development: The key concepts, issues and implications' (1995) 63.

[2004] Fritjof Capra, 'The systems view of life; a unifying conception of mind, matter, and life' (2015) 11 (2) Cosmos and History: The Journal of Natural and Social Philosophy 242; UN, *Achieving Sustainable Development and Promoting Development Cooperation* (n 264); Waas and others, 'Sustainable Development: A Bird's Eye View' (n 264).

[2005] AD Basiago, 'Economic, social, and environmental sustainability in development theory and urban planning practice' (1999) 19 The Environmentalist 145, 150.

[2006] Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (n 477).

[2007] Basiago, 'Economic, social, and environmental sustainability in development theory and urban planning practice' (n 2005)145.

oily sludges[2008] from petroleum. In effect, natural resources such as petroleum are required to be exploited "no faster than they can be regenerated [if possible]"[2009] or be reasonably conserved.[2010] At the same time, the emission of wastes must not be done 'faster than the wastes can be assimilated or absorbed by the environment'.[2011]

What these requirements suggest is that economic activities from the economic realm of sustainability must be measured and balanced. It has been argued by some[2012] that if the right economic steps on the exploitation of the environment are taken, there would not be the need to harbour fear of depleting the natural resources such as petroleum. "Provided we maintain sound economic policies, worrying about humans depleting resources amounts to unfounded hysteria"[2013] – Bourne has observed. Economic policies that do not integrate legal concerns from the social realm such as ROL and justice would make the 'hysteria about resource depletion founded'. This is because there will not be the needed balancing acts

[2008] Shahryar Jafarinejad, *Petroleum Waste Treatment and Pollution Control* (Butterworth-Heinemann 2016).

[2009] Basiago (n 2005); Khan, 'Sustainable development: The key concepts, issues and implications' (1995) 63.

[2010] Faure and Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (n 437).

[2011] Basiago (n 2005); Khan, 'Khan, 'Sustainable development: The key concepts, issues and implications' (1995) 63.

[2012] Basiago (n 2005).

[2013] Ryan Bourne, 'The Earth's resources are limited, but human ingenuity is infinite' (*Commentary*, Cato Institute) < www.cato.org/publications/commentary/earths-resources-are-limited-human-ingenuity-infinite > accessed 27 May 2019.

with requisite duties and responsibilities that can hold the economic policies and actions in check.[2014]

Rather than exclusively looked from the environmental damage perspective, the bottom line of sustainability is anchored on "the quality of [petroleum exploitation] being able to continue over a period",[2015] preferably for a long time in an assured subsistence fashion. The milestone that would have been reached is characteristic of sustainable development.

Achieving sustainability in petroleum exploitation in SSA requires a fair balance between environmental law that focuses on environmental protection, petroleum law that focuses on providing an effective framework for petroleum exploitation and SDGs which focus on sustainable development or the convenient marriage between socioeconomic development activity including petroleum exploitation and that of environmental protection – a conjugality that reinforces the ecological balance, or the appropriacy thereof.[2016]

10.5 Remedies for Environmental Degradation from Petroleum E&P

Four main remedies can be provided for a country that is heavily dependent on petroleum resource or the industries and other activities that depend on the fossil fuel. The first remedy is to make persons (legal and natural) to be accountable for any environmental damage caused. In the recent landmark ruling of *Jam and*

[2014] ibid.

[2015] Cambridge Dictionary, 'sustainability' (Cambridge University Press 2019) < https://dictionary.cambridge.org/dictionary/english/sustainability > accessed 1 May 2019.

[2016] Bosselmann, *The Principle of Sustainability: Transforming law and governance* (n 1879); Solis, 'Human rights versus human needs: debating the language for universal access to modern energy services' (n 1880) 56; CJ Dernbach and AJ Mintz, 'Environmental Laws and Sustainability: An Introduction', *Editorial* (2011) 3 Sustainability 531.

others[2017] *v IFC* at the USA supreme court, for instance, the absolute or total immunity of the World Bank to be sued, as claimed by the IFC, was successfully challenged by Indian farmers and fisher-folk that were said to have been adversely affected by a coal project financed by the IFC due to the air pollution, water contamination and farm destruction suffered by the applicants.[2018] In effect, the immunity of the World Bank as an IO is not absolute and not covered by its commercial activities – the court averred. This lawsuit suit for remedies from the World Bank harnessed important legal function for accountability and environmental action. According to Razzaque, 'remedies in environmental matters is purposed on providing appropriate redress to victims, implementing obligations, promoting restoration, reinforcing the ROL, and encouraging sustainable development'.[2019]

Although current dimensions of international environmental law do not necessarily provide effective remedies to attain the full breadth of this purpose,[2020] the case of *Jam and others v IFC* has, at least, achieved the following objectives: 'reinforcement of ROL' that World Bank is not above the law and the preliminary fulfilment of procedural justice. If the applicants can prove that IFC was, indeed, responsible for the environmental degradation and that this impacted on their lives

[2017] Earth Rights International is representing the applicants in the court; see EarthRights International, 'Budha Ismail Jam, et al v. IFC: An Indian fishing community takes on the World Bank' < https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/ > accessed 27 April 2019.

[2018] Kirk Herbertson, 'The World Bank Group's defeat at the US Supreme Court will save its mission' (The Elders, 14 March 2019) < https://theelders.org/news/world-bank-groups-defeat-us-supreme-court-will-save-its-mission > accessed 14 March 2019.

[2019] Jona Razzaque, 'Access to Remedies in Environmental Matters and the North–South Divide' in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (1st edn, Cambridge University Press 2015) 588.

[2020] ibid.

adversely, a substantive redress to *Jam and others* as victims of environmental damage would likely be procured. Despite the World Bank's apparent culpability in environmental degradation in the case of *Jam and others*, the World Bank has taken initiatives in the petroleum industry to mitigate environmental hazards, which are not restricted to projects it has financed. For instance, having discovered that gas flaring was a global environmental concern, the World Bank launched a 'global gas flaring reduction' project aimed at addressing the challenge.[2021] In the same vein, petroleum companies must be made legally accountable in preventing and addressing environmental damages from their petroleum exploitation in SSA.

The second remedy is to find the best ways of extracting and using the fossil fuel so that it does not unduly harm the environment. One of the best ways is to use efficient technologies in the extraction of petroleum and recycling of petroleum products. In this regard, there should be continuous development of innovative technologies which ensure that the petroleum extraction process should neither emit more toxic gases nor should allow petroleum to drop onto the sea surface or on the soil. The other best way to extracting and using petroleum is to ensure that there is high energy resource efficiency, in this case, petroleum resource efficiency. What this essentially means is that better means are deployed to ensure that fewer amount or volume of petroleum is used to generate "the same or an improved service or product" or output.[2022]

[2021] Kyla Tienhaara, 'Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses' (2011)11(3) Sustainable Development Law & Policy 15.

[2022] European Commission, 'Thematic Issue: Exploring the Links between Energy Efficiency and Resource Efficiency' (June 2015) 49 Science for Environment Policy.

Energy resource efficiency can be "measured as the ratio between useful material output (Mo) and material input (Mi), both measured in physical terms"[2023] to produce the corresponding measure of efficiency.[2024] An instance is given of energy efficient cars that consume less fuel to cover longer mileage at expected standard speed. Sub-regional entities such as the EU have established a legal framework for harnessing resource efficiency.[2025] This is important to establish the appropriate rules, rights and duties in harnessing energy resource efficiency in the EU. SSA could take major steps in enacting appropriate laws on ensuring energy resource efficiency while not unduly compromising the need to generate the needed revenues from the petroleum resources.

The third remedy is to find viable[2026] and credible[2027] alternative energy sources. Currently, the alternative energy sources include biomass (e.g. biofuels) including biogas that is extracted from digested organic material; biodiesel from animal fat and vegetable oil; and ethanol derived from corn or such related plant material as well as green diesel that is extracted from plant materials such as algae (e.g. seaweeds).[2028] Other clean energy sources include wind power and solar energy as well as hydropower, geothermal energy, and nuclear energy (this uses

[2023] ibid.

[2024] Kristina Dahlström and Paul Ekins, 'Eco-efficiency Trends in the UK Steel and Aluminium Industries: Differences between Resource Efficiency and Resource Productivity' (2005) 9(4) Journal of Industrial Ecology 171.

[2025] Umut Turksen, 'Energy Resource Efficiency in the EU: Major Legislative Initiatives' in Nikolai Mouraviev and Anastasia Koulouri (eds) *Energy Security* (Palgrave Macmillan 2019).

[2026] Viable alternative energy sources here mean, those that have the capability of successfully performing, in a practical sense, as fossil fuels such as petroleum.

[2027] Credible alternative energy source here means, those energy sources that can be as reliable and believable as that of fossil fuels such as petroleum.

[2028] Anju Dahiya (ed), *Bioenergy: Biomass to Biofuels* (Elsevier 2015).

uranium, which is exhaustible).[2029] Apart from nuclear energy, all the above are renewable and sustainable energy sources.[2030] Compressed natural gas (a high-pressured methane), which can substitute petroleum products such as LPG, diesel and gasoline, is also a fairly clean energy source. Increased production and usage of electrical cars and similar machines can also be a fairly clean energy source.

So far, there is no credible evidence that these alternative sources of energy and fuels produce substantial carbon emissions to have significant adverse effects on the environment.[2031] Although the alternative energy sources have great prospects,[2032] none of the alternative energy sources are, for now, as viable and credible as fossil fuels, at least, in the eyes of many governments across the world, especially those from SSA. In some regions such as emerging markets,[2033] however, the participation in renewable energies has been increasing[2034] but not to the extent of competing favourably with fossil fuels.[2035] The development of alternative energy has also been increasingly placed on a high pedestal in

[2029] Henrik Lund, *Renewable Energy Systems: A Smart Energy Systems Approach to the Choice and Modelling of 100% Renewable Solutions* (2nd edn, Elsevier 2014); Nicholas Jenkins and Janaka Ekanayake, *Renewable Energy Engineering* (Cambridge University Press 2017).

[2030] Lund, *Renewable Energy Systems: A Smart Energy Systems Approach to the Choice and Modelling of 100% Renewable Solutions* (n 2029).

[2031] ibid; Jenkins and Ekanayake, *Renewable Energy Engineering* (n 2029).

[2032] Mario Giampietro and Kozo Mayumi, *The Biofuel Delusion: The Fallacy of Large-scale Agro-biofuel Production* (Earthscan 2009); Rafael Luque and James Clark (eds), *Handbook of Biofuels Production: Processes and Technologies* (Woodhead Publishing Ltd 2011).

[2033] Emerging countries such as India, Brazil and China.

[2034] Belén Olmos Giupponi, 'Mapping Emerging Countries' Role in Renewable Energy Trade Disputes' (2015) 3 OGEL.

[2035] Bjorn Lomborg, 'On climate change, humanity is not 'evil'' (Opinion, The Globe and Mail 26 September 2019) < www.theglobeandmail.com/opinion/article-on-climate-change-humanity-is-not-evil/> 27 September 2019; Lomborg, 'The Danger of Climate Doomsayers' (n 1950).

developed markets such as Germany, UK and Norway. For instance, renewable energy production is key to EU energy policies and law.[2036] But EU is challenged with the dilemma of either protecting the interests of investors such as MNPCs by relaxing environmental protection rules and hence not enhancing sustainable development or protecting the interest of environmental protectionist, promoting renewable energies and sustainable development but losing out on economic benefits from investments into natural resources such as petroleum.[2037] This unsettled disposition of alternative energy sources such as biofuels makes a fourth remedy a durable proposition.[2038] The fourth remedy is to develop a coping mechanism to ward off the effects of such harmful energy sources. This could be in the form of recycling of carbon emissions[2039] or neutralising the adverse effects of carbon dioxide from petroleum extraction and usage.[2040] All these remedies can be enhanced by a robust sustainability framework.

[2036] Ha Nguyen and Umut Turksen, 'The External Effects of the Energy Union Strategy on Trade and Investment in Renewable Energy from the EU to Vietnam: An Initial Assessment' (2019) 3 OGEL.

[2037] Belen Olmos Giupponi, 'Squaring the Circle? Balancing Sustainable Development and Investment Protection in the EU Investment Policy' (2016) 25(2) European Energy and Environmental Law Review 44.

[2038] Luque and Clark (eds), *Handbook of Biofuels Production: Processes and Technologies* (n 2032).

[2039] For instance, in Iceland carbon dioxide has been recycled into 'rock'; see Rosamond Hutt, 'Scientists in Iceland are turning carbon dioxide into rock' (World Economic Forum, 21 May 2019) < www.weforum.org/agenda/2019/05/scientists-in-iceland-are-turning-carbon-dioxide-into-rock/ > accessed 13 August 2019.

[2040] Lund, *Renewable Energy Systems: A Smart Energy Systems Approach to the Choice and Modelling of 100% Renewable Solutions* (n 2029); Jenkins and Ekanayake, *Renewable Energy Engineering* (n 2029).

