Environment and Extractives Industry- Legal and policy Perspective

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The most applicable legal frame work

- The Constitution 1995- national objective xxvii, xxvi. Articles 39 & 237 (2)(b)
- The National environment Act 2019 & Cap 253
- The National Environmental Impact Assessment Regulations 1998
- The National Environmental (waste management) regulations 1999
- The Oil and gas Policy 2008
- Mining Act 2003
- Mining Regulations 2004
- The Petroleum Exploration and Production Act 2011
- The National Environment (Wetland River banks regulations)
- Water Act
- Wild life Act
- National forestry and tree planting Act
- Land Act as ammended

Relevant Institutions

- NEMA- National Environment and Management Authority
- Ministry of Water Lands and Environment
- Lead agencies- ministry, department, agency, local government or public officer in which/ whom the functions of control or management of any segment of the environment are vested
- Directorate of Geological Survey and mines
- Petroleum Authority- to monitor and regulate petroleum activities reserve estimation and measurement of produced oil and gas)

Rights with in the environment context

- Some of the fundamental rights include the right to life, right to a clean and healthy environment- Art 39, right to an education, and
- right to dignity Article 24. Constitution of the Republic of Uganda (1995),
- Article 22. The right to life includes the right to a livelihood and enjoyment of social economic rights and other components as well.

Principles of environmental management

- Sustainable Development-Meets the needs of the present without compromising the ability of future generations to meet their own needs. By use of environmental and social impact assessment, risk analysis, cost-benefit analysis and natural resources accounting. Take into account; Environment, Economy, Society when planning
- Polluter pays principle- assessment of damages- endeavor to promote the internalization of environmental costs and the use of economic instruments
- Precaution - threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation
- NEA 2019- ensuring that in the implementation of public and private projects, approaches that increase both the environment and people's resilience to impacts of climate change are prioritized
- Prevention of environmental harm
- Access and benefit sharing regarding natural resources

Principles continued

- Refer- S.5 NEA 2019
- Equitable, gender responsive and sustainable use of the environment and natural resources, including cultural and natural heritage
- Ensuring optimum sustainable yield in the use of renewable natural resources - ecological yield that can be extracted without reducing the base of capital itself
- Requiring prior environmental and social impact assessments of proposed projects which may significantly affect the environment or use of natural resources
- Requiring the application of the mitigation hierarchy in environmental and social impact assessments including: to avoid and minimize impacts, achieve restoration targets and for residual impacts, deliver biodiversity offsets
- ensuring that processes of environmental management and human development have due regard to international human rights standards

The concern oil and gas environmental practices/ issues

- The concerns Involve the whole process through exploration, onshore and offshore drilling, refining and transportation
- Emphasize operator responsibility, government oversight and impact on ecosystems
- Seismic activities during exploration
- Development of Oil fields by drilling a number of wells
- Associated gas and non associated gas- must be processed for use but not burned/ flared
- Venting gas into the atmosphere releases large quantities of methane a potent climate changing gas.
- Drilling muds and cuttings / rock fragments contain chemicals that affect land, marine and aquatic life.
- Produced or extracted water contains toxic substances and heavy metals such as lead, zinc and mercury and volatile organic compounds such as benzene and toluene- produced water is highly saline and dangerous to plant growth
- Gas flaring produces carbon monoxide, nitrogen oxides and sulphur oxides a principal cause of acid rains. Nigeria has suffered the highest brunt of gas flaring

Concerns/issues continued

- Offshore activities are difficult to reach and shirk regulation on waste management and oil spills- e.g

a) exon valdiz spill -1989 spilled 10.8 million US gallons (260,000 bbl; 41,000 m3) of crude oil covering 1,300 miles (2,100 km) of coastline, and 11,000 square miles (28,000 km^2) of ocean.

b) Gulf of Mexico oil spill: discharged 4.9 million barrels (210 million US gal; 780,000 $m^{3,}$ spill lasted over six months. Caused extensive damage to marine and wildlife habitats, fishing and tourism industries

- Ground clearance- forests clearance, obstruction of animal life, construction access roads open ways to poachers and loggers
- Land acquisition and associated social impacts
- Impacts of Influx of workers into the Project Area- associated health problems
- Construction of major roads, access roads and helipads

Further concerns

- Refineries- the boiling, vaporizing & solvent treatment emit into land and atmosphere. Refineries produce air pollutants /air emissions
- The end products-jet fuel, gasoline, diesel fuel, kerosene, lubricating oils etc
- Spills from storage tanks, pipe line leakages, tankers and barges- mostly during transportation
- EPA – In 2001, the refining industry produced 48 million pounds of toxic air emissions, leading to cancer, asthma, child hood development problems

