

Chapter 12:

Harnessing oil as natural resource wealth: a focus on the legal frameworks of Nigeria and Uganda

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1 Introduction

Natural resources¹ are “a gift of nature and an endowment of comfort that makes the existence of mankind complete”.² It is a matter of debate whether resource-rich states in Africa use the resources for the comfort of the majority of their citizens. Governance of natural resources is a broad issue that raises more questions than answers. This is despite society’s longstanding desire for and institutionalisation of governance norms through law. Law serves three critical roles in the governance of natural resources. Firstly, states order the behaviour of individuals and organisations in the realm of natural resources through law and legal institutions, converting economic and social policies into outcomes.³ Secondly, the law defines the structure of government by arranging and distributing political and economic interests and power. In the case of oil, legal authority to act, political and economic power are established and distributed among the state, local host communities and extractive companies as the major stakeholders in the exploration of the resource. Thirdly, the law provides space for public participation in governance through substantive and procedural tools that promote accountability.⁴

It is not enough to have a legal framework in a resource-rich state. A pragmatic legal framework in the realm of resource governance must seek to address issues that include, how rights and benefits are allocated among stakeholders; the rights and benefits of local host communities; requirements for linking investments to the economy or creating jobs; and environmental health and safety obligations of the extractive companies. Transparency, accountability and a clear sense of purpose, however, must accompany the making of law from the onset to the point of enforcement and

1 Natural resources in the context of this chapter refer to raw materials embedded in the soil, which are extracted and modified by man for his/her benefit and use. They can be thought of as natural capital assets, distinct from physical and human capital, in that they are not created by human activity. See World Bank (2010: 44-46).

2 Aladeitan (2013: 160).

3 See World Bank (2017).

4 Ibid.

implementation for such legal framework to shore up value realisation, revenue management and the creation of an enabling environment in oil resource governance.

This chapter examines the correlation between the resource-rich state and the content of its law focusing on performance level under three key components in the 2017 Resource Governance Index (RGI).⁵ These include: value realisation; revenue management; and enabling environment. It focuses on the legal frameworks⁶ of Nigeria and Uganda, which have been identified as part of the 81 states that together produce 8% of the world's oil and 78% of its gas.⁷

On a scale of 100, Nigeria scored 42 points and ranked 55 among 89 assessments in the 2017 Resource Governance Index (RGI). Nigeria has the largest oil and gas reserves in sub-Saharan Africa and has the ninth largest reserve in the world.⁸ It, however, faces challenges that affect value realisation, revenue management and the enabling environment in the extractive decision-making chain.⁹ Similar challenges bedevil the Ugandan oil and gas sector, which was rated 44 on a scale of 100 in the 2017 RGI, placing it at number 51 of the 89 states assessed in the index.¹⁰ Uganda has 2 billion barrels proven oil reserves, which attracted exploration interest during the commodity boom of the last decade.¹¹ According to the RGI Report, early years of exploration in Uganda have been marked by governance challenges that include a poor licensing regime, inadequate infrastructural development and investment conditions and hostility from the local communities.¹²

To analyse the correlation between the state and the content of its law, and the performance levels in the three key components of the 2017 RGI identified above, the chapter is divided into four sections. The first section comprises the introduction. The second section assesses selected laws dealing with oil resources law in Nigeria and

5 Natural Resource Governance Institute (2017a).

6 For each project to extract natural resources from the ground, there are rules that govern the rights and responsibilities of governments, companies and citizens. Together these rules are called a legal framework, or legal architecture. The legal framework that governs the extractive industry comprises a set of documents that include the constitution, legislation, regulations and contracts. See NRG Reader (2015).

7 The 2017 RGI assesses how 81 countries, including Nigeria and Uganda govern their oil, gas and mineral wealth. The index composite score comprises of three components: value realisation; revenue management; and the enabling environment. According to the RGI report, the overall score for both Nigeria and Uganda in oil resource governance fall within the ranking for states that exhibit serious shortcomings. See <<http://resourcegovernanceindex.org/>> (accessed 5-3-2018).

8 OPEC (2017).

9 Value in Nigeria's oil resource industry is lost in licensing and in the state-owned enterprise's sales of government oil, as well as when revenues from oil and gas are disbursed and saved. See Natural Resource Governance Institute (2017b).

10 Natural Resource Governance Institute (2017c).

11 Ibid.

12 The 2017 RGI assesses how 81 resource-rich states govern their oil, gas and mineral wealth. See Natural Resource Governance Institute (2017c).

Uganda. In the Nigerian case, the focus is on: the 1999 Constitution of the Federal Republic of Nigeria (as amended); the Petroleum Act;¹³ the Nigerian National Petroleum Corporation (NNPC) Act;¹⁴ the Associated Gas Re-injection Act;¹⁵ the Environmental Impact Assessment Act (EIAA);¹⁶ and the Nigeria Extractive Industry Transparency Initiative (NEITI) Act.¹⁷ In Uganda, the authors focus on the Constitution of Uganda (1995) (as amended); the Constitutional (Amendment) Act (2005); the Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations;¹⁸ the Petroleum (Exploration, Development and Production) Act;¹⁹ and the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act.²⁰ The third section highlights some approaches, suggesting that there are components that may be built into the legal framework of both countries to boost sustainability in the harnessing of oil resource in Nigeria and Uganda. The fourth section comprises the conclusion.

2 Assessing the legal frameworks for oil resources in Nigeria and Uganda

2.1 Legal framework in Nigeria

2.1.1 The 1999 Constitution of the Federal Republic of Nigeria (as amended)

The legal framework in the Nigerian oil resources sector is discussed in light of the provisions of Sections 16(1) and (2)(b), 20 and 44(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Section 16(1) provides that:

The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution:

- (a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;
- (b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;

Section 16(2)(b) further provides that the state shall direct its policy towards ensuring that the material resources of the nation are harnessed and distributed as best as possible to serve the common good. Under Section 20, the 1999 Constitution provides that

13 Petroleum Act 1969, CAP P 10, Laws of the Federal Republic of Nigeria 200419692004.

14 Nigerian National Petroleum Corporation Act No. 33 of 1977, Chapter N 123, Laws of the Federal Republic of Nigeria 2004.

15 Associated Gas Re-injection Act 1979.

16 Environmental Impact Assessment Act No. 86 of 1992.

17 Nigeria Extractive Industry Transparency Initiative (NEITI) Act 2007.

18 The Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations (1993).

19 The Petroleum (Exploration, Development and Production) Act 2013.

20 The Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act 2013.

the state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria.

Section 44(3) of the 1999 Constitution, which refers to oil and other minerals, provides as follows:

Notwithstanding the foregoing provisions of this section, the entire property in and control all minerals, mineral oils and natural gas 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.

The provision of Section 44(3) is reiterated by item 39 (part 1) of the second schedule to the 1999 Constitution, which vests exclusive powers to legislate on mines and minerals, (including oil fields, oil mining, geological surveys and natural gas) in the National Assembly of the state. The implication of these provisions is that only the federal legislature is vested with the prerogative to make laws in respect of mines and minerals, including oil fields, oil mining, geological surveys and natural gas.

