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SUBJECTIVITY IN THE LOGIC OF ZAMBIA'S ENVIRONMENTAL IMPACT ASSESSMENTS (EIA) PROCESS: THE BEDROCK OF CONTROVERSIAL EIA APPROVALS

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1

INTRODUCTION

1.1 Brief Background

The motivation to undertake an analytical scrutiny of the EIA rules in Zambia derives from the controversial decision to approve the establishment of a large scale open-pit mine (the Kangaluwi Copper Mine) in the Lower Zambezi National Park. This matter raised a lot of controversy and a public outcry that also made international news headlines.¹ Environmental organizations like Worldwide Fund for Nature (WWF) Zambia, Civil Society Organizations (CSOs), a host of individual environmentalists and high profiled Zambian citizens, drawing upon their Constitutional rights,² led a public campaign against the development. A group of individual activists even attempted to halt this development through litigation in what became a protracted court case which was thrown out by the Lusaka High Court on a technicality.³ By the time of writing this article, the appeal against the High Court dismissal was also thrown out by the Court of Appeal.

On behalf of the Lower Zambezi Tourism Association, an evaluation report was published in which a number of flaws were identified in the approval of the mining project, inter alia, critical legislative and policy gaps in the evaluation, approval and management of mining within protected areas in Zambia.⁴ The comments and opinions that characterized the public protest against this development revealed a number of sentiments; some Zambians have interpreted the approval as an act of political interference in the regulatory business of the

Zambia Environmental Management Agency (ZEMA), CSOs have accused government of prioritizing economic development at the expense of environmental protection, while others see the controversial decision as a capacity weakness on the regulator's part – describing the Zambia Environmental Management Agency (ZEMA) as a lion that roars but does not bite.

Meanwhile, some legal scholarly experts have called for a review of the EIA rules particularly owing to a number of omissions, mistakes and errors inherent in the rules.⁵ While this paper considers the said omissions, errors and mistakes as part of the broad array of challenges in Zambia's EIA process, the narrow focus of analysis in this paper is on the form and character of the rules, the subjective regulatory culture created by the rules in practice, and the controversial approval system that emerges out of this subjective regulatory culture. The authors propose that, the mischief of regulatory subjectivity in the current rules should be cured or they may be carried forward in the proposed new set of EIA regulations. Such a perpetuation would be likened to pouring old wine in new skins.

The Lower Zambezi case is neither the first nor the last case of the sort exemplifying such controversies. It features in the introduction herein only because the case raised the highest level of controversial EIA approvals ever seen in Zambia; and as such, it becomes the first case in which the approval was legally challenged in a protracted litigation to the height of the Court of Appeal. This paper is not a case commentary on the Lower Zambezi case, which, by the time of writing this article had been dismissed on appeals technicalities, for the second time, but this time by the Court of Appeal. Nothing in this paper should be construed as advancing an argument in support of, or in antagonism to, the development of large-scale open-pit mining operations in a national park. Rather, the paper attempts to analyze the root of such controversies and further demonstrate that such controversies in the EIA approval system will be

1 Cecilia Jasmine (The Mining Intelligence), 'Zambia Scraps Plans to Build Giant Copper Mine in National Park' <<https://www.mining.com/zambia-scraps-plans-to-build-giant-copper-mine-in-national-park/>>.

2 The Constitution of Zambia (Amendment) Act No. 2 of 2016, Art 256.

3 Vincent Ziba and Five others vs the Attorney General and Mwembeshi Resources Limited (2019) HCZ 2014/HP/A006.

4 Kelly Leigh, Evaluation Report: Kangaluwi Open-pit Copper Mine in the Lower Zambezi National Park (Lower Zambezi Tourism Association, November 2014) 4.

5 Proceed Munatsa, 'The Law and Practice of Environmental Impact Assessments (EIAs) in Zambia: Strengths and Weaknesses' (2015) VI (6) International Journal of Politics and Good Governance 1-9, 8.

inevitable for as long as the current subjectivity in the rules subsist.

The analysis proceeds in the first part to explain the statutory foundations of EIAs in Zambia. More than just a mere descriptive narrative of this foundation, the paper analyzes how the culture of regulatory subjectivity is bred right from the statutory foundations of EIAs. In the second part, the paper delves into the gist of the matter to undertake a critical examination of the substantive EIA rules themselves, the pre-authorization mechanism and the subjective regulatory culture that emerges out of this mechanism in the practice of EIAs. That public participation is a crucial part of the approval process, the third part involves analysis of the different values of public participation in EIAs from a Constitutional, statutory, regulatory and case law perspective. In essence, the paper attempts to demonstrate how the subjective clash of values in the EIA process impairs public participation. The paper concludes with a reiteration of its *locus classicus*; that EIA controversies and the contested approvals that flow from the process are themselves symptomatic of the subjectivity in the EIA rules.