10.6 Conclusion

While petroleum exploitation in SSA can instigate climate change, petroleum revenue is a significant source for protecting socioeconomic rights that can in turn contribute to sustainability which limits the travails of climate change. There is, therefore, a delicate balance between socioeconomic rights, petroleum exploitation, climate change and sustainability.[2041] Socioeconomic rights' impediments such as poverty, global environmental degradation, injustice and inequality constitute urgent underlying challenges which sustainability can significantly help in addressing. Law is a foundational pillar that can be used to achieve the aims of sustainability.[2042] It is imperative that innovative means of enhancing the 'enactment, use and analysis of laws that foster sustainability' are continuously improved and consolidated in SSA.[2043]

The NAS and SDGs are mutual instruments for harnessing sustainability in the petroleum industry.[2044] While the NAS is a medium through which the SDGs, especially SDG 1, can be operationalised, the SDGs serve as a platform which the World Bank can leverage to enhance the implementation of the NAS.[2045] For

[2041] Faure and Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (n 437); Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009); Solis, 'Human rights versus human needs: debating the language for universal access to modern energy services' (n 1880) 56.

[2042] Shihata, 'The Role of Law in Business Development' (n 149)1577; Dernbach and Mintz, 'Environmental Laws and Sustainability: An Introduction' (n 2016).

[2043] ibid.

[2044] The World Bank, 'Africa's Future and the World Bank's Support to It' (n 143).

[2045] Long, 'Underpinning commitments of the Sustainable Development Goals (n 1979) 91; French and Kotzé, 'Introduction' in French and Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (n 256); UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (n 1956).

instance, the NAS and SDGs have both sought to mitigate poverty in ways that promote socioeconomic rights. At the same time, ROL and justice are part of the pillars of both the NAS and SDGs.[2046] This chapter makes contribution to the thesis by way of the new insights it has provided for the harmonisation of the SDGs with petroleum law and environmental law instruments (such as the Paris Agreement 2015) for the protection of socioeconomic rights in SSA. The next – final - chapter of the thesis presents the overall conclusion, key contributions, recommendations and areas for future research.

[2046] Shihata, 'Legal Framework for Development (n 28); Shihata and Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' in Blake and others (eds), *Boundaries and Energy* (n 34); Cass, *The Rule of Law in America* (n 309); Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (n 329).

CHAPTER ELEVEN

CONCLUSION, CONTRIBUTIONS, AREAS FOR FUTURE RESEARCH AND RECOMMENDATIONS

11.1 Introduction

The aim of this chapter is to briefly articulate structure, content and reasoning of the thesis so as to remind the readers of the aims, findings and contributions of the study.

11.2 Conclusion

11.2.1 Summary of key findings

The main research question of the thesis has been: To what extent can petroleum law interrelate with the ROL, justice, and the NAS to enhance socioeconomic rights in SSA? Using mixed research methodology including doctrinal, socio-legal and comparative legal research approaches, which were employed as a multidimensional necessity to respond to both the main research question and seven specific research questions,[2047] the study articulated the following key finding for the main research question:

- To a very large extent, petroleum law can interrelate with the ROL, justice, and the NAS to enhance socioeconomic rights in SSA.

[2047] Hoecke and Ost (eds), *Methodologies of Legal Research* (2011); McConville and Chui (eds), *Research Methods for Law* (n 164); Morris and Murphy, *Getting a PhD in Law* (n 150); Putman and Albright, *Legal Research, Analysis, and Writing* (n 184); Bryman, Becker and Sempik, 'Quality criteria for quantitative, qualitative and mixed methods research: A view from social policy' (n 157).

Table 5 below summarises the key findings drawn from the seven specific questions of the study:

Table 5: Summary of key findings

Key findings	**Location or source of findings**
1. The relationship framework in which ROL and justice can be harnessed to enhance petroleum law and socioeconomic rights in SSA is that which: ✓ Identifies ROL and justice as comfortable bedfellows that complement each other rather than undermine each other in their effort to achieve their objectives. ✓ Sees ROL and justice as both internal and external to petroleum law. ✓ Recognises socioeconomic rights as one of the main aims in the interrelationship between ROL, justice and petroleum law.	Chapter four: In response to question 'i'.
2. SSA has not been performing well in key socioeconomic rights indicators such as HDI, BLI and WHI. Most of the SSA countries are suffering from the resource curse. Their petroleum resources have not been effectively used to significantly enhance their socioeconomic rights.	Chapter five: In response to question 'ii'.

3. The key sources of petroleum law that can be used to design appropriate petroleum legislation and contracts in SSA include legislation, contracts, treaties, general principles of law, judicial decisions, resolutions/decisions of IOs, juristic works and customary practices. The various ownership types boil down to private ownership, public ownership and joint-ownership regimes available in various forms in the petroleum industry.	Chapter six: In response to question 'iii'.
4. The global petroleum legal regime contains huge mix of legislations and contract types such as PSC, CC, SC and JVC, which can provide literature and lessons for the development of robust petroleum laws in SSA. No matter the contractual type, the most important consideration is whether it can rake in more revenues for the HS in the interest of justice: ✓ Fiscal terms in petroleum contracts, that essentially provide the ways in which contracting parties will divide between themselves the obligations and rights appertaining to 'financial benefits and risks'[2048] associated with petroleum exploitation projects, are at the heart of the share of petroleum revenues between the HS and the MNPCs. ✓ Depending upon factors such as deficiencies in geological formations, negotiation capabilities of parties, and clarity of existing petroleum resource data as well as corruption and general weak pillars of ROL and justice, the fiscal terms can	Chapter seven: In response to question 'iv'.

[2048] NRGI, 'What are oil, gas, and mining fiscal terms?' (1 January 2010) < https://resourcegovernance.org/analysis-tools/publications/oil-gas-and-mining-fiscal-terms > accessed 15 July 2019.

	unfavourably differ from one contract to the other against the interest of the HS in SSA. But the fiscal terms, which are usually unfavourable in SSA, are sometimes enshrined in the petroleum legislation of the HS in ways that are applicable to every contract or petroleum development project. ✓ There are usually four key factors upon which the fiscal terms in the petroleum legal regime are formulated and anchored. In the first place, risks associated with petroleum projects such as 'geological risks, unpredictable variation of prices, technical uncertainties, and political risks'[2049] are usually considered as critical to determining fiscal terms. Secondly, in petroleum-rich countries such as in SSA, there is always the potential for revenues from the petroleum resources to dominate other public revenues. This, thus, requires closer attention. The third feature is that, there is the recognition of the finite nature of petroleum resources and, therefore, the need for HS to ensure that maximum economic benefits are generated therefrom so much so that 'the depletion of the value of the petroleum asset of the HS can be compensated for'.[2050] Fourthly, petroleum exploitation endeavours are capital intensive, which need huge investments to be made before the required revenues can flow and be appropriated. These four characteristics ought to	

[2049] ibid.