Basically, any legal framework fashioned by the legislature should reflect a state's petroleum policy objective, establishing, maintaining and enforcing a system of competence to regulate petroleum activities in a manner consistent with the state's national petroleum objectives.²¹ For a law to be effective, transparency, accountability and a clear sense of purpose accompanied by effective public participation should accompany the making of that law from the outset to the point of enforcement and implementation. Transparency and accountability are necessary if the national vision is to be realised and socioeconomic goals clarified. In this respect, the Nigerian 1999 Constitution is fundamentally flawed, as it does not encourage the inclusion of the input of the public through participatory processes.

The wording of Section 44(3) of the 1999 Constitution is at variance with the state's policy objectives laid out in Section 16(2)(b) because it restricts decision-making concerning the management of natural resources in Nigeria to the federal government, subject to the legislative competence of the National Assembly. Similarly, the provisions of Sections 16 and 20 of the 1999 Constitution, which appear to encompass the tenets of environmental justice and sustainability, as well as promote ideals that are synonymous with a sound legal framework for the governance of oil resources in Nigeria, are not enforceable by any court. The non-justiciability of Sections 16 and 20, which fall under Chapter II of the 1999 Constitution, is predicated on Section 6(6)(c) of the 1999 Constitution (as amended).²² The practical implication of Section 6(6)(c) is to dismantle the aspirations of Section 16 and 20 in Chapter II of the 1999

21 Likosky (2010: 12).

22 Section 6(6)(c) provides that the judicial powers vested in the courts shall not except as otherwise provided by the Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directives principles of state policy set out in Chapter II of the 1999 Constitution.

Constitution by ousting the jurisdiction of the Courts to entertain any “issue or question” relating to these sections.

2.1.2 The Petroleum Act, 1969 (as amended)²³

The Petroleum Act provides for the exploration of petroleum from territorial waters and the continental shelf of Nigeria and vests the ownership of, and all on-shore and offshore revenue derived from petroleum resources in the federal government.²⁴ Section 1(1) of the Act reiterates the position of the 1999 Constitution as it vests the entire ownership and control of all petroleum in, under or upon any land in Nigeria in the federal government of Nigeria.²⁵

The Office of the Minister of Petroleum Resources in Nigeria is a key unit of governance in the oil and gas industry by virtue of the Petroleum Act, which confers the Minister with wide powers including the power to grant and revoke licenses and make regulations. Section 2 of the Act provides that the Minister may grant:

- a licence, to be known as an oil exploration licence, to explore for petroleum;²⁶
- a licence, to be known as an oil prospecting licence, to prospect for petroleum;²⁷ and
- a lease, to be known as an oil mining lease, to search for, win, work, carry away and dispose of petroleum.²⁸

Under Section 3 of the Petroleum Act, no refinery shall be constructed or operated in Nigeria without a licence granted by the Minister in the prescribed form. Where no

23 Now known as Petroleum Act Cap. P10 (Laws of the Federation of Nigeria (LFN) 2004).

24 Section 14 of the Petroleum Act defines ‘petroleum’ as “mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation”, and ‘natural gas’ as gas obtained from boreholes and wells and consisting of hydrocarbons.

25 By virtue of Section 1(2) of the Act, this provision is deemed to apply to all land (including land covered by water) which is in Nigeria, under the Nigerian territorial waters, forms part of the continental shelf or forms part of the exclusive economic zone of Nigeria.

26 Oil exploration licences are no longer granted in practice. Presently, the Department of Petroleum Resources on behalf of the federal government of Nigeria has engaged the services of a seismic data-gathering services company, and this negates the need for exploration in the strict sense.

27 Oil prospecting licenses under the Petroleum Act appear to confer the rights to not only exploration but also exploitation of oil resources won during prospecting operations subject to the fulfilment of obligations imposed under the Act or by the Petroleum Profit Tax Act or any other law imposing taxation in respect of oil resources in Nigeria.

28 A lease is the grant to an applicant of the exclusive right to conduct exploration and prospecting operation and to win, get, work, store, carry away, transport export or otherwise treat petroleum discovered in or under the leased area. This is subject to any provision of the Petroleum Act and any special terms or conditions imposed in the grant of the lease.

form is prescribed, or no terms or conditions are prescribed, then the Minister has the discretion to decide or impose a form, terms and conditions. The Minister is equally vested with the power to regulate the downstream petroleum sector as no person is permitted to store, import, sell or distribute any petroleum products without a license granted by the Minister.²⁹ The consent of the Minister is also required for the assignment of any rights in licences or leases granted under the Petroleum Act.³⁰

The provisions in the Petroleum Act on the assignment of rights in licences and leases initially seem to be straightforward. Practice in the oil industry, however, reveals a legal gap in the Act, widened by the advent of increasing acquisition, divestment and financing activities in the upstream petroleum sector. This gap lies in the definition of what constitutes "...interests therein or thereunder" in Paragraph 14 of the first schedule of the Petroleum Act. The Petroleum Industry Bill (PIB)³¹ attempts to cure the lacunae in the Petroleum Act by expounding on the assignment of licence or lease.³² The Bill, among other objectives, seeks to create new institutions to govern the operations of the industry, through the incorporation and privatisation of the state-owned enterprise, the Nigerian National Petroleum Corporation (NNPC). However, the PIB has been in draft form since 2008.

The Petroleum Act also includes provisions that promote safe operations, protection of the environment and conservation of natural resources. A fundamental challenge, however, persists because the Petroleum Act is outdated, and does not reflect contemporary realities. For instance, the state-owned enterprise might perform its commercial and operational duties through contractual arrangements, which presumably enjoy statutory authorisation by virtue of Paragraph 35(a) of the first Schedule of the Petroleum Act. The Minister is empowered to, if he considers it to be in the public interest, impose on a licence or lease terms and conditions not inconsistent with the Petroleum Act, participation by the Federal Government in the venture to which the licence or lease relates, on terms to be negotiated between the Minister and the applicant for the licence

29 Section 4 of the Petroleum Act.

30 Paragraph 14 of the First Schedule to the Petroleum Act provides that "[w]ithout the prior consent of the Minister, the holder of an oil prospecting licence or an oil mining lease shall not assign his licence or lease, or any right, power or interest therein or there under".

31 The PIB Draft Bill 2008 proposes: to establish the legal and regulatory framework, institutions and regulatory authorities for the Nigerian petroleum industry; to establish guidelines for the operation of the upstream and downstream sectors; and for purposes connected with the same.

32 Section 173 of the Petroleum Act provides that where a licence, lessee or production sharing or service contractor is taken over by another company or mergers, or is acquired by another company either by acquisition or exchange of shares, including a change of control of a parent company outside Nigeria, it shall be deemed to be, and treated as an assignment within Nigeria and shall be subject to the terms and conditions of the Petroleum Act. The PIB explicitly construes an assignment of a licence or lease or any rights, power or interest to include mergers, takeover and basically any other arrangement that results in a change of control of the licence or even a contract thereunder. See Sections 173 and 194 of the Petroleum Industry Bill (2008).

or lease.³³ The implication of this provision is that the NNPC undertakes its operation with extractive companies through various forms of contracts that do not maximise the benefits from oil and gas resource for the country. An examination of practice in the industry reveals that most contractual arrangements are usually fraught with frictions and conflicts between the respective committees, the Corporation's joint venture partners and production sharing contractors, over compliance with laid down legal and policy direction, accessibility to data and prompt and adequate reporting by the operating partners or contractors.³⁴

2.1.3 The Nigerian National Petroleum Corporation (NNPC) Act

A discussion on the oil and gas governance framework in Nigeria is incomplete without discussing the NNPC and its enabling constitutive NNPC Act³⁵ with a view to show the lack of accountability and transparency in the Nigerian oil and gas sector. Statutorily, the affairs of NNPC are to be managed by a Board of Directors consisting of a chairman, who is the Minister of Petroleum Resources, and other members.

Section 5(2) is a far-reaching provision, which confers much latitude and flexibility to the President and the Corporation to undertake a general review of the affairs of the Corporation without legislative amendment. Of course, this provision is certainly not without consequences as such latitude has been susceptible to abuse, whims and caprices of the holders of the office of the President and the management of the Corporation over the years. The latitude may, no doubt, be responsible for the level of corruption and gross mismanagement of the country's number one foreign exchange earner; oil. It is equally imperative to note that this particular provision appears to be the basis on which the Corporation has undergone various changes by successive governments, from its inception in 1977 to present, without any significant amendment to the establishing Act.

The NNPC Act in Section 6(1) further confers wide-ranging discretionary power on the Corporation by providing that:³⁶

the Corporation shall have powers to do anything which in its opinion is calculated to facilitate the carrying out of its duties which includes but are not limited to holding, managing and alienating movable and immovable property; purchasing or otherwise acquiring or taking over all or any of the assets, business, properties, privileges, contracts, rights obligations and liabilities of any other Company, firm or person in furtherance of any business engaged in by the Corporation; entering into contracts or partnerships with any Company, firm or person which in the opinion of the Corporation will facilitate the discharge of its duties; establishing and maintaining

33 First Schedule, paragraph 35(a), of the Petroleum Act.

34 Aladeitan (2013: 160).

35 NNPC Act, 1977 (Decree No. 33, 1977), Cap. N. 123, L.F.N. 2004 and the NNPC (Amendment Act) of 2007.

36 Section 6(2) of the NNPC Act.

subsidiaries for the discharge of such functions as the Corporation may determine, and; training managerial, technical and such other staff for the purpose of the running of its operations and for the Petroleum Industry in general.

With respect to the powers conferred on the NNPC by the Act, it is significant to point out that leaving the Corporation to exercise its powers as it may deem necessary, without setting parameters, guidance or performance standards comparable with international best practice of state-owned enterprises (SOEs) which must be complied with, appears to be a serious omission. This has resulted in the loss of value in licensing and a decline in sales of resources.

Although the NNPC Act requires the Corporation to keep proper accounts and records in accordance with best commercial standards³⁷ as well as appoint auditors with the approval of the President for purposes of auditing its accounts; it requires the auditors to submit its detailed observations and recommendations for that year to the Corporation.³⁸ The entire process for auditing the Corporation is flawed and defeats the essence of accountability, thus creating an avenue for reckless and unchecked excesses, which have characterised the Corporation over the years.

Another indication of lack of accountability and transparency in the management of the affairs and operations of the Corporation can also be observed from Section 7(4) and (5) of the NNPC Act which empowers the Corporation –

to maintain a fund which consists of such monies as may from time to time be provided by the Federal Government for the purposes of the Act by way of grants or loans ... and such monies as may be received by the Corporation in the course of its operations in relation to the exercise by the Corporation of any of its functions under the Act and from such fund [shall] defray all expenses incurred by the Corporation.

This provision gives the Corporation unfettered discretion in the application of monies accruing to it. The only check in the exercise of this wide power is the requirement of Section 7(5) of the NNPC Act which mandates the Corporation to submit to the President, not later than three months before the end of each financial year, estimates of its expenditure and income relating to the following financial year. What is required here is simply ‘submission’, and there is no requirement for approval by the President. This creates a gap that can be exploited and taken advantage of by the management board and officials of the Corporation.

The Corporation has an obligation to prepare and submit their schedule estimates of revenue and expenditure to the Minister of Finance under the Fiscal Responsibility Act (FRA) 2007.³⁹ What is clear from the provisions on the Corporation’s borrowing powers⁴⁰ and disposal of surplus funds,⁴¹ is the involvement of the President in issues relating to funds. It appears that the management of the affairs of the Corporation is more

37 Section 7(1) of the NNPC Act.

38 Section 7(2) & (3) of the NNPC Act.

39 Section 21 of the Fiscal Responsibility Act.

40 Section 8 of the NNPC Act.

41 Section 9 of the NNPC Act.

or less vested in the President, and if viewed from the fact that the NNPC Act was a product of the military interregnum in government, the drafting of the Act may not be surprising, having regard to the autocratic nature of the military rule. What is however surprising, is the fact that the succeeding civilian administration has not deemed it necessary to amend the Act to reflect contemporary realities that can promote value realisation and boost revenue management in a manner that translates to an enabling environment for investment in the oil resource sector.

Furthermore, the NNPC Act shields of the Corporation from legal proceedings through a limitation of suits and states that:⁴²

no suit against a member of the board or an employee of the Corporation for an act done in respect of an alleged neglect shall be instituted in any court unless it is commenced within 12 months next after the act or the neglect complained of

Before an action can be instituted or commenced against the Corporation, a notice of intention to sue is required to be served on it by the intending plaintiff or his agent one month prior to the suit.⁴³ This is an attempt to insulate the Corporation from being answerable for its neglect and defaults, bearing in mind that the discovery of acts of neglect or injury may be well after twelve months, and investigation to verify certain facts may take a longer period than a month.

Still on the issue of transparency and in what has been described as a measure of the Corporation's continuing importance to the calculus of political leadership,⁴⁴ is the regulation of public access to the Corporation's offices across the country. Regulation of access is so intense to the extent that there are extreme and extraordinary security arrangements in the Corporation's offices all over the country. Reasons other than security to ward off a physical attack, at least until the recent threat of 'Boko Haram' and attacks of the Niger-Delta militants, have been provided for the level of security. One reason is that public access to the Corporation is regulated for the purpose of securing and guarding its operational secrets.