Oil spills

Three days after the exon Valdiz Spill

March 24, 1989, 11,000 sq mi (28,000 $km^{2.}$ By

http://response.restoration.noaa.gov/photos/

Shell oil spill in Nigeria

Spilled 26,411 barrels January 2012 to Jan 2013

http://www.vanguardngr.com/2013/01/shell-spills-over-26000-barrels-of-oil-in-13-months-2/

Environmental Sensitivity Atlas of the Albertine Graben

- Fragile habitats
- designated protected areas- 10 wild game protected areas and over 8 wild life reserves
- Endemic and threatened species- home to over 42 bird species
- areas of high biodiversity
- cultural, religious and historical sites

Refer- www.nema.go.ug

Mining and Environment

- Most commonly reported activities involve clearance of veg, soil/rock removal, mining in streams, lack of backfilling, use of toxic material. These include.
- Air contamination by emission of gases & dust particles
- Soil contamination by soil particulate matter (SPM) in metals
- Surface water contamination by emission of effluent with SPM
- Over use of water resources in areas of water scarcity
- Contamination & destruction of renewable capital & ecological infrastructure
- Loss of biodiversity from veg clearance
- Water has been called “mining’s most common need”
- Main sources of effluent are: dewatering of mine water, spent water for dust extraction, leachte run off from waste dumps
- Release and use of effluents like mercury lead to loss of aquatic life, displacement of people, depletion of livelihood, death & destruction of aquatic life & their habitat
- Small scale operations carried out without appropriate safeguards & environmental standards thus releasing contaminated water into envt

Mining and Environment cont'd

- Underground operations constructed haphazardly, excavated to unsafe depths – risk to life
- Removal of topsoil rendering land bare & susceptible to erosion
- Abandoned mine pits become repositories of water thus breeding grounds for malaria infected mosquitoes, land degradation
- Change in topography resulting to change in drainage patterns
- High toxicity in acidic wastes affect plant growth
- Removal of veg lead to loss of some plant nutrients
- Stock pilling reduces quality of soil resources

Standing and filing of cases

- Article 50 of the Constitution grants broad standing to file a suit a when a fundamental right has been infringed or threatened
- **By ordinary suit**- order 4 rule 1, suit to be commenced by plaint

"To put it in the biblical sense the Article 50 makes all of us our" **"brothers keeper". Per Aweri j, in Acode vs AG**

- File by notice of motion or ordinary plaint **-** Charles Harry Twagira v AG, SCCA No. 4 of 2007
- Arbitration- UN Permanent Court of arbitration and Others – for dispute on international agreements
- Statutory notice not mandatory- **Civil Appeal No. 28 Of 2011 Kabandize And 20 Others Vs Kampala Capital City Author**
- Article 137- File a constitutional petition for interpretation of the constitution.

Climate change -liability

- NEA 2019- means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods
- Trend of changes in the earth's general weather conditions as a result of an average rise in the temperature of the earth's surface (global warming) due, primarily, to the increased concentration of greenhouse gases ("GHGs") in the atmosphere.
- Carbon majors Report- 100 oil companies are source of over 70% of emissions- active fossil fuel producers including ExxonMobil, Shell, BHP Billiton and Gazprom are linked to 71% of industrial greenhouse gas emissions since 1988 when IPCC was established
- Over half (52%) of all global industrial GHGs emitted since the start of the industrial revolution in 1751, have been traced to these 100 fossil fuel producers;
- Section 69 NEA- Put in place measures and strategies to tackle impacts of climate change
- Impact on food, health, development, education etc ????

Some climate change liability principles

- Utility argument: that companies are providing energy to the world,
- Concurrent wrong doing.- wrong doers liable to a claimant for the same loss
- Concert of action- aider and abettor liable for criminal actions of the principle offender
- Alternative liability- allows the plaintiff to shift the burden of proving causation of their injury to multiple defendants even though only one of them could have been responsible
- Enterprise liability- other wise legally unrelated corporation or people can be jointly liable for some action on the basis of being part of a shared enterprise
- Market share liability- how do you determine the market share of each defendant?
- Comingled product theory- identification and or discovery of defendants

Courts approach to climate cases

- **United States: Juliana v U.S.(2016) Case No. 6:15-cv-01517-TC, Opinion and Order (10 November 2016).**

I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.

It has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase in CO2 levels in the atmosphere and therefore to hazardous climate change."

- **In Urgenda Founda;on v. The State of the Netherlands, C/09/456689/HAZA 13-1396 (24 June 2015**) A sufficient causal link "can be assumed to exist" between Dutch emissions, global climate change, and its effects. See

Apportioning climate change liability

- **Indivisible injury rule**: If two or more events cause a single "*indivisible injury*" a Defendant who in part contributes to the injury can be held accountable for the entire loss Estable v. New,2011 BCSC 1556, Supreme court of British Columbia. But compare the devaluation approach where the injuries are divisible.
- Product liability: Manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause harm- the VW gas emissions controversy

Courts' approach

- Finally, a recent Supreme Court case demonstrates that courts may be willing to shift the burden of proof to polluting industries to prove that their activities environmentally benign In **Constitutional Appeal No. 05 OF 2011 AMOOTI GODFREY NYAKAANA Vs NEMA & ORs-**, National Objectives and Directive Principles of State Policy – the need to meet the development and environmental needs of present and future generations of Ugandans- the Supreme Court referred favorably to a case from India that described shifting the burden of proof as part of the precautionary principle: ie

"Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. . . .

- **Mohamed Ali Baadi and Others v. Attorney General, High Court of Kenya at Nairobi (petition No. 22 of 2012) (April 2018)**

Courts Approach continued

- In 2015 A Dutch appeals court has ruled that Royal Dutch Shell can be held liable for oil spills at its subsidiary in Nigeria- oil pollution law suit
- In UK- Jan 2016, 15,600 Ogoni farmers and fishermen devastated by two large Shell oil spills in 2008 and 2009 for a £55million settlement. Each received £2,100).Million pounds also build health clinics and refurbish its schools. Shell to clean up the Bodo fishing grounds and swamps

- **Choice of Forum**: Oil spills - Bille and Ogale communities in Nigeraia, case filed in UK Court- No clean drinking water since 1989… H Crt dismissed claim, on apeal, the court of Appeal held; English courts do not have jurisdiction over claims against Shell's Nigerian subsidiary. No sufficient evidence that Shell exercised a high degree of oversight, control or direction over SPDC, and therefore that the parent company had no legal responsibility for pollution by its Nigerian subsidiary.

Courts cont'd

- The claimants appealed this decision, arguing that the Judge reached this conclusion before disclosure of relevant documents or hearing witnesses about the relationship between Shell and SPDC.
- Court of appeal that the parent company did not hold a duty of care towards affected communities, on appeal the Supreme court reserved its judgment pending decision in **Vedanta Resources PLC and another (Appellants) v Lungowe and others [2019] UKSC 20-** claim brought by 1,826 Zambian villagers (Nchanaga copper mine)against UK-based Vedanta
- **Ruling**: UK was a proper place to fie the suit , inter alia it was arguable Vedanta did owe a duty of care to the claimants , because; the Board of the parent company had oversight over its subsidiaries. Existence of a management and shareholders agreement under which it was obligated to provide various services to KCM, including employee training. Provided health, safety and environmental training across its group companies. Provided financial support to KCM, etc

international Instruments

- African Charter on Human and Peoples Rights
- Brussels regulations – jurisdictional regime rules by EU members - the court in the member state of the party that gets sued has jurisdiction, while other grounds exist.
- IFC guidelines on involuntary resettlement
- Un Guiding principles on business and human rights

a) State duty to protect human rights
b) The corporate responsibility to respect human rights
c) Access to remedy for victims of business related abuses

- Foreign Corrupt Practices Act- US
- Alien Tort Statute- USA

Remedies

- Environmental restoration order- issued to any person whose activities cause or are likely to cause pollution, it may contain a prohibition or a stop order, restore the environment, as near as possible, to the state in which it was before the taking of the action
- In case a person defies, the authority/NEMA can

a) require the payment of an administrative fine for the violation

b) seize any equipment or substance used in the commission of the violation

c) Use the equipment or substance seized under this subsection to undertake pollution abatement or restoration of the degraded ecosystem or rectify the environmental wrong committed

d) require payment of costs and expenses incurred by the Authority or authorised officer in the exercise of that power

Remedies

- **Environmental improvement notices and environmental compliance notices:** environmental inspector may issue to a person whose activity is causing or is likely to cause pollution/deleterious to human health or the environment

a) environmental compliance notice may culminate in an environmental compliance agreement