[2050] ibid.

inform the way the fiscal regime is designed in the petroleum legal framework.[2051] ✓ The fiscal instruments or tools in petroleum contract types such as PSC, CC, JVC and SC do activate the fiscal terms. These instruments include income tax, royalties, government equity, windfall profit taxes, bonuses, and other taxes and fees, as well as profit oil, tax oil, and cost oil (as translated into monetary values). ✓ The fiscal instruments in PSC such as profit oil, tax oil, cost oil and royalties do significantly contribute to making the PSC the most popular contractual regime in the petroleum industry of SSA. ✓ Although the PSC is one of the most popular contract types and provides 'a good balance between the interests of petroleum E&P companies and the HS'[2052] especially because of its redressing fiscal terms, the dominance of PSC in SSA countries can also be largely traced to lack of and/or limited capacity (such as expertise and capital) in the sub-region to effectively harness their petroleum resources for the adequate socioeconomic benefit of their people. ✓ However, all the contractual regimes are complementarily applied in most SSA countries that use PSC as the main contractual regime.	

[2051] ibid.

[2052] Inocencio, 'Independent Regulatory Agencies in the Oil and Gas Industry' (n 1013), 143.

- ✓ In most SSA countries that employ the CC as the main petroleum contractual regime, they also intersperse it with some form of PSC, JVC and/or SC as complementary regimes.
- ✓ The JV and SC are usually used to complement the PSC and/or CC, depending upon the contractual choices available in the petroleum legal regime. It all has to do with balancing the fiscal terms and interests of parties from a menu of petroleum contract types that can enhance the size of public revenue from the petroleum industry. In effect, one principal contract type is usually employed from a dossier of active contract types.
- ✓ As a result of differences in HS in SSA such as institutional capacities, political risks, geological risks, economic/political priorities, and size of petroleum deposits, it is evident that HS will have varied menu of fiscal instruments in their petroleum contracts.
- ✓ Despite the differences in SSA countries, it is imperative that countries in SSA carefully consider integrating into their petroleum fiscal regimes essential features such as the following: Firstly, the fiscal terms in petroleum contracts should be clearly supported by highly accessible laws and regulations. In this regard, the parties should not have discretionary right or should only have minimal discretionary right to derogate or change fiscal terms in each contractual arrangement. Constraints on the use of discretion will

	facilitate effective enforcement of petroleum contracts and enhance 'the ability of the HS to apply coherent sector-wide fiscal strategy'.[2053] Lack of discretionary right also minimises impediments such as corruption in contract negotiations. The second consideration is that there is the high propensity of fiscal regimes to be reasonably stable if the fiscal terms in contracts have 'progressive elements that allow the HS to generate increasing share from petroleum revenues in tandem with increases in profitability'.[2054] This fiscal imperative is effectively used by countries such as Norway.[2055] It is important that the petroleum legal regime provides space for this to be achieved. The third fiscal element to consider is that 'the total value over the life of a petroleum project must be thought of alongside the timing of expected flow of revenues'.[2056] For instance, fiscal instruments such as royalties and bonuses do rake in 'revenues for the HS at an earlier stage compared to fiscal instruments like the profit-based taxes'.[2057] ✓ Fiscal terms that are aligned to the tenets of ROL and justice in petroleum contracts, whichever they are, can significantly	

[2053] NRGI, 'What are oil, gas, and mining fiscal terms?' (n 2048).

[2054] ibid.

[2055] NORSK, 'Fundamental Regulatory Principles' (n 954).

[2056] NRGI, 'What are oil, gas, and mining fiscal terms?' (n 2048).

[2057] ibid.

enhance socioeconomic rights of citizens and protect profit interests of petroleum E&P companies. ✓ With good fiscal terms imbued with the tenets of ROL and justice, the HS can be able to mitigate if not eliminate the risk of occurrence of impediments such as 'non-compliance with petroleum law, over-exploitation of loopholes and corruption'.[2058]	
5. The petroleum legal regimes in SSA countries such as Ghana, Nigeria and Angola have inadequate integration of the ROL and justice principles and could, therefore, learn from more effective petroleum legal regimes such as Norway and the UK. For justice and higher petroleum revenues for the HS, Norway provides a more attractive model. For that which more highly incorporates tax rules, the UK is an attractive model. Either way, adaptation must consider local conditions such as poverty and limited petroleum industry infrastructure. Ghana, has by far, performed better than most SSA countries when it comes to ROL and justice, but she could do better. ✓ Most of the petroleum laws in SSA largely favour MNPCs more than the HS: - The fiscal terms in the petroleum legal framework of Nigeria[2059] are more favourable to MNPCs than to the HS but	Chapter eight: In response to question 'v'.

[2058] ibid.

[2059] The Petroleum Profits Tax Act [1990], ss 8 – 29; the Deep Offshore and Inland Basin Production Sharing Contracts Act [1999], ss 5 – 14; The Petroleum Act [1969], ss 10, 35, 40, 42, and 61.

	some efforts are being made by the government to redress the balance.[2060] - The fiscal terms in the petroleum legal framework of Angola have been befuddled by a number of weaknesses including insufficient share of revenue for the HS and political arbitrariness as well as limited clarity, stability, coordination and implementation of petroleum legislative instruments and contracts. These are largely favourable to the MNPCs. For instance, the Presidential Decree No. 6/18,[2061] which is a new fiscal regime for marginal field development that is less than 300 million barrels of reserves or marginal fields that are not viable economically due to limited and/or lack of the needed petroleum infrastructure, does entertain unfair fiscal terms against the HS. The petroleum tax has been cut from 20% to 10% and petroleum income tax for marginal fields has been reduced from 50% to 25%.[2062] At the same time, 50% of petroleum income tax has been levied on MNPCs' share of the profit oil while it is 35%	

[2060] Pitman and Chinweze, 'The Case for Publishing Petroleum Contracts in Nigeria' (n 1218).

[2061] Presidential Decree No. 6/18 of 18 May 2018 on fiscal incentive regulation for marginal field development.

[2062] ibid; Clemência Nogueira, 'Angola - Oil and Gas' (International Trade Administration, 22 August 2019) < www.export.gov/article?id=Angola-Oil-and-Gas > accessed 29 August 2019.