Whereas the veracity or otherwise of this reason is not ascertainable, what is not in doubt is the fact that the NNPC Act actually enjoins the Corporation to prohibit and restrict the access of the public or of any class of members of the public to any premises vested in, occupied by or under the control of the Corporation etc.⁴⁵ The essence of this statutory restriction to a public corporation leaves much to be desired, but since it is not an outright prohibition, and with the enactment of the Freedom of Information Act⁴⁶, it is hoped that restriction of public access to the Corporation's premises may

42 Section 12(1) of the NNPC Act.

43 Section 12(2) of the NNPC Act.

44 Nwokeji (2007: 5).

45 Section 17 of the NNPC Act.

46 The Freedom of Information Act 2015 is an Act that makes public records and information more freely available. It provides for public access to public records and information, protect public records and information to the extent consistent with public interest and the protection of personal privacy.

be reduced to the barest minimum in order to bolster the dwindling image of the state as one that lacks the capacity to create an enabling environment.

2.1.4 The Associated Gas Re-injection Act, 1979

This is an Act made to compel every company producing oil and gas in Nigeria to submit preliminary programs for gas re-injection and detailed plans for implementation of gas re-injection by no later than 1 April 1980.⁴⁷ Section 3 of the Act prohibits any company engaged in the production of oil or gas to flare gas produced in association with oil without the written permission of the Minister. Under Section 3(2), the Minister may issue a certificate to a company engaged in the production of oil or gas, where he is satisfied that the utilisation or reinjection of the produced gas is not appropriate or feasible in a particular field.

The Minister is further vested with the discretion to specify the terms and conditions for the continued flaring of gas in the particular field or fields.⁴⁸ The Minister may also permit the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 standard cubic metre (SCM) of gas flared.⁴⁹ The Minister may, if satisfied, grant the permission subject to the payment of such a sum as the Minister may prescribe.⁵⁰ Section 4 penalises an offender with forfeiture of the concessions granted in a particular field in relation to which the offence was committed. The Minister may also withhold any entitlements of any offender towards the cost of completion or implementation of a desirable re-injection scheme.⁵¹

There are also the Associated Gas Re-injection (Continued Flaring of Gas) Regulations (1984), which are subsidiary legislation under the Associated Gas Re-injection Act. These stipulate conditions for the issuance of permits by the Minister under Section 3(2) of the Associated Gas Re-injection Act. Section 1 of the Regulations provide for the continued flaring of gas in a particular field or fields, provided anyone or more of the laid out conditions are met. The conditions include where more than 75 % of the produced gas is effectively utilised or conserved and where the produced gas contains more than 15% impurities, which render the gas unsuitable for industrial purposes. Other conditions include where an on-going utilisation programme is interrupted by

47 Sections 1 and 2 of the Associated Gas Re-injection Act.

48 Section 3(2)(a) of the Associated Gas Re-injection Act.

49 Section 3(2)(b) of the Associated Gas Re-injection Act.

50 There is a proviso to the effect that any such payment shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the federal government by companies engaged in the production of oil. See Section 3(2)(b) of the Associated Gas Re-injection Act.

51 Section 4(2) of the Associated Gas Re-injection Act.

equipment failure; or where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilisation point is less than 50,000 SCF/KM.⁵²

These Regulations do not reflect contemporary realities and philosophy for transparency and accountability. There is an indication that the state lacks the political will to enforce its anti-gas flaring provisions in the Associated Gas Re-injection Act of 1979. The Act, which targets anti-gas flaring policies and requires companies to submit to the Minister detailed programs for reinjection of associated gas produced or programs for the use of such gas, is completely watered down by the provisions of Section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations 1985.⁵³

2.1.5 The Environmental Impact Assessment (EIA) Act, 1992

The EIA Act is a guide on the procedures to be undertaken in considering the likely impacts of any project, whether private or public, on the environment. The Act is described as a landmark in the Nigerian environmental protection regime because it is the first statute that allows public participation in the decision-making processes relevant to development.⁵⁴ Thus, members of the public have access to information on such projects and the right to participate in the decision-making process on the potential (negative or positive) impacts on their immediate environment.⁵⁵

Under the EIA Act, companies engaged in extractive activities in the petroleum sector may not embark on projects without considering the environmental impacts at an early stage, except as permitted by law.⁵⁶ By virtue of Sections 2(2) and (3) of the EIA Act, “where the extent, nature or location of a proposed is likely to significantly affect the environment”, oil companies are expected to undertake an environmental impact assessment of the intended project. Under Sections 4(d)-(e) of the EIA Act, an environmental impact assessment shall include a description of the proposed activities, assessment of the proposed activities, and an assessment of the likely environmental impacts and alternatives to mitigate any negative impacts of the project. Petroleum and

52 Section 1 of the Associated Gas Re-Injection (Continued Flaring Of Gas) Regulations.

53 Omeke (2011).

54 Section 7 of the EIA Act allows public participation in environmental impact assessment in Nigeria. It provides that “before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity”. The Review Panel accentuates public participation in environmental impact assessments in Nigeria. Under Section 37(b) of the EIA Act, proceedings in the review panel stage are expected to be conducted in public “in a manner that offers the public an opportunity to participate in assessment”. See Omorogbe (2002: 577).

55 Ekhtor (2016: 43).

56 Section 2(1)(4) of the EIA Act.

mining are included in the list of industries deemed as subject to mandatory study activities under the schedule to the EIA Act.⁵⁷

The Act has been a subject of criticism over the years due to limitations imposed by the provisions of Section 15(1) on exceptions to the performance of environmental impact assessment in certain projects. Section 15(1) of the EIA Act states that an environmental assessment of the project shall not be required where:

- (a) in the opinion of the Agency the project is in the list of projects which the President, Commander-in-Chief of the Armed Forces or the Council is of the opinion that the environmental effects of the project is likely to be minimal;
- (b) the project is to be carried out during national emergency for which temporary measures have been taken by the Government;
- (c) the project is to be carried out in response to circumstances that, in the opinion of the Agency, the project is in the interest of public health or safety.

These provisions run contrary to the intentions of the EIA Act. For instance, based on the provisions, notwithstanding valid objections to a proposed project, the President of Nigeria has the discretion to evade the statutory requirements for an environmental impact assessment in projects relating to the petroleum sector. Consequently, corporate bodies with an extractive interest in the oil industry may through access or 'connections' to the President potentially influence him or her to give approval to their proposed projects, notwithstanding the negative environmental impacts of such projects.⁵⁸

It is interesting to note that the Environmental Impact Assessment Bill (2017), which is presently under review, retains the provisions of Section 15. The Bill makes no significant clarification on what constitutes 'minimal' effect of a project as provided for in the EIA Act. Similarly, the Bill does not qualify the nature of projects which would be considered to be in the interest of the public, as laid down by Section 15 of the EIA Act. These are legal gaps that certainly deserve the attention of stakeholders in the field.

2.1.6 Nigeria Extractive Industry Transparency Initiative (NEITI) Act, 2007

The NEITI Act, as the title suggests, is enacted to ensure due process and transparency in the payments made by companies operating in the Nigerian extractive industry to the federal government.⁵⁹ The Act is intended to ensure accountability in the revenue receipts of the federal government from companies in the extractive industry and to

57 Under Section 25 of the EIA Act, in mandatory study activities projects, EIA reports shall be published and made available to the public in selected places and any person or individual can file comments on the conclusions and recommendations of such reports.

58 Osa (2016: 1).

59 Aladeitan (2015).

eliminate all forms of corrupt practices in the determination, payment, receipt and posting of revenue accruing to the federal government.⁶⁰ Having regard to the above functions, it is evident that the NEITI Act is a response to noticeable transparency and accountability gaps in the country's oil, and gas and solid minerals sectors.⁶¹

However, the Act is fraught with legal gaps. For instance, Section 2(c) of the Act empowers NEITI to "eliminate all forms of corrupt practices in the determination, payments, receipts and postings of revenue accruing to the Federal government from extractive industry companies".⁶² This particular clause appears to be overly ambitious, and in fact, some of its terms of reference are already exercised by statutory government agencies such as the Federal Inland Revenue Service, Central Bank of Nigeria, and the Office of the Accountant General of the Federation. This clause can, however, be modified to give NEITI a clear coordinating role, limiting overlaps with other government agencies and departments in the performance of key functional mandates.

It is encouraging to note that the Petroleum Industry Governance (PIG) Bill addresses some of the gaps in the legal framework governing Nigeria's oil and gas industry.⁶³ For instance, by virtue of clause 86 of the Bill, all existing enactments, including but not limited to the Petroleum Act, the Pipeline Act and the Petroleum Profit Tax Act, are to be read with such modifications as to bring them into conformity with the Bill. In the event of any inconsistency between the provisions of the Bill and that of any other enactment, the provisions of the Bill shall prevail.⁶⁴ It is also instructive to note that although variation to all extant Acts covered by the Bill will take effect when the Bill is assented to by the President, the NNPC Act, the NNPC (Projects) Act and the NNPC Amendment Act will only be repealed when the Minister issues a legal notice vesting the assets and liabilities of the NNPC in the relevant successor entities.⁶⁵

60 Section 2, Nigeria Extractive Industries Transparency Initiative (NEITI) 2007.

61 Aladeitan (2015).

62 This clause is similar to that of Section 3(c) of the NEITI Act which prescribes a function for NEITI to ensure transparency and accountability in the management of the investment of the Federal Government in all extractive industry companies.

63 The Senate only recently passed the PIG Bill into law in June 2017. The PIG Bill is just one of several components of the Petroleum Industry Bill which has been before the National Assembly for over a decade. The PIG Bill seeks to restructure the Nigerian National Petroleum Corporation and the Department of Petroleum Resources, as well as remove the overlap of functions among the commercial, regulatory and policy institutions. Clause 2(1)(g) of the Bill curtails the discretion of the Minister by subjecting the exercise of his powers to grant, amend, renew, extend or revoke petroleum exploration and production licenses and leases under the Petroleum Act to the recommendation of a new commission to be created under the Bill; the Nigerian Petroleum Regulatory Commission.

64 See Clause 86 of the PIG Bill.

65 *Ibid.*

2.2 Legal Framework in Uganda

2.2.1 The 1995 Constitution of the Republic of Uganda (as amended)

The 1995 Constitution of the Republic of Uganda has elaborate provisions regarding environmental management. In the National Objectives and Directive Principles of State Policy, the Constitution requires the Government of Uganda to take measures to protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.⁶⁶ The government is also required to promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met. It is further required to promote the rational use of natural resources so as to safeguard and protect the biodiversity of Uganda.

In the substantive provisions, the 1995 Constitution makes specific provision for the right to a clean and healthy environment. Under Article 39, every Ugandan has a right to a clean and healthy environment. This provision is reiterated under Section 3 of the National Environment Act Cap 153 and Section 5(2) of the National Forestry and Tree Planting Act No. 8 of 2003, which similarly provide for the right to a clean and healthy environment. The breach of the right entitles any person or responsible body to bring an action in furtherance of the right. The 1995 Constitution further imposes on the state and citizens the duty to create and protect a clean and healthy environment.⁶⁷ These provisions imply that a party whose right to a clean and healthy environment is violated due to oil exploration and production, may institute legal action to seek redress against the extractive company responsible, or even the state.⁶⁸

Over a decade ago, Uganda discovered commercial volumes of oil in the Albertine and Nile basin. Since then, a major concern for stakeholders in Uganda's natural capital sector has been oil resource governance and how much local content will be utilised in developing the sector. The oil resource sector in Uganda is budding, and most citizens are yet to enjoy the benefits of the resource through the creation of innovative

66 Principle XIII of the 1995 Constitution.

67 Article 17(1)(j) of the 1995 Constitution.

68 In the case of *Environmental Action Network v. British American Tobacco*, the applicant brought an application under Article 50(2) of the 1995 Constitution and rule 3 of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, for a court order compelling the respondent, a manufacturer of 'dangerous products' (cigarettes), to fully and adequately warn consumers of the health risks associated with its products. Although the order was ultimately denied, the court did confirm the *locus standi* of the applicant and that Article 50(2) enabled individuals to bring public interest matters to court on behalf of those who were not in a position to do so.

opportunities to build a new economy founded on upstream gas extraction activities, and the downstream linked value addition industries.⁶⁹

The 1995 Constitution vests the ownership of all minerals and petroleum in the government, which is to hold the same in trust for the people of Uganda. This introduces the public trust doctrine in the management of oil and gas resources,⁷⁰ which is embedded in the Constitutional (Amendment) Act of 2005.

2.2.2 The Constitutional (Amendment) Act, 2005

This Amendment Act has significant implications for oil and gas management and control, and the sharing of royalties derived from oil and gas exploitation. Part XIII and specifically Section 43 amends Article 244 of the 1995 Constitution by replacement. Accordingly, the entire property in and the control of all minerals and petroleum in, on or under any land or waters in Uganda are vested in the government on behalf of the Republic of Uganda.

This is, however, subject to Article 26 of the 1995 Constitution, which emphasises the need to fairly and adequately compensate surface landowners before the government can take over the petroleum-rich lands. Just like Nigeria, the parliament in Uganda is mandated to make laws regulating the exploitation of minerals and petroleum; the sharing of royalties arising from mineral and petroleum exploitation; the conditions for payment of indemnities arising out of the exploitation of minerals and petroleum; and conditions regarding the restoration of derelict lands.

2.2.3 The Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations, 1993

These Regulations were made under the repealed Petroleum (Exploration and Production) Act, Cap. 150. They however remain in force as long as they are not inconsistent with the repealing Act.⁷¹

Regulation 51(1) provides for the prevention of pollution of the environment in carrying out exploration, development, production and transportation of oil and gas.⁷²

69 See <<http://www.monitor.co.ug/Business/Prosper/What-Uganda-can-learn-from-other-oil-and-gas-producers/688616-3470538-item-00-jp6am5z/index.html>> (accessed 9-12-2017).

70 Article 244.

71 Section 189 of the Petroleum (Exploration, Development and Production) Act, 2013.

72 Under Regulation 36, an application for the consent of the Commissioner to the construction or installation of a fixed platform should be made in writing and should state among others, the location at which it is intended to construct or install the fixed platform and the reasons for selection of that location.