In theory, the EIA rules are ostensibly comprehensive with respect to their object and scope. This aspect of EIA administration in Zambia was lauded as a strength in the legal scholarly analysis by Proceed Munatsa in 2015.⁶ But with a much deeper focus on the form of the rules mirrored against actual EIA practices on the ground, it is found that these rules create a highly subjective approval system bereft of objective scientific standards of regulation. In effect, Munatsa rightly observes that EIAs in practice are not as 'effective' as they are ostensibly presented on paper.⁷ Effectiveness in the context of this analysis is in reference to the extent to which EIAs in Zambia can enforce the precautionary and prevention principles of environmental law within the object of environmental management.⁸

As such, the paper proposes that the subjectivity in the approval system can be cured through standards

⁶ *ibid* 7.

⁷ *ibid* 8.

⁸ Two of the functional principles of environmental management upon which the Environmental Management Act, 2011, is founded.

that set scientific criteria for decision-making rather than a reliance on opinion-based comments and value-based judgements. The authors hope that the proposed new set of EIA regulations will cure the mischief of subjectivity in the current rules if not to overhaul them completely. Specifically, the authors hope the proposed new set of regulations will reflect the standard-based system envisioned by the then Environmental Council of Zambia (ECZ) some twenty years ago;⁹ i.e. (i) the need to develop sector-specific guidelines for preparing EIAs;¹⁰ (ii) the need to continue improving professional competence of personnel involved in undertaking EIAs;¹¹ (iii) the need for legislation to ensure economic and political independence in EIA assessments;¹² (iv) the need to review the quality and level of public participation especially in deriving management options;¹³ (v) the need to develop a set of priority indicators based on environmental physical, chemical or biological measures,¹⁴ and (vi) the need for the regulations to incorporate a review stage in the EIA process, during which independent experts give their point of view in respect to the EIA of any project,¹⁵ and (vii) the need for the ECZ and authorizing agents to initiate review and monitoring of projects that have entered implementation stage.¹⁶

2 SUBJECTIVITY IN THE STATUTORY FOUNDATIONS OF EIAs IN ZAMBIA

2.1 Environmental Management Act 2011

The spirit of EIAs in Zambia derives from the general object of the Environmental Management Act No.12 of 2011 (herein truncated as EMA); to promote

⁹ ECZ, *State of the Environment in Zambia 2000* (Environmental Council of Zambia, Lusaka 2001), 150-151.

¹⁰ *ibid* 152.

¹¹ *ibid* 152.

¹² *ibid* 152.

¹³ *ibid* 152.

¹⁴ *ibid* 153.

¹⁵ *ibid* 153.

¹⁶ *ibid* 154.

integrated environmental management, to protect and conserve the natural environment and to promote sustainable management of natural resources.¹⁷ EIAs are also conceived as tools for prevention and control of pollution and environmental degradation.¹⁸ EIAs are designed to provide an avenue for public participation in environmental decision-making and access to environmental information while establishing baselines for environmental monitoring and auditing.¹⁹ It is within this logic that EIAs in practice are designed to be an enforcement and implementation mechanism for the precautionary and prevention principles of environmental law; the two principles which, if effectively enforced and implemented, guarantee the safety of the public from negative effects of development projects in attaining the right to a safe, clean and healthy environment.²⁰ Essentially, the precautionary and prevention principles are directing principles with an objective to realize the right to a safe environment, failure to which, they become political slogans for achievement of ambiguous policy goals.²¹ The precautionary and prevention principles are defined in Article 255 of the Constitution of Zambia as;

Where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation [the precautionary principle];²² origin, quality, methods of production, harvesting and processing of natural resources shall be regulated²³

A much more elaborate definition of the principle of prevention is enacted in the EMA as:

Adverse effects shall be prevented and minimized through long-term and integrated planning and the coordination, integration and co-operation of efforts, which consider the entire environment as a whole²⁴

While scientific certainty and/or a lack of it underpins the precautionary principle, planning and decision-making underpins the principle of prevention. Should the determination of environmental risk using scientific certainty and/or a lack of it, and should the planning and decision-making upon which environmental risk management is based be subjective and controversial matters, the effectiveness of the precautionary and preventative principles in practice becomes contestable. Ordinarily, therefore, EIA rules are expected to enforce a scientific based approval system in order to cure subjectivity that may come with determination of environmental risk and the planning and decision-making that are attendant to it. Inevitably, scientific certainty, planning and decision-making such pivotal elements in the enforcement of the precautionary and prevention principles that the entire EIA process and practice revolve around the two elements.

