

CRIMINAL ASPECTS OF ENVIRONMENTAL LAW AND TECHNICALITIES OF ENVIRONMENTAL CRIMES¹.

1.0 INTRODUCTION

An environmental crime is any deliberate act or omission leading to degradation of the environment and resulting into harmful effects on human beings, the environment and natural resources. Environmental crimes include all violations of environmental laws attracting criminal sanctions. Environmental crime prosecutions therefore refer to the prosecution of environmental cases in the criminal courts.

Historically, traditional criminal law did not care about environment protection hence there has been a tendency of advocating for it to be included among those crimes that affect or is affected by public order, morality and social economic development. The question has always been whether the environment deserves the response of criminal law.

In subject of environmental law, enforcement becomes one of the most important components. Environmental enforcement relates to those sets of actions that Government or other persons take to achieve compliance within the regulated community and to correct or halt situations that endanger the environment or public health. Enforcement by Government usually includes inspections, negotiations, compliance promotions and legal actions of civil litigation and criminal prosecution.

The objective of environmental law enforcement is the same like other branches of law i.e. to deter detected violators from violating again; to deters other potential violators from violating by sending a message that they too may experience adverse consequences for non compliance.

The objectives of deploying criminal law in environmental law enforcement are

- (a) to confirm standards established in the interest of
- the environment or public health;
 - government credibility and government control (standard setting)
 - fair competition;
- (b) protecting or restoring environmental damage to ensure sustainable development.

2.0 THE LEGAL FRAMEWORK FOR ENVIRONMENTAL CRIMES

There are a few provisions in our Penal Code Act relating to environmental protection in

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the sense of protecting the right to a clean and healthy environment. These relate to nuisances and offences against health and convenience under Part XVII, offences endangering life or health under Part XXII, negligent acts likely to spread infection of disease, adulteration of food or drink, fouling water and air (ss 171, 172).

The effectiveness of the above provisions on environment and/or public health protection is limited because they are generalized crimes and not specific and therefore difficult to interpret. They also do not offer other alternatives that can lead to protection of the environment.

The National Environment Statute of 1995 therefore seeks to provide for a more comprehensive and effective legal framework for criminalisation of and sanctions against those who commit environmental law violations, as one of the ways of ensuring compliance with environmental protection legal provisions.

The National Environment Statute introduced a fundamental change in the management of all aspects of the environment. Before the introduction of the Statute, however, the principal themes in as far as criminal aspects in environment related laws was that most of the laws had outdated or outmoded criminal provisions and lacked effective sanctions to deter infraction.

This situation has now changed and new methods, aspects and legal provisions of environmental criminal law have come into play. The question is whether these new norms can be successfully used to protect the environment.

There are 3 aspects that can be used in today's environmental law enforcement.

- ✓ **Traditional Criminal Law:** by means of fines and imprisonment.
Where the traditional criminal law is used, it is still necessary to bring it in line with current thinking of conservation. The intention of environmental criminal law is to restore the environment and not necessarily punish the offender. However, infraction of environmental conservation and standards should be made an expensive affair.
- ✓ **Punishment through community service:** In lieu of imprisonment or fine (which is usually simple to pay), the use of "community service" with an environmental orientation is very effective. The community service acts as an instrument for mobilizing shame in a public manner. This may act as a deterrent more effectively than fines or prison sentences.
- ✓ **Publicity:** Perception is so important in creating deterrence in the environment field. How enforcement actions are taken is just as important as the fact that they are taken. Enforcement actions can have significant effects far beyond bringing a single violator into compliance if they are well placed and well publicized e.g. the press, or an apology.

Law applicable:

The main legislation under which charges will commonly be brought is the National Environment Statute 4 of 1995 and other laws that were previously presented. Charges will also be commonly brought mainly under subsidiary legislation that was mentioned in the previous paper.

3.0 CONCEPTUAL LEGAL ASPECTS FOR ENVIRONMENTAL CRIMINAL LAW ENFORCEMENT

Changing man's or woman's environmental behavioral norms may be achieved in three ways: **EDUCATION, INCREASING CAPACITY AND LEGAL**. I will only deal with legislation related issues.

Several measures have been used in an integrated manner in Uganda's legislation in order to achieve environmental goals. There may be divided into several stages: prohibition, prevention, licensing and inspection, orders, restoration to previous conditions, penalties and public participation, among others.

(a) Prohibitions

The prohibition stipulated in the legislation should be clear with an orientation on results. The prohibition should be absolute, dispensing of the need to prove **intent or negligence** - *mens rea*.

In case of pollution or degradation violations (e.g. prohibition of water pollution, soil erosion, etc), it is emphasized that the condition of the area prior to pollution or degradation is not a factor in the considerations leading to conviction, the very act of prohibition is prohibited, not the results. This makes the burden of proof easier since it is a form of strict liability offence.

(b) Anticipatory Prevention

Environmental law is anticipatory, as it requires prior activities to be done before the environment is modified. The provisions relating to EIA, audits and "polluter pays principle" play an important role here. The criminal implication of this is that potential polluters and environmental degraders should be aware and should be required to cover the costs of environmental damage financial liability of damage caused. This is in addition to the environmental crime of not carrying out an EIA.

(c) Permits and licenses

An especially effective means of ensuring compliance in the granting of licenses and permits by NEMA and other lead agencies. This grants NEMA and the lead agencies the power to issue, revoke or incorporate conditions in it.

The very act of managing a project without those licenses or permits even if no environmental damage has been caused constitutes an offence under the law. To combine the permits with the prohibitions mentioned above makes the charge sheet very interesting.

(d) Improvement Orders

The law authorizes an environmental inspector to issue an improvement order to an owner or operator of a facility directing him to adopt specific measures in order to abate the environmental problems. This is issued with time limits of compliance.

Failure to act according to instructions of the environmental inspector is deemed a personal offence of the owner or operator of the facility irrespective of the impact of the action on the environment.

(e) Restoration orders

Further, to improvement orders, the Executive Director is empowered to issue a Restoration Order to any person. These are also deemed personal offences irrespective of the impact of the action on the environment. The order instructs the owner or operator to act in a certain manner.

4.0 SALIENT CRIMINAL ASPECTS UNDER THE ENVIRONMENT STATUTE

The regulation of activities that have or are likely to have an impact on the environment is the main province of environmental law. The law is anticipatory in that even attempts to commit an offence are as bad as commission of an' offence. This is especially to areas of EIA, management of hazardous wastes and toxic chemicals, trans-boundary movement of wastes, etc.

The core environmental crimes under the Statute are-

• **Environment Impact Assessment (EIA)**

Criminal Implications:

- ✓ Failure to submit or prepare an EIA creates a criminal offence which can lead to 18 months imprisonment or fine of not less than Shs.180,000= and not more than Shs.18m/= or both.
- ✓ Developing a project without an EIA is an environmental crime per se.
- ✓ The burden is on the Developer to conduct and submit an EIA Report to NEMA.

• **Environmental Standards**

Every establishment or individual is under a duty to operate within the prescribed standards are minimum standards, criteria and measurements.

There are environmental standards for the discharge of effluent and waste-waters, noise, soil quality, ozone and solid waste.

Criminal Implications:

- ✓ Failure to operate within the standards or the guidelines attracts not more than 18 months imprisonment or a fine of not more than Shs.18m/= or both.
- ✓ Breach of the standards is both a strict and vicarious liability.
- ✓ Environmental standards need scientific measurement and proof.

• **Waste Management (Sec. 53)**

Wastes are widely defined under the Statute and the Regulations.

Criminal Implications

- ✓ Every person is under duty to manage wastes generated by his establishment in such a manner that he does not cause ill health to the person or damage the environment.
- ✓ Every person is under obligation treat, reclaim and recycle the wastes as a waste minimization measure.
- ✓ No person is allowed to dispose of wastes into the environment unless he or she follows the law and the standards.
- ✓ It is a criminal offence to import any wastes which is toxic, extremely hazardous, corrosive, carcinogenic, flammable, persistent, explosive, radioactive, etc.

Criminal Implications:

- ✓ On conviction, an imprisonment term of not less than 36 months or to a fine of not less than 360,000 and not more than 36 million.

Control of Pollution and Discharge of Oils into the Environment

It is an offence to pollute or lead any other person to pollute the environment or in excess of the set standards or guidelines.

Criminal Implications

- ✓ Polluting or discharging oils *per se* is a strict liability offence
- ✓ Offence attracts Shs.360, 000/= or a 36 months imprisonment term or both.
- Environmental Inspections and Record Keeping

i) Environmental Inspectors

- ✓ S.80 of the Statute creates the institution of environmental inspectors. These have the same powers of entering, confiscating and inspecting facilities to ensure that there is compliance with the legal requirements.

Criminal Implications

- ✓ Hindering or obstructing an environmental inspector, or failing to comply with a lawful order such as **IMPROVEMENT NOTICE** is criminal offence on conviction attracts imprisonment of a term not less than 12 months or a fine of not less than Shs. 120,000= and not more than 12 million or both.
- **Records keeping**
- ✓ Facility owners or their agents are required to keep records of the amount of wastes and by products generated by their activities so as to show how far they are complying with the provision of the Statute.
- ✓ Failure to keep records of activities, products, by-products, and wastes required to be kept leads to an offence being committed and liability on conviction to imprisonment for a term of not less than 12 months or a fine of not less than 120,000= and not more than 12 million or both.

- **Conservation of Wetlands, Lakeshores and River Banks**

The National Environment (Wetlands, River Banks And Lake Shores Management Regulations, 2000 prohibits any reclamation- or drainage, depositing of any substance, damaging or destruction of any wetland without a permit from NEMA. Riverbanks and lakeshores are also protected.

Criminal Implications

- ✓ Depositing any substance in a lake or river or their banks and shores or drain a river or lake without a permit or reclaiming or draining or destroying a wetland attracts 12 months or a fine of 120,000= and not more than 12 million or both.