(effective since 2012) for domestic or local petroleum companies that partner with the national concessionaire.[2063] - The fiscal terms in the petroleum legal framework of Ghana[2064] have not been that favourable to the HS as compared to the MNPCs but some steps are being taken to address the imbalance. - Performance of fiscal rules under revenue management in Angola on the RGI by NRGI was found to be poor just like Ghana as compared to that of Nigeria which performed very well for fiscal rules' existence, monitoring requirement, and adherence. Ghana, however, performed better than Nigeria with 65 score against 44 score on the RGI for revenue management under which fiscal rules are captured. Angola scored 31 thereof, underscoring a much weaker position on overall revenue management and fiscal rules of the RGI. - However, just as Ghana and Nigeria are currently undertaking legal steps to reform the current petroleum legal architecture in their jurisdictions, it is so with Angola. The countries must ensure that tenets of ROL and justice are effectively integrated in their emerging petroleum legal frameworks.	

[2063] Wood Mackenzie, *Angola upstream summary* (Country Report, 10 September 2019); Petroleum Activities Law (Law 10/04, of 12 November 2004), Art 93; Petroleum Activities Law (Law 5/19, of 18th April 2019).

[2064] Act 919 [2016], ss 10 (14) a, 10 (14) b, and 87; Petroleum Revenue Management Act, 2011 [Act 815], Preamble; Income Tax Act of Ghana, 2015 [Act 896], s 7, first schedule, and sixth schedule of Act 896 amended by Income Tax (Amendment) Act, 2016 [Act 907].

6. The interconnection between the themes (competitiveness and employment; vulnerability and resilience; governance and public sector capacity) and instruments (partnerships, knowledge, and finance) of the NAS can be a useful infrastructure for interrelating the ROL, justice and petroleum law to enhance socioeconomic rights in SSA. But the NAS has, by far, not effectively pushed the frontiers towards this end, although some successes have been made since 2011.	Chapter nine: In response to question 'vi'.
7. Sustainability and socioeconomic rights can be achieved in the context of petroleum exploitation in SSA through effective stakeholder engagements that utilise the points of harmony between environmental law, petroleum law, SDGs and investment law to mutually meet the needs of the HS, the planet, and businesses such as MNPCs. ✓ With respect to the SDGs, provisions such as SDG 1 on poverty eradication; SDG 2 on hunger eradication, achievement of food security and improved nutrition'; SDG 4 on enhancing quality education; SDG 6 on ensuring universal access to clean water; SDG 7 on ensuring clean and affordable energy; SDG 8 on sustainable economic growth and employment; SDG 9 on sustainable industrialisation; SDG 13 on combating climate change; and SDG 16.3 on 'ensuring peace, strong institutions and ROL at the national and international levels and equal access to justice for all'; as well as SDG 17 on promoting partnership of stakeholders; are	Chapter ten: In response to question 'vii'.

particularly germane imperatives that exemplify how socioeconomic rights can be pursued alongside the protection of environmental rights. Essentially, the operational logic of the SDGs is that all the 17 goals and 169 targets "are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental".[2065]

Ironically, there is an underlying disharmony between SDGs such as on combating climate change that abhors CO_2 emissions, on one hand, and the SDGs on sustainable industrial development and petroleum E&P that emit CO_2 while helping to eradicate poverty and hunger to promote standard of living, on the other hand.[2066] This disharmony can be difficult to reconcile, but it is imperative that SSA countries continue to institute legal measures to exploit their petroleum resources and industrialise to mitigate poverty while taking reasonable and conscious steps to gradually reduce CO_2 emissions. Ground-breaking innovation and technological development can have the huge potential of containing emission levels and dangers of CO_2 emissions from petroleum E&P in the future.

- ✓ The SDGs and the commitments of the Paris Agreement are linked to each other from the standpoints of both

[2065] UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' (n 1956).

[2066] French and Kotzé, 'Introduction' in French and Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (n 256).

	socioeconomic development that especially enhances socioeconomic rights and environmental protection that particularly combats climate change and promotes environmental rights such as "rights to a safe, clean, healthy, and sustainable environment".[2067] Indeed, the Paris Agreement is essentially anchored on the effort 'to strengthen the global response to the threat of climate change, in the context of the imperatives of the 17 SDGs'.[2068] The implementation of the SDGs and the Paris Agreement have shared principles such as 'universality, indivisibility and leaving no one behind'.[2069] Reinforcing these commitments means that the 17 SDGs present a significant global mobilising force of action in furthering the achievement of global development goals including environmental goals[2070] such as combating climate change in the Paris Agreement. The current commitments in the 'Nationally Determined Contributions' of states in the Paris Agreement are "falling far short of the target"[2071] of carbon neutrality[2072] and achieving	

[2067] IUCN World Declaration on the Environmental Rule of Law [2016], Principle 3.

[2068] Paris Agreement [2015], Art 2.

[2069] Long, 'Underpinning commitments of the Sustainable Development Goals: indivisibility, universality and leaving no one behind' in French and Kotzé (eds), *Sustainable Development Goals* (n 1979); OECD, *Development Co-operation Report 2018: Joining Forces to Leave No One Behind* (n 1981).

[2070] French and Kotzé, 'Introduction' in French and Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (n 256).

[2071] UN Climate Change, 'UN Climate Chief Urges Action on Climate Emergency' (n 1903).

[2072] Paris Agreement [2015], Art 4.

1.5 degrees Celsius[2073] of global warming by 2050. For instance, the EU recently 'could not agree on the deadline of net zero emissions of CO_2 where four countries[2074] vetoed[2075] while Donald Trump (USA President) took his country out of the Paris Agreement.[2076] The UN has averred that the target of 1.5 degrees Celsius can only be achieved if 'carbon emissions can be reduced to 45% by 2030'.[2077] The imperative of combating climate change in the Paris Agreement has some positive relationship with imperatives such as poverty eradication, economic growth, and universal access to clean water[2078] which are pursued in the SDGs. In fact, both the Paris Agreement and the SDGs have common provisions to combat climate change[2079] and protect	

[2073] Paris Agreement [2015], Art 2.

[2074] Poland, Estonia, Czech Republic and Hungary vetoed even a less strict version of the earlier EU agreement on net zero emissions target by 2050; see Kottasová, 'An EU proposal to slash carbon emissions to net zero by 2050 was blocked by four countries' (n 1907).

[2075] ibid.

[2076] Kottasová, 'Climate apartheid' to push 120 million into poverty by 2030, UN says' *CNN* (n 1909).

[2077] UN Climate Change, 'UN Climate Chief Urges Action on Climate Emergency' (n 1903).

[2078] See Maria Belén Olmos Giupponi and Martha C Paz, 'The Implementation of the Human Right to Water in Argentina and Colombia: The justiciability of the human right to water in Argentina and Colombia' (2015) 15(1) Anuario Mexicano de Derecho Internacional 323; María Belén Olmos Giupponi, 'Climate change and right to water in Latin America' (The Economy Journal.com) < www.theeconomyjournal.eu/texto-diario/mostrar/1618607/climate-change-and-right-to-water-and-in-latin-america > accessed 12 December 2019; The World Bank, 'Quality Unknown: The Invisible Water Crisis' (20 August 2019) < www.worldbank.org/en/news/feature/2019/08/20/quality-unknown > accessed 9 October 2019.

[2079] See SDG 13 and climate change provisions across the Paris Agreement.

socioeconomic rights. Just like the SDGs, the Paris Agreement 'acknowledges the necessity of states to engage in the promotion of universal access to sustainable energy and the deployment of renewables in developing countries such as in SSA'.[2080] But this imperative is a challenge partly due to low capacities in SSA and expensive nature of sustainable energy adaptation. Also, just like the Paris Agreement, the SDGs are confronted with low commitment levels by states including those in SSA. Consequently, socioeconomic rights and environmental rights continue to be adversely affected in SSA.[2081]	

11.2.2 The bottom-line

Petroleum is usually characterised by 'mineral oil or related hydrocarbon and natural gas'.[2082] It generates several products that attract huge interests due to the significance they carry. The significance of petroleum resource or crude oil is underpinned by the fact that, for many generations, petroleum products[2083] have

[2080] Raphael J Heffron and others, 'A treatise for energy law' (2018) 11(1) The Journal of World Energy Law & Business 34.

[2081] UN Climate Change, 'UN Climate Chief Urges Action on Climate Emergency' (n 1903).

[2082] Petroleum Act 1998 c 17 s 1.

[2083] Petroleum products such as 'fuel oil /diesel fuel, residual fuel oil /heavy fuel oil, natural gas liquids, still gas, motor gasoline, aviation gasoline, kerosene jet fuel, naphtha jet fuel, kerosene, and propane/liquefied petroleum gas; see EIA, 'Glossary' (US Energy Information Administration).

been powerful enablers in critical sectors[2084] of any country.[2085] But SSA has been grappling with extreme levels of poverty despite its petroleum resource abundance.[2086] Extraction of these products involve a wide spectrum of complexities and stakeholders, which require the use of petroleum law. Petroleum law refers to the codified rules, norms and principles that have been framed to regulate businesses, activities, processes, institutions and products in the petroleum industry.[2087] The inspiration of the thesis has been premised on the disposition that petroleum law should play a positive role in enhancing socioeconomic rights such as right to adequate standard of living in SSA. However, based on the largely unfair, inconsistent and complex nature of petroleum legislation and contracts in SSA, the thesis demonstrates that petroleum law in SSA must be effectively integrated with ROL and justice to make a meaningful impact on the lives of people of SSA.

In order to secure ROL, SSA countries must strive to establish and/or improve 'good laws, institutions and processes that will ensure accountability, stability, equality and access to justice for all'.[2088] These, in the end, can help in the 'protection of human rights and environmental rights'.[2089] Strong ROL and justice

[2084] Strategic areas such as transportation, industry and households.

[2085] IAG, '144 Products Made from Petroleum that may Shock You' (n 109); see Martin and Kramer, *Williams & Meyers, Oil and Gas Law* (n 109).

[2086] Bill & Melinda Gates Foundation, 'Goalkeepers: The Stories Behind the Data' (n 32); Myers, 'Petroleum, Poverty and Security' (2005).

[2087] Ikenna, "International Petroleum Law" (n 33); Bentham, 'The International Legal Structure of Petroleum Exploration' in Rees and O'Dell (eds), *The International Oil Industry* (n 84).

[2088] UN Global Compact, 'Promote the rule of law to protect citizens and businesses: Rule of Law' < www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law > accessed 2 June 2019.

[2089] ibid.

in harnessing petroleum law provides the opportunity for businesses such as MNPCs to develop unshaken confidence in the petroleum legal framework to have all their rights respected and protected. Also, with strong ROL and justice, the rights of every stakeholder of the petroleum industry are protected.[2090]

Petroleum law demonstrates strong ROL and justice if the petroleum legislation and contracts are 'written clearly and can easily be accessed wherein elements such as certainty and enforceability of legal rights'[2091] as well as fairness, consistency, accountability and equity are established and guaranteed.[2092] At the same time, disputes arising from petroleum contracts or other such engagements can have ready access to a judiciary that is independent and impartial in such a way that 'fairness is promoted, transparency is ensured, and the disputes are resolved timely and predictably'.[2093] Additionally, other public institutions such as the petroleum regulatory institutions[2094] must have the capacity to operate effectively and efficiently in such a way that they can capacitate businesses such as petroleum companies and their staff to positively contribute to the economy and society including enhancing socioeconomic rights of citizens of the HS.[2095]

[2090] ibid.

[2091] ibid.

[2092] ibid.

[2093] ibid.

[2094] Institutions such as Ghana Petroleum Commission, OGA of UK, DPR of Nigeria, ANPG of Angola, and NPD of Norway.

[2095] UNGA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels* (n 409); see also Barnett, 'Can Justice and the Rule of Law Be Reconciled?' (n 23); Rawls, *Justice as Fairness: A Restatement* (n 24); Hooker, 'Fairness' (n 66); Sandel, *Justice: What's the Right Thing to Do?* (n 24); Sen, *The Idea of Justice* (n 404); Fennell and McAdams, *Fairness in Law and Economics* (n 477).

Enhancing ROL and justice does come with "great benefits to business, and other stakeholders".[2096] Without strong ROL and justice, petroleum companies can be deterred from participating in the petroleum industry or from being responsible since 'they will find it difficult to operate, meet their legal obligations and procure respect for protection of their legal rights'[2097] in the legal framework. It can be said that, 'the dossier of rules, responsibilities and institutions that govern the behaviour of actors such as governments, MNPCs and the World Bank as well as the public are central to optimal resource management'.[2098] This is, essentially, the petroleum legal framework. The legal framework that governs petroleum E&P is very crucial in determining the extent to which the HS and investors maximise equitable benefits from the exploitation. The framework has to be robust for the needed interconnectedness to be achieved. This requires carefully designed imperatives on competitive licensing, meaningful local content, integrated oil and gas transportation and marketing as well as efficient management of revenues in a connected, monitored, transparent and equitable manner.[2099]

Therefore, governments of HS in SSA are required to ensure that they provide the needed legal framework that promotes ROL and justice both within and outside petroleum law. This will enable petroleum companies to work towards meeting "their commitments to universal sustainability standards"[2100] such as Paris

[2096] UN Global Compact, 'Promote the rule of law to protect citizens and businesses: Rule of Law' (n 2054).

[2097] ibid.

[2098] NRGI, 'Natural Resource Charter' (n 863), Precept 1.

[2099] ibid.

[2100] UN Global Compact, 'Promote the rule of law to protect citizens and businesses: Rule of Law' (n 2054).

Agreement 2015, SDGs, and UNGC; human rights standards such as UDHR,[2101] ICESCR,[2102] ACHPR,[2103] and DRTD;[2104] as well as national petroleum laws such as Petroleum Act 1998 c 17 for UK,[2105] the Petroleum Act 29 November 1996 for Norway,[2106] the Petroleum Act 1969 for Nigeria,[2107] Law No. 10/04 of 12 November 2004 (the Petroleum Activities Law) for Angola,[2108] and Petroleum (Exploration and Production) 2016 (Act 919) for Ghana. As a development partner with prowess and locus in international financial mediation and facilitation, the World Bank can be integral to this cause of positive legal action by not only fully complying with applicable legal imperatives but also using its NAS and successive strategies to promote ROL and justice in petroleum laws and regulations for the respect and promotion of socioeconomic rights.[2109]

A fair look at the reams of evidence and explorative analysis in this thesis would hardly procure any reasonable conclusion other than the fact that the petroleum legal frameworks in SSA are largely not aligned to the high standards of ROL and justice that can effectively help petroleum law to significantly enhance socioeconomic rights. Governments of SSA must do more to enhance their

[2101] Art 25.

[2102] Arts 1, 6, 11, 12, and 13.

[2103] Arts 14, 15, 16, 17, 21, and 22.

[2104] Arts 1 and 2.

[2105] Tordo with Johnston and Johnston, 'Petroleum Exploration and Production Rights: Allocation Strategies and Design issues' (n 791) 63; Petroleum Act 1998 c 17.

[2106] The Petroleum Act, 29 November 1996 No. 72 relating to petroleum activities (2012).

[2107] The Petroleum Act [1969].

[2108] Law No. 10/04 of 12 November [2004].

[2109] Shihata, 'The Role of Law in Business Development' (n 149) 1577; Friedman, 'Legal Rules and the Process of Social Change' (n 255).

capacities in harnessing petroleum law to protect socioeconomic rights of their citizens.

At the same time, the World Bank can use its wealth of finance, knowledge and partnership to influence the operation logic of MNPCs and to help build capacities of SSA countries in ways that make their governments reasonably capable of enacting robust legislation, negotiating fairer contracts and concluding agreements that would reasonably conform to the higher standards of ROL and justice.

While at that, climate change prevention measures, as promoted by instruments such as SDGs and Paris Agreement 2015, should be on the environmental protection agenda of SSA. But this strategic priority should not be executed in a manner that unduly undermines the right of SSA to freely exploit their petroleum resources to enhance their socioeconomic rights.

11.3 Original Contributions to Knowledge

According to Macleod-Clark and Hockey, research contribution is characterised by an 'attempt to increase the sum of what is known, and by the discovery of new facts or relationships'.[2110] The contribution of the thesis is, therefore, looked from the perspective of theory and practice. The key contributions are identified as follows:

11.3.1 Overall contribution of the thesis

Generally, the thesis deepens the understanding of the interrelationships between the ROL, justice, petroleum law and the NAS as they relate with socioeconomic

[2110] Jill Macleod-Clark and Lisbeth Hockey, *Further Research for Nursing* (Scutari Press 1989).

rights. A robust petroleum legal ecosystem clothed with ROL and justice enhances innovation, which generates significant value for all stakeholders including shareholders, consumers and employees as well as governments of the HS.[2111] The thesis has:

- ✓ Provided a valuable a useful toolkit for MNPCs so that they can develop new legal relations with SSA based on win-win and fair contractual arrangements.
- ✓ Offered a source of inspiration for energy and development law students and scholars researching the functional relationship between justice, the ROL, petroleum law and socioeconomic rights.
- ✓ Presented an effective framework for carrying out legal reform, which has featured unique insights that are of great value to policymakers and practitioners concerned about sound petroleum legal regime that substantially supports socioeconomic rights in SSA.
- ✓ Demonstrated that petroleum law is a major instrument that can be used to ensure that maximum economic recovery is generated from the petroleum resources in SSA.

In addition to the overall contributions, a number of novel findings are offered in the context of various chapters of the thesis which are summarised below.

11.3.2 Contribution of Chapter Four

In Chapter Four, the thesis provides granular details of the relationships between the ROL and justice. It highlights the extent to which the ROL and justice are

[2111] Anton Botes, Andrew Lane and Hannah Edinger, 'The new frontier' (Deloitte Insights, 15 March 2019) < www2.deloitte.com/insights/us/en/industry/oil-and-gas/africa-oil-gas-industry-energy-reserves.html > accessed 13 May 2019.

fundamental to the effective functioning of the law. It also demonstrates the need for the ROL and justice to be comfortable bedfellows in their relationship with socioeconomic rights.

11.3.3 Contribution of Chapter five

In Chapter Five, the thesis contributes to deepening the understanding of socioeconomic indicators including HDI, BLI and WHI as parameters of socioeconomic rights such as adequate standard of living in SSA. The thesis demonstrates just how poor the socioeconomic rights in SSA have been despite their huge petroleum resources. The thesis provides greater understanding of socioeconomic rights as an entitlement frontier for socioeconomic development – underscoring how socioeconomic development can help enhance socioeconomic rights and vice versa.

11.3.4 Contribution of Chapter Six

In this chapter, the extensive analysis of sources of petroleum law and their universal acceptance as a *lex petrolea* highlights the need to have an international treaty on petroleum law. It also highlights the extent to which sources and theories of petroleum law can inform technical decisions on how best to formulate petroleum legislation and contracts. Chapter Six has enhanced the legal infrastructure of what make up petroleum law and ownership scenarios.

11.3.5 Contribution of Chapter Seven

In Chapter Seven, the thesis complements efforts to clarify the suitability of various petroleum legal regimes in the world. The global petroleum legal architecture has been explored to simplify petroleum contracting regimes in order to push the frontiers of understanding of petroleum law and to facilitate the

selection and use of appropriate petroleum regimes by policy makers and petroleum companies. The thesis has critically established the nature of best practice in petroleum legislation and contracting which could be pertinent to SSA.

11.3.6 Contribution of Chapter Eight

Here, the thesis contributes to the development of petroleum law in SSA. In doing so, it argues that an effective legal framework for petroleum E&P must be one that has the capacity to generate maximum economic benefits for the HS and to deliver reasonable investment returns to petroleum E&P companies.