As such, in section 29, the law prohibits undertaking any project that may have an impact on the environment without written approval of the Zambia Environmental Management Agency (ZEMA – herein referred to as the Agency).²⁵ The legal form of the term ‘may’ have an impact signifies the uncertainty that comes with prediction and determination of environmental risks in practice. It throws, especially, the application of the precautionary principle into subjective political, economic, ecological and cultural contestations.²⁶ This can be evinced from the effect of the provision in practice that that the law does not necessarily prohibit projects but only prohibits them if they do not have written approval. As such, the approval itself must be based on an accurate or scientifically sound basis of predicting and determining environmental risks. The safeguard, therefore, comes with the stringency of conditions set out in the approval

17 The Environmental Management Act No.12 2011, preamble.

18 *ibid* preamble.

19 *ibid* preamble.

20 *ibid* s4.

21 Nicolas De Sadeleer, *Environmental Principles: From Political Slogan to Legal Rules* (Oxford University Press 2002) 255-256.

22 The Constitution of Zambia (n 2), Art 255(c).

23 *ibid* Art 255(j).

24 The Environmental Management Act No.12, 2011, s6 (b).

25 *ibid* s29 (1).

26 De Sadeleer (n 21) 256.

according to the second part of subsection 1 of section twenty-nine.

Subsection 2 makes the regulatory instruments clear; the approval must come in form of a license or permit in which conditions are stipulated dictating how to proceed with the approved project. These conditions are the hallmark of EIA regulations to be analyzed further in the proceeding discussion. But in subsection 3, the Agency may delegate its approval functions to an appropriate authority. In theory, the delegated authority holds the scientific expertise to be relied upon in deciding the matter under review. The practice, however, is different. Meanwhile, the legal form of subsection 4 demonstrates the foundation of subjectivity in this approval:

The Agency shall not grant an approval in respect of a project if the Agency ‘considers’ that the implementation of the project would bring about adverse effects or that the mitigation measures may be inadequate to satisfactorily mitigate the adverse effects of the proposed project.

The logic of subsection 4 implicitly posits that proposed projects do not come with an inherent risk of adverse effect on the environment. But this risk is inherently associated with how the project is planned to be implemented. As such, environmental risk lies with the implementation of the proposed project and not with the nature and scope of the project itself. This is already a subjective matter from ecological, economic, political and cultural perspectives of the many Zambians who may be interested in, and affected by, a proposed development project. This should explain the phrasing of the foundational section 29 in which the law prohibits undertaking any project that ‘may’ have an impact on the environment without written approval of the Agency. Essentially, project approval is based on how the Agency ‘considers’ the implementation design of a proposed project, and not necessarily the scientific certainty that can be gleaned from the nature and scope of the project itself against a particular environment. This premise became an important basis of legal argument in the EIA case of Zambia Community Based Natural Resource Management Forum and other vs the Attorney General and Mwembeshi Resources Limited - as the second defendant successfully argued that: ‘[t]here is

no law that prevented a party from being issued with a mining license before completion of an EIA. What was forbidden was to commence mining operations before the EIA.’²⁷

From the foregoing legal argument, the project proponent only needs to prove, in pre-approval theory, that their practices vis-à-vis project operation will be conducted in such a way that it significantly reduces or eliminates the risk of causing adverse effects on the environment during its operation. From regulatory ethos, the prediction and determination of whether a proposed project ‘may’ have adverse effects on the environment is subjective if not based on scientific certainty. Ordinarily, EIA regulations, being a set of detailed rules enforcing the statutory object in practice, are expected to cure the subjectivity wrought in the statutory legal text.

As was rightly held by the judge in the case cited, EIAs are widespread public interest matters.²⁸ They inevitably provoke public conflicts of interests, contestations and grievances especially after approval. As such, the judge held that this was enough reason to believe that such matters needed to be determined on their merits.²⁹ Reference to ‘merit’ in this case hinged on the plausibility of scientific certainty regarding the reality of a causal link between the proposed project activities and the negative effects such activities would cause on the complainants, the surrounding communities and on the environment in general.

Recognizing the public-interest nature of EIAs, legal drafters saw it fit to provide, in subsection 5, a procedural right to any persons aggrieved with the granting or refusal to grant an approval under the law to, within fourteen days of that decision, lodge an appeal in accordance with Part X. The part X appeal system revolves around three processes; firstly, the aggrieved may apply to the board of the Agency for review of the decision or direction within thirty days;³⁰

27 Zambia Community Based Natural Resource Management Forum and Five others vs the Attