

# Statutory Approach to Liability & Redress for Environmental Damage

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# Outline

- Introduction
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- Critical Questions
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# Introduction

- Env'tl law in region scattered in diverse laws until recently
- Even though framework laws have been put in place, scattered & uncoordinated regimes very much the norm
- Countries in the region very quick to sign and ratify MEAS
- Normative context for env'tl management now there thro Framework environmental Laws
- The capacity to implement most of these laws only now being created (institutional & individual)
- Procedure to take env'tl claims thro law enforcement institutions sticky

# General Legal Principles

- Right to life & a healthy environment
- State sovereignty
- Right to development
- Sustainable development
- Common concern
- Obligation not to cause environmental harm
- Intergenerational & intra-generational equity
- Precautionary principle
- Duty to assess (EIA)
- Polluter pays
- Public participation in envtl dec.making
- Principle of subsidiarity

# General Legal Principles (Contd)

- Our Framework envtl laws (EMCA & NEMA) have most of these principles
- Precautionary principle:
  - “uncertainty regarding serious potential environmental harm is not a valid ground for refraining from preventive measures”
    - enables action whose -ve impacts are not yet known in science with the req’t that preventive measures be put in place to mitigate such -ve impacts.
    - Court rendition in *Leatch .v. National Parks and Wildlife Service and Shoalhaven City Council*
      - ...the precautionary principle is a statement of common sense...It is directed towards the prevention of serious or irreversible harm ... in situations of scientific uncertainty...where uncertainty or ignorance exists ...makers should be cautious.”
- Ambit of the precautionary principle is wide and can range from over-precautionary to recklessly permissive

# General Legal Principles (Contd)

- The laws implementing the precautionary principle are biosafety laws, trade laws, standards laws, environmental laws etc
- Public participation in envtl decmaking
  - Procedural rights: right to information & access to such informn & justice
- EIA – *ex ante* activity at planning stage of a project to gather information about potential impact of the proposed activity on the envt & use of information in dec-making
- Biosafety essentially an EIA activity
  - **Risk assessment** - defined as the identification of potential environmental adverse effects or hazards, and determining, when a hazard is identified, the probability of it occurring.

# Laws & Institutions

- Provisions in the three East African countries deposited in:
  - Constitutions
  - Framework environmental laws
  - Sectoral laws on environmental resources
  - Physical planning laws
- Constitutions:
  - Positive obligation to ensure envt is wholesome
  - Right of access to high court for all legal prsns
  - Overall, there are general solid constitutional bases for environmental rights, public participation and access to justice in the three East African countries.
  - Enforcement greatly circumscribed by legislation that unduly interferes with these rights (Official secrets Act & structural limitations to accessing information)

# Laws & Institutions (Contd)

- Framework Env'tl Laws
  - Uganda and Kenya have comprehensive framework legislations providing for National Environment Management Authority (NEMA) as the principal Government institution responsible for the implementation of all policies relating to the environment.
  - Uganda's NEMA already operational & Kenya's getting there
  - These provide for PP during the conception, design, formulation and implementation of projects through the EIA process.
  - Uganda and Tanzania have detailed EIA guidelines which make provision for PP but Kenya is yet to promulgate these.
  - PP integral to EIA & biosafety
- Other laws:
  - Nature conservation and natural resource management laws (Mining, Wildlife, Energy, Forest etc)
  - Physical planning laws.



# Laws & Institutions (Contd)

- Right of all to a clean & healthy envt and locus standi to enforce right
  - Included in Constitutions and Framework envtl laws
  - Duty of all to protect envt
  - EIA provisions with procedural safeguards and remedies for flouting these
  - Section 53 provides basis for biosafety measures necessary to regulate biotechnology
- Polluter pays
- Carrots & Sticks Vs Command & Control (Art 11)
  - DT - provision of technical/ technological & financial assistance

# Critical Questions

- What is the role of institutions & law/lawyers/judicial functionaries in the development of a L & R system for biotechnology?
- Are the laws/legal institutions in & of themselves capable of ensuring delivery by such system?
- What are the peculiarities of a liability & redress legal regime in biosafety?
- Are laws in and of themselves the prime driver of liability & redress systems?
- Is absence of specific laws on liability for biotech activities indicative of absence of redress?
- Answers to these questions critical to discourse on liability & redress in biotechnology field

# Lessons from EIA

- Biotechnology/biosafety information/science & specialised knowledge intensive like EIA
- Actors in EIA like in biotechnology can be unbalanced in terms of capacity
- Weak/ineffective laws
  - Constitutional weaknesses
    - Absence of positive constitutional requirement that information be availed.
  - Legislation relating to national security
    - Sedition.
    - Tanzania Newspapers Act.
    - Official Secrets Act.

# Lessons from EIA (Contd)

- Restricted/limited access to information
  - Public access to records is limited/restricted.
  - “Authorized officers” - gatekeepers
  - Obligation not to divulge information even when obtained lawfully (Official Secrets Act).
  - Publication in inaccessible media and languages.
- Dearth of human and technical resources
  - Lack of qualified manpower
  - Insufficient technical resources.
  - Most environmental agencies underfunded.
- Politicisation of EIA issues
  - High-handedness of state functionaries
  - Environment-Development interface

# Lessons from EIA (Contd)

- Absence of/ inadequate Public Interest Lawyering
  - EIA legal requirements technical and require a specialized cadre of lawyers especially in East Africa where the language of the law and court is other than that spoken by most people.
- Limitations to public interest litigation:
  - Few public interest lawyers
  - Lack of adequate skills and training for lawyers and judges
  - Costs of litigation prohibitive and danger of paying damages once you lose the case
  - Lack of clarity on the issue of procedures.

# Conclusion

- Biosafety about risk assessment and management
  - Efficacy of framework of biosafety laws & institutions dealing with liability and redress dependent on the capacity of countries to put in place mechanisms for risk assessment and management.
- Rudiments of a L&R system exists in Kenyan envtl & other laws
- It should be refined to cover LMOS
- The Biosafety Regulations already intimate what issues one should look for
  - Risk identification, risk-source characterisation, exposure assessment and risk estimation.
- General objves of a liability regime will be to protect human health and the environment from TBM of LMOs

# Conclusion (Contd)

- Need to build capacity of diff individual & institutional actors esp regulators, law enforcement agencies & public (lessons from EIA & Bomas)
- Lopsidedness & lack of information fuels mistrust
- Need to work on appropriate legal procedure for handling envtl actions and biosafety particularly
- Procedural issues: access to information, public participation and access to justice
- Balance this with proprietary nature of technology
- Different interests need to be considered and protected
- AIA – activities not illegal *per se*

# Conclusion (Contd)

- Compulsory insurance for actors as an organized way of managing risks and to ensure that if and when damage occurs, it is not brought against people of straw
- Legal justifications to be availed to defendants where they adhered to all conditions laid out by NBC
- Establishment of a national fund:
  - NBC allows activities and may be read to be in line of causation
  - Fund establishment necessary given the limitation of actions; damage may only become apparent after long periods.
  - Funds could be sourced from imposition of tax on biotechnology activities and the setting of the cash aside
  - Also need to balance against interests of technology development for food security



# Conclusion (Contd)

- Objectives of CBD:
  - Conservation
  - Sustainable use
  - Fair & equitable sharing of benefits