Further, under Regulation 51(2), in the disposal of any waste material, a licence holder should not create any conditions, which may adversely affect public health, life, property, aquatic life, wildlife or vegetation. The Regulations further require that before drilling operations are commenced in any licensed area, the person-in-charge should submit a description of the procedure, personnel, equipment and materials that will be used in reporting, cleanup and prevention of the spread of any pollution resulting from exploration or development activities for approval. Regulation 56 also bars the disposal of drilling mud into any lake, river, stream, pond or other water bodies. Under Regulation 56(2), produced water may be disposed into an operating area after satisfying, with the commissioner's approval, that the oil content of produced waters discharged from offshore platforms has been reduced to an average of not more than 10 mg/l during normal operation.

The Regulations also make provisions for safety issues. Regulation 85(1) requires the operator to prepare a manual of instructions for safety in operations and bring it to the attention of every person who is about to be engaged in, or concerned with, the carrying out of operations or the execution of works in any licensed area. Regulation 112 further requires that all confined areas where operations could lead to the emission and accumulation of explosive mixtures or toxic gases should be provided with suitable means of ventilation and with a continuous ventilation monitoring system approved by the commissioner, which should be fitted with an audible warning device. Regulation 114 requires that at appropriate distances from every place where gases such as hydrogen sulphide are, or could be a hazard, the person-in-charge should cause to be displayed suitable signs warning of the presence of the gases, and any person observed approaching that place should be warned of the danger that exists. Regulation 115 prescribes that the exhaust gases from engines, motors or devices using gas in place of steam or air to operate pumps and other power-driven equipment, should be discharged in a direction and location where they will not create a health hazard to any person.

2.2.4 The Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act, 2013

The Act seeks to operationalise the Oil and Gas Policy by establishing an effective legal framework to ensure that midstream operations are carried out in a sustainable manner that guarantees optimum benefits for all Ugandans, both the present and future generations; enabling the development of petroleum refining, gas conversion, pipelines, transmission and other activities in midstream operations.⁷³

The Act provides that licensees, or any person exercising or performing functions, duties or powers thereunder, should take into account and comply with environmental

73 Section 1 of the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act.

principles prescribed in the NEA and other applicable laws. For these purposes, the Oil Authority of Uganda may grant a licence to an entity contracted by the licensee upon such conditions as are deemed fit by the National Environment Management Authority (NEMA), for the management of transportation, storage, treatment or disposal of waste arising out of midstream operations, and it is an offence for any such contracted entity to operate without such a licence.⁷⁴

The Act prohibits venting and flaring of gases. Gas venting means the release of gases to the atmosphere, whereas flaring means combustion of hydrocarbons without application of the resulting heat or gases for any useful purposes.⁷⁵ These activities are prohibited by Section 38, which provides that a licensee is not allowed to flare or vent petroleum in excess of the quantities needed for normal operational safety without the approval of the Minister on the advice of the Oil Authority.⁷⁶ All facilities in the mid-stream stage should be planned and constructed in such way as to avoid gas flaring or venting under normal operating conditions. Hence, any disposal of gases by flaring or venting for normal operational safety should be with the written consent, of the Authority, where it is necessary for the safety of midstream operations or necessary to comply with a requirement imposed by or under any law in Uganda, or in case of an emergency.

However, even where flaring or venting is done without consent as an emergency, the licensee should ensure that the flaring or venting is kept at the lowest possible level, and submit a technical report to the authority detailing the nature and circumstances that caused the emergency situation. Part III of the Act provides that the process of licensing for midstream operations shall be kept open and transparent. Section 12 provides that the Minister shall, within 45 days after receiving an application for a mid-stream licence, cause a notice of the application to be published in the Gazette and at least one newspaper of wide circulation in Uganda, and such notice must indicate: details of receipt of the application; description of the nature and location of the proposed facility or operation; inform the members of the public that the application may be inspected, within the limits of the laws governing intellectual property rights and commercial confidentiality; and invite parties and local authorities in the areas affected by the project who object to the granting of the licence, whether on personal, environmental or other grounds, to lodge their objections with the Minister.

According to Section 74, the Minister may, in accordance with the Access to Information Act, 2005, make available to the public: details of all agreements, licences and any amendments to the licences or agreements whether or not terminated or valid; details of exemptions from variations to, or suspensions of the conditions of a licence;

74 Section 3 of the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act.

75 Section 2 of the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act.

76 The Oil Authority of Uganda is established under Section 9 of the Petroleum (Exploration, Development and Production) Act.

and all assignments and other approved arrangements in respect of a licence. This section would ordinarily be very significant in ensuring transparency and accountability in midstream operations, but it seems the proceeding Sections 75 and 76, which impose very stringent clauses on confidentiality of data and prohibition against disclosure of information, respectively, curtail these guarantees.

2.2.5 The Petroleum (Exploration, Development and Production) Act, 2013

The Act is one of the newest enactments in the field of oil and gas. It was enacted basically to regulate the upstream sector and aims at giving effect to Article 244 of the 1995 Constitution of Uganda. It regulates petroleum exploration, development and production; establishes the petroleum authority of Uganda; provides for the establishment of the national oil company of Uganda; and regulates the licensing and participation of commercial entities in petroleum activities.

The major purpose of this Act is to operationalise the National Oil and Gas Policy. It aims to establish an effective legal framework and institutional structures to ensure that the exploration, development and production of petroleum resources is carried out in a sustainable manner that guarantees optimum benefits for all Ugandans, both the present and future generations and creating a conducive environment for the efficient management of petroleum resources.⁷⁷

It also seeks to establish institutions to manage the petroleum resources and regulate petroleum activities; and regulate petroleum activities through licensing, exploration, development, production and cessation of activities or decommissioning. Public safety and protection of public health and the environment in oil activities; supporting the development of state participation and national content in the petroleum industry and ensure transparency and accountability in all activities regulated under the Act, are other strategic approaches laid out in the Act.⁷⁸

To achieve this, a licensee is required to contract a separate entity to manage the transportation, storage, treatment or disposal of waste arising out of petroleum activities. However, the licensee shall remain responsible for all the activities of the entity so licensed. A person contracted by the licensee shall not undertake the above activities without obtaining a licence from NEMA.

The Act makes provision for punitive measures where a person violates the environmental principles contained in the Act. It further provides that a person shall not be granted a petroleum production licence unless their development plan takes proper account of best petroleum industry practices and safety factors.⁷⁹ This provision is largely

77 Section 1 of the Petroleum (Exploration, Development and Production) Act.

78 Ibid.

79 Section 74(1)(b) of the Petroleum (Exploration, Development and Production) Act.

vague because the Act does not satisfactorily define what amounts to ‘best petroleum industry practices’.⁸⁰ The only reference to practice which might constitute ‘best petroleum industry practice’ is embedded in Section 76(1)(f) which states that a petroleum production licence granted under the Act must expressly require the licensee to undertake an environmental impact assessment prior to commencing any production activity.⁸¹

With respect to access to information by the public, the Act empowers the Minister, in accordance with the Access to Information Act (2005) to make available to the public: details of all agreements, licences and any amendments to the licences or agreements whether or not terminated or valid; details of exemptions from, or variations or suspensions of the conditions of a licence; approved field development plans; and all assignments and other approved arrangements in respect of a licence upon payment of the prescribed fee.⁸² This seems to be a good guarantee for transparency and accountability in the sector. However, the stringent confidentiality provisions under Section 152 and other express restrictions in Section 153 have restricted it.

There are neither regulations on operational mechanisms of the Petroleum Fund, nor Regulations on sharing of revenues from royalties of oil and gas in the Petroleum (Exploration, Development and Production) Act (2013) or elsewhere.

Furthermore, although the National Oil and Gas Policy (2008) has transparency and accountability as some of its principles, and one of the actions in the policy is to participate in the processes of the extractive industries and transparency initiative (EITI), Uganda is yet to participate fully in the processes of the EITI as required under the Oil and Gas Policy.

A worrisome feature that cuts across most of the legal instruments in the oil governance sector for Nigeria and Uganda is the bureaucratic impediments hindering public participation in decision-making, access to justice and dispute resolution of aggrieved parties. The review of the legal framework for the management of the oil and gas sector in Nigeria and Uganda reveals that there is a variance between the law on paper and its implementation in practice.⁸³ It equally shows the prevalence of unfettered discretion in the management of the resource by the political leadership as opposed to a standardised approach for appropriate and effective management. It is submitted that unfettered discretion which gives far-reaching latitude and flexibility for the policy direction of a state’s oil resources can be overwhelming and expose the

80 The Act merely defines ‘best petroleum industry practices’ to mean the best available practices that are generally accepted as good, safe, transparent and efficient in carrying out petroleum activities and that can be applied globally under similar circumstances, something which leaves a lot to be desired since environmental compliance is best achieved through strong regulation.

81 Section 76(1)(f) of the Petroleum (Exploration, Development and Production) Act.

82 Section 151 of the Petroleum (Exploration, Development and Production) Act.

83 See <http://resourcegovernanceindex.org/compare?country1=UGA_oil-gas&country2=NGA_oil-gas> (accessed 26-4-2018).

sector to undue interference and political consideration other than best operational and management practices.

3 Essential components of the legal framework for ensuring sustainability in the oil sector for Nigeria and Uganda

From the above examination of the Ugandan and Nigerian legal frameworks, the following elements of resource governance are suggested as components that should be highlighted and wholly integrated into the legal frameworks for improving sustainable governance of the oil industry in both countries.

3.1 Value-based approach

Prior to building any legal framework for the oil and gas sector, a methodology must be adopted to guide decision-makers on the underlying prospects and challenges in the governance of natural resource in general, and oil resources in particular. Values imply a level of judgment about what is important. Through values, concrete principles like the actual value of the resource, human rights, social equity and legitimacy become synonymous with the emerging legal framework.

The emergence of values in resource governance is grounded on the understanding that whilst economic development is essential, not all values are monetary, as biodiversity has intrinsic and cultural values that go beyond economics.⁸⁴ The value-based approach attaches weight to oil resources, as well as connects the activities and decisions of key stakeholders in the sector. Based on values, key decisions can be made about oil resources and the impact of their extraction on the ecosystems.

The Nigerian and Ugandan legal frameworks have developed without clear values underpinning them. This failure has resulted in gaps that compromise the effectiveness of well-meaning legal provisions. While Uganda has a normative framework for ingraining the principles of accountability and transparency, it faces the same challenges that are faced in Nigeria. This raises the need for ensuring that when principles are adopted, they permeate all activities in the oil and gas industry. This will provide a context for dealing with corruption and other rent-seeking activities that are common in the oil and gas sector in both countries.

84 See <<https://www.unep-wcmc.org/expertise/We-specialize-in/Valuing-natural-capital>> (accessed 12-12-2017).

3.2 Value-addition approach

Most importantly, both states should seek to re-engineer their economic models to add value to their oil and gas resources.⁸⁵ Both states should shift from crude oil exports to intermediate and finished oil products by adding value and maximising their natural resource wealth. This shift is long overdue. Oil and gas industry governance in Nigeria and Uganda should include the use of legal provisions that buoy up national investment in the sustainable harnessing of environmental assets through industrialisation and reversing natural capital losses. These legal provisions should include developing and strengthening private and public partnerships for harnessing natural capital.

Similarly, there is a need for reform of the banking sector laws and regulations to ensure that investors rely extensively on company disclosures to evaluate environmental-related financial risks.⁸⁶ Presently, company quantification of natural resource use and pollution impacts is largely guided by the Global Research Index (GRI) sustainability reporting guidelines.⁸⁷ Increasingly, large companies and organisations are creating transparency reports and making considerable strides in building local communities through skills transfer and investment. As environmental, social and governance reporting become more commonplace, the corresponding monitoring systems are likely to improve.

3.3 Principles

Good governance, transparency, accountability, participation and responsiveness principles should be included in the laws of both states as they provide the architecture for the sustainable harnessing of oil and gas as well as a standard for measuring economic development in resource-rich states. Specifically, the principle of public participation goes beyond the typical state-driven approach by highlighting the central role of members of the public. Inclusive decision-making through the public participation principle implies a horizontal process in which power dynamics are re-balanced, and the views of groups at risk of marginalisation are clearly taken into account in decisions regarding natural resource governance, including through appropriate representation.

85 See <https://au.int/sites/default/files/newsevents/workingdocuments/12582-wd-agenda_2063_e_0.pdf> (accessed 21-12-2017).

86 UNEP (2015).

87 See Global Reporting Initiative (GRI) Sustainability Reporting Guidelines, which produce international framework for the sustainability reporting process to promote the drive towards greater transparency. The framework sets out principles and indicators that organisations can use to measure and report their economic, environmental, and social performance. CERES and the United Nations Environment Program (UNEP) founded GRI in the USA in 1997.

Recognition and respect for tenure rights, especially customary, collective rights of members of host local communities, is an important principle that should also be included in the laws of both Nigeria and Uganda. For instance, though the laws on oil and gas resources vest total ownership and control in the government in Nigeria and Uganda to the detriment of the local communities in the areas where the resources are situated, there is general consensus that the ownership of mineral resources by the federal government of Nigeria has been detrimental to the people of the oil producing areas of Nigeria.⁸⁸ This is likely to be replicated in Uganda. Recognising tenure rights of local communities in the oil and gas industry laws in both states can contribute to effective and equitable natural resource governance. More specifically, such recognition facilitates local stewardship of lands and resources, providing a foundation for sustainable livelihoods and contributing to the fulfilment of human rights and cultural survival. International frameworks such as the Voluntary Guidelines on the Governance of Tenure (Voluntary Guidelines),⁸⁹ the African Charter on Human and Peoples Rights (whose tenets are part of the law in both Nigeria and Uganda),⁹⁰ and the United Nations Declaration on the Rights of Indigenous Peoples⁹¹ are all legal documents that reflect a global consensus on the need to recognise and respect all legitimate tenure rights. However, the Voluntary Guidelines and the UN Declaration on the Rights of Indigenous Peoples do not enjoy the force of law in Nigeria and Uganda. There are opportunities for including the principles in these documents in both countries, and these should be utilised.