Chapter Eight is the first comprehensive academic study that has compared the petroleum legal regimes of Ghana, Nigeria and Angola on one hand and UK and Norway on the other hand - as characterising the general factors in SSA. It has demonstrated comparative outlook of best practice in petroleum resource governance that integrates the ROL and justice for the benefit of socioeconomic rights in SSA. In effect, the thesis in chapter eight contributes to the dialogue that is geared towards making petroleum legislation and contracts in SSA more just and fairer for the benefit of socioeconomic rights by critically assessing the comparative merits of the good practices identified in two developed, oil producing countries, namely the UK and Norway.

11.3.7 Contribution of Chapter Nine

In Chapter Nine, the thesis has identified the opportunities and strengths which the NAS provides for harnessing ROL and justice in the governance of the petroleum industry in SSA. It has also demonstrated the usefulness or otherwise of the NAS for enhancing the ROL, justice and petroleum law as well as socioeconomic rights in SSA.

The expectation is that the contribution of the thesis to legal literature in interconnecting law with the NAS will provide a useful guide for policy makers and the other stakeholders of the World Bank. This is possible through the close analysis of the content of the NAS, its prospects, challenges and transitional issues. The hope is that this effort will make a significant contribution to the enhancement of the NAS and other strategies of the World Bank.

11.3.8 Contribution of Chapter Ten

Although petroleum E&P can have adverse effects on the environment and the people such as climate change, it is imperative that petroleum E&P activities continue to be responsibly carried out in order to effectively enhance sustainability in SSA. Chapter Ten's contribution is the greater insight it has given to the harmonised deployment of the SDGs, petroleum law and environmental law instruments (such as the Paris Agreement 2015) in order to protect socioeconomic rights in SSA.

11.4 Areas for Future Research

Future research areas that can advance the trajectory of this thesis include the following three topics:

11.4.1 Climate change containment

According to the UN, most institutions including human rights organisations "have barely begun to grapple with what climate change portends for human rights" despite the urgency associated with climate change. The "piecemeal, issue-by-

issue human rights methodology is woefully insufficient". [2112] At the same time, the wholesale advocacy against petroleum exploitation by countries even in poor SSA is a questionable position to take as it does not appear to be in synch with development and environmental rights to freely dispose of petroleum resources, for instance.[2113]

How can the "piecemeal, issue-by-issue human rights methodology" be addressed? How can the problematic wholesale rejection of petroleum exploitation be addressed? Can climate change be contained while petroleum exploitation continues? Can there be a study to uncover the legal measures that can be put in place to enhance scientific innovation in developing mechanisms to absorb or cope with the adverse effects of climate change in the long run? A detailed future research in these areas can significantly help in protecting the socioeconomic rights in SSA.

11.4.2 Human rights other than socioeconomic rights

This thesis has mainly focused on socioeconomic rights with particular attention on right to adequate standard of living as a beneficiary of an effective interrelationship between the NAS, petroleum law, the ROL and justice. But because human rights are usually noted to be "indivisible and interdependent",[2114] it is imperative that "equal attention and urgent consideration … [are] given to the implementation, promotion and protection of"[2115] not just 'economic, social and

[2112] OHCHR, 'UN expert condemns failure to address impact of climate change on poverty' (n 1938).

[2113] UNEP, 'What are your environmental rights?' (n 1877).

[2114] DRTD, Art 6 (2).

[2115] ibid.

cultural rights in ICESCR but also civil and political rights obtained in the ICCPR'.[2116] Therefore, future research could look at how civil and political rights are enhanced by the strategic integration of the ROL, justice, petroleum law and World Bank strategies, even if it is not the NAS but its possible successor.

11.4.3 Field study other than desk-based research

The thesis has been based on desk research, which has collated, analysed, synthesised and presented data that have already been published both on the internet and in print. This research approach may have somewhat hidden the current opinions of stakeholders such as the HS, MNPCs, the public and the World Bank regarding their satisfaction or otherwise of the current petroleum laws in SSA and thoughts of reforms that can engender the effective protection of socioeconomic rights in the petroleum industry of SSA. Field research involving interviews, observations and discussions with these stakeholders can provide information that can supplement this thesis in the future.

11.5 Key Recommendations

The three main recommendations of the thesis are as follows:

11.5.1 Rule of law and justice should be effectively integral to the formulation and enforcement of petroleum law in SSA

The thesis argues that the current architecture of petroleum legal regime in SSA does not substantially embrace the ROL and justice, and that there is the need to restructure petroleum legal regimes along the tenets of justice and the ROL in SSA. Without a good legal framework that is imbued with the ROL and justice, it

[2116] ibid.

is hard to achieve any fair deal between investors and the HS to significantly benefit socioeconomic rights. It is, therefore, recommended that while the ROL protects procedural rights in petroleum law which ought to be guaranteed, justice is a substantive right in petroleum law that ought to be harnessed.

11.5.2 More effective World Bank strategy should succeed the NAS

The World Bank strategy that would succeed the NAS after 2020 should expand the current structure. It should strongly feature ROL and justice as well as enhancement of natural resources such as petroleum. Socioeconomic development should be an entitlement right as featured in UDHR, ACHPR, ICESCR and DRTD. The monitoring and publicity mechanisms of the NAS should be improved through organised regular updates that refer to the successes, challenges and emerging opportunities for the strategies.

11.5.3 Higher tax rate and maximum economic recovery

Norway has 78% tax rate in its petroleum licensing arrangements, which generates remarkable economic benefits for the country. Of course, even though "there appears to be no standard or benchmark as to"[2117] the exact nature of fair share of revenue from petroleum resources, especially within the framework of ROL and justice, 'one can give a reasoned judgement that can neither be refuted nor proven'.[2118] Give and take, a 70% tax rate is suggested for SSA if the tax-based licensing regime is followed. Or even if the licensing regime is not used, the share of profit between petroleum companies and the HS in SSA should not go

[2117] Agalliu, 'Comparative Assessment of the Federal Oil and Gas Fiscal System' (n 34) 7.

[2118] Locke, 'Offshore and Gas: Is Newfoundland and Labrador Getting Its Fair Share?' (n 66); ibid.

below 65% for the HS. The reason why this is proposed is that, arguable though it might be, this rate will maximise economic recovery for the state and will not hurt the profits of petroleum companies.

Al-Kasim has observed that, 'the most important lesson that should be learnt from the Norwegian model is the need to continue to pay attention to the development of systems that ensure sustainable benefit to the nation as a whole' not just the private petroleum companies.[2119] Once petroleum companies make profit, as the argument of Norway goes, the society must also make similar measure of profit. By far, Ghana has done relatively better in terms of shaping the petroleum legal framework than its Angolan and Nigerian counterparts. But, Ghana equally has more to do especially relating to fiscal terms and process of contracting as well as improving the ROL and justice in its petroleum governance.

[2119] ibid.

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