5.0 COMMON ENVIRONMENTAL CRIMES IN UGANDA.

The types of common environmental crimes likely to feature in our courts will generally include doing the following in contravention of the law or without a permit as the case may be-

- ✓ Setting up and operating a project without an EIA;
- ✓ Discharging from an establishment without a permit;
- ✓ Offences relating to environment inspectors and inspections;
- ✓ Failure to comply with requirements of a restoration or improvement order;
- ✓ Maintaining and operating a facility that emits noise without a permit or beyond the set standards;
- ✓ Discharging harmful or polluting substances or waste substances into water systems contrary to the law;
- ✓ Disposing, Storing and treating or transporting of hazardous waste without a permit
- ✓ all the degrading prohibitions relating to wetlands, river banks and lakeshores (using wetlands, river banks and lakes shores without a permit, area related prohibitions (protected zones)
- ✓ exporting genetic resources or derivatives without a permit;
- ✓ all the degrading prohibitions relating to fragile soils protection, hilly and mountainous areas.;

6.0 LEGAL TECHNICALITIES AND PRINCIPLES RELEVANT TO THE PROSECUTION OF ENVIRONMENTAL CRIMES

- ✓ Environmental law provides for **anticipatory injury** or damage. Even where a violation of the law may not necessarily result in any direct or immediate injury to person or property, failure to comply with the law is an offence. In such cases, the law seeks to guard against the danger or probability of injury or damage and thereby minimize it.
- ✓ Environmental laws **punishes** violations **of the law provisions**. Unlike the traditional

criminal offences under the Penal Code Act which prohibit specific acts and impose penalties for those acts, environmental statutes tend to provide for criminal penalties for violation of any of the provisions of the Statute.

- ✓ **Environmental offences tend to impose strict and vicarious liability.**
Although the burden of proof lies with the prosecution, there is no need to prove *mens rea* (criminal intention). Also, the employer or proprietor of a facility can be held liable for the acts of the employees. Environmental cases are therefore relatively easy to prove in court. The strict liability nature can be seen from the wording of the provisions in the statute.
- ✓ Environmental laws are regarded as 'public welfare' statutes (creating public welfare offences). The law is aimed at protecting human health and the environment. The offender (a reasonable person) is deemed to know that his or her conduct is subject to stringent public regulation and may seriously threaten the community's health or safety.
- ✓ **Like other criminal offences, causation must be established, i.e.** that the prohibited event was caused by the accused's acts or omissions.
- ✓ **No requirement for notice of violation before instituting criminal proceedings.**
There are always attempts to handle environmental violation amicably. In this regard, in practice, the offender may be notified that they are violating the law. The notice, however, is not a legal requirement and is therefore not a legal pre-requisite for instituting criminal proceedings. Criminal proceedings can be commenced even without a prior notice of violation.
- ✓ **No requirement for prior civil proceedings.** There is no requirement to institute civil proceedings before commencing criminal proceedings.
- ✓ **Drafting charges and trial procedure.** The rules under the MCA apply:
- ✓ **Reporting of cases.** The practice has been that aggrieved members of the public or interested environmental concern groups report a case to a lead agency, the District Environment Office or NEMA headquarters. In the near future, cases will also be reported to the Police.
- ✓ **Investigations.** Environmental inspectors play a key role to gather scientific evidence and make reports. These are some of the expert witnesses the courts should expect to see commonly, testifying in environmental hearings. Even when the Police takes over the investigations, as will be the case, the Environmental Inspectors will continue to play a crucial role together with them. The Inspectors assist to identify key witnesses and exhibits. Already, NEMA has been using Police Photographers to take photographs.
- ✓ **Exhibits.** The documentary and exhibits the courts should expect to see will include-

reports of the Environment Inspectors-laboratory reports-photographs-maps.

- ✓ **Decision to prosecute.** The decision to prosecute is by the DPP, but NEMA plays an important role. In future, other players and lead agencies should be able to inform and bring to notice the police and DPP.

- ✓ **Use of criminal summons.** Environmental offences are not committed by "criminals" in the normal sense of the word. The people who commit environmental crimes are respected members of society like factory managers and proprietors, mayors of local authorities, etc. What will happen in practice is that the case will be registered and a criminal summons applied for. An arrest warrant will be sought and prosecution commences.

- ✓ **Jurisdiction and bail.** The offences are triable andailable by a Magistrate Grade 1 or Chief Magistrate.

- ✓ **Trials.** These will be characterized by scientific evidence to prove ingredients. A lot of background study will be expected of the Prosecutors.

- ✓ **Punishments.** Most offences are punishable with a fine, imprisonment or both. However, under S. 106 of the NES, the court *may* in addition to *any* other orders, order
 - (a) that the substance, equipment and appliance used in the commission of the offence be forfeited to the state;
 - (b) that *any* license, permit or other authorization given under the Statute and to which the offence relates be cancelled;
 - (c) that the accused do community work which promotes the protection of the environment;
 - (d) issuance of an environmental restoration order against the accused under Part 1 of the Statute.