Provision for devolution and subsidiarity through collaborative governance is also fundamental in improving the relevant legal frameworks of both countries. Devolution is defined as “a process by which state control over the use of natural resources is gradually and increasingly shared with local communities”.⁹² In the present context, devolution is closely linked to the principle of subsidiarity, by which decisions are taken at the lowest possible level. Devolution and subsidiarity are key elements that create flexible and adaptive processes for decision-making and management of natural resources. Accordingly, building devolution and the subsidiarity principles in the oil resource governance framework addresses access to justice, differentiated actions for specific situations of vulnerable groups and social and environmental accountability. The focus on devolution further reinforces the rights-based approach to natural resources governance, as members of the local community through their representatives are engaged in making decisions with respect to the extractive activities in their

88 Ekhaton (2016: 43).

89 FAO (2012).

90 Article 21 of the African Charter provides that all peoples shall have the right to freely dispose of their wealth and mineral or natural resources.

91 United Nations Declaration on the Rights of Indigenous People (2007), at <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> (accessed 20-01-2018).

92 Nakangu (2016).

environment. Both Nigeria and Uganda have work to do to ingrain devolution and subsidiarity principles within their oil and gas laws.

4 Conclusion

Nigeria and Uganda share similar historical antecedents in terms of laws that regulate certain sectors of their respective economies. Uganda's entrance into the group of oil resource extracting states is, however, relatively new compared to that of Nigeria, and the state is yet to fully participate in the EITI. Both states are making similar efforts to provide a responsive legal framework for oil resources governance.

This chapter does not dwell in-depth on the reasons for the poor performance of Nigeria and Uganda in the RGI Report. Based on the review of their legal frameworks, however, it is safe to posit that both states share similar governance challenges. The content of their respective laws and the role of the state as prescribed by these laws have contributed to the governance challenges the countries have experienced.

An assessment of the legal frameworks for oil resource governance in Nigeria and Uganda reveals gaps, which justify the 2017 RGI Report's conclusion that a governance deficit exists in the decision-making chain in the extractive industry in Nigeria and Uganda. Legal reforms to boost value realisation, improve revenue management and maintain an enabling environment are critical if Nigeria and Uganda are to harness oil wealth for the benefit of their people.

The existing legal instruments governing the management of oil resources in both states do not reflect contemporary realities and the principles of inclusiveness, transparency and accountability. This explains the mismanagement, lack of regard for the rule of law, poor regulatory quality and corruption associated with the governance of oil resources in Nigeria for instance.⁹³ It also explains the poor revenue management and corruption that undermines the development of an appropriate legal framework for the budding oil resource industry in Uganda.

Review of the content of laws in both states and their performance on the 2017 RGI, which places Nigeria and Uganda within the ranking for states that exhibit serious shortcomings in oil resource governance, leads us to conclude that there is a correlation between the content of the law, state presence and sustainable harnessing of oil resources. For any state, including Uganda and Nigeria, to govern its oil and gas sector sustainably, the principles of accountability and transparency outlined above, a value-based approach and the need for value addition must be incorporated into the legal framework.

93 See <http://resourcegovernanceindex.org/compare?country1=UGA_oil-gas&country2=NGA_oil-gas> (accessed 10-02-2018).

References

- Ahmed, Z (2012) “NEITI: The prospects, issues and challenges” Presentation to the IMF Mission (21-3-2012), at <<https://www.imf.org/external/np/seminars/eng/2012/kinshasa/pdf/za.pdf>> (accessed 13-03-2018).
- Aladeitan, L (2013) “Ownership and control of oil, gas, and mineral resources in Nigeria: between legality and legitimacy” 38 *Thurgood Marshall Law Review* 159-197.
- Aladeitan, L (2015) *Natural resources and conflict in Nigeria: the legal framework for resource governance, peace and sustainable development* Ph.D. thesis, University of Abuja, Nigeria.
- Ekhtor, EO (2016) “Public regulation of the oil and gas industry in Nigeria: an evaluation” 21 *Annual Survey of International & Comparative Law* 43-93.
- FAO / United Nations Food and Agricultural Organisation (2012) *Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security*.
- Likosky, M (2010) “Contracting and regulatory issues in the oil and gas and metallic minerals industries” 18 *Transnational Corporations* 12.
- Nakangu, BB (2016) *NRGF challenges and opportunities in eastern and southern Africa* NRGF Regional Scoping Report.
- Natural Resource Governance Institute Reader (2015) “Legal framework navigating the web of laws and contracts governing extractive industries”, at <https://resourcegovernance.org/sites/default/files/documents/nrgi_primer_legal-framework.pdf> (accessed 30-4-2018).
- Natural Resource Governance Institute (2017a) “Resource governance index”, at <<http://resourcegovernanceindex.org/>> (accessed 5-5-2018).
- Natural Resource Governance Institute (2017b) “Nigeria: Oil and Gas, 2017 Resource Governance Index”, at <<http://resourcegovernanceindex.org/country-profiles/NGA/oil-gas>> (accessed 8-4-2018).
- Natural Resource Governance Institute (2017c) “Uganda: Oil and Gas, 2017 Resource Governance Index”, at <<http://resourcegovernanceindex.org/country-profiles/UGA/oil-gas>> (accessed 8-4-2018).
- Nwokeji, G (2007) *The Nigerian National Petroleum Corporation and the development of the Nigerian oil and gas industry: history, strategies and current directions* Policy Report of the Joint James Baker III Institute for Public Policy/Japan Petroleum Energy Centre on the Changing Role of National Oil Companies in International Energy Markets.
- Omeke, CA (2011) *Critique on the legal regime governing gas flaring in Nigeria* unpublished LLM dissertation of the University of Nigeria Nsukka Nigeria.
- Omorogbe, Y (2002) “The legal framework for public participation in decision-making on mining and energy development in Nigeria: giving voices to the voiceless” in DN Zillman, AR Lucas & G Pring (eds) *Human rights in national resource development: public participation in the sustainable development of mining and energy resource* 549.
- OPEC / Organization of the Petroleum Exporting Countries (2017) Annual statistical bulletin, at <<https://asb.opec.org/index.php/foreword>> (accessed 29-4-2018).
- UNEP (2015) *The financial system we need, aligning the financial system with sustainable development*, at <http://unepinquiry.org/wp-content/uploads/2015/11/The_Financial_System_We_Need_Policy_Summary_EN.pdf> (accessed 30-4-2018).
- World Bank (2010) *Trade report*, at <https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr10-2b_e.pdf> (accessed 10-3-2018).

World Bank (2017) *The role of law in World Development Report 2017*, at <https://openknowledge.worldbank.org/bitstream/handle/10986/25880/9781464809507_Ch03.pdf?sequence=35&isAllowed=y> (accessed 10-12-2017).