- A court finding that fundamental rights have been violated could issue an order that includes compensation- Article 50 (1)
- Environmental restoration order by court: issued in proceedings against a person who has caused or is likely to cause pollution

b) Court may order the payment of costs in the form of reparation, restoration, restitution or compensation to the person whose health or the environment or livelihood has been polluted, harmed or otherwise adversely affected by the action which is the subject of the order

Assessment of damages

- List and weigh all the Costs for the entire project , exploration, production, refining, transportation, cleaning, waste disposal, transportation, decomposing ,

a) Direct and Indirect costs

b) Market and Non-Market costs

c) Costs of Displacement and Unfairness

- Costs= things lost

a) Goods, services, Heritage, Health, Quality of life, Certainty, Security, etc

b) lost eco system

c) Measure costs from perspective of compensation, Those harmed to relinquish things

d) Absence of price does not mean ZERO Value= zero

- Consider essential roles that nature plays with respect to human activities and existence (e.g., purifying water, pollinating plants, providing food, providing recreation opportunities, and controlling erosion and floods
- Award damages basing on the link between reasonable costs of restoration measures, reinstatement measures or preventative measures

Absence of price but valuable

- Total economic value= use value + non use value
- Use value

a) Direct; - charcoal use & tourism

b) Indirect ; Flood control habitat

c) Optional value; - potential future use

- Non use value

a) Existential value;- Enjoyment from continued existence of resources

b) Altruistic value;- Enjoyment from use of resources by others

c) Bequest value;- enjoyment from passing resources into the future

Assessment

- Human health- Lost Productivity +lost Quality of Life + lost years of life
- Ecosystem services: Food, Freshwater, Fuel wood, Biochemical, Genetic resources
- Link the damage to the market price of the environmental resource
- Consider the economic value attached to its use, e.g travel costs to visit and enjoy an environmental amenity, the extra market value of private property
- Lost Income from enjoyment of environmental goods, e.g tourism
- require that the part of compensation paid for restoration or clean up should be spent for that purpose .

Assessment continued

- For damage to the capital(Lake, national park, forests)
- Change or loss of human capital e.g fishermen shifting from one area to another
- Loss of cultural and social capital e.g replacement cost, transport cost, nutrient cycling
- Economic social cost after project closure e.g increased crime, disturbance etc
- Lost prospects e.g nomadic to modern farming,
- Consider the offenders ability to pay
- The use and non use value e.g lost ability to control floods, a flower farm impairs the pollination ability of surrounding bees, water filtration, waste treatment, disturbance, water supply , disturbance regulation(buffering of floods, storm surges etc)
- **Courts not yet up to the task; In Amooti Nyakana Vs NEMA supra Katurebe. J.** I would have considered ordering that the appellant make good the damage he did to the wetland, but since the 1st respondent already destroyed his structures, it would not be fair to do so. – each party bare their own costs.
- **All in all Decide whether the benefits exceed the cost? The shilling value, social value etc**

A lawyer's concern

- Analyze/hire personnel to scrutinize the EIAs of particular projects and verify on ground if;
- Are Exploration and drilling activities being conducted in environmentally sensitive areas- national parks, forest reserves, Ramzar Convention protected wetlands, World heritahe sites etc
- Is a pipe line right of way being cut through protected areas above

lawyers' concerns continued

- How are the byproducts of extraction, including produced water, drilling muds, and cuttings, treated and disposed? Are drilling muds being reused? Is produced water being re-injected? Are any disposal pits properly lined?
- Is associated natural gas being vented or flared into the atmosphere?
- At offshore wells, are wastes transported onshore for treatment and disposal,instead of being released into the marine environment
- Are pipelines constructed with double-wall piping and automatic cutoff valves to prevent any possibility of leakage or explosion? Are joints appropriately joined and sealed?

Concerns continued

- At refineries, what measures are in place to minimize pollutant releases and the potential for accidents?
- Do oil tankers have double hulls and the technology needed to prevent spills? Are other appropriate safety measures in place?
- Have emergency response plans been established?
- Do the EIAs address impacts of climate change?
- Assessment of liability on clean up costs, civil penalties, oil spill response fund
- National laws insufficiently developed- Follow international best practice

challenges

- It’s a task to establish people's control over the forces that reign supreme in trade and commerce.
- Task to develop sufficient legal recourse to defend against corporate power
- Gathering evidence is tedious and difficult- company identity e. g change of hands, corporate structure, accessing PSAs to determine liability, gathering evidence from affected communities
- Tensions within the claimants
- Funding litigation- not enough funds, duration of litigation, opponents financial and legal muscle
- Cost of obtaining experts
- Mediation- lack of expertise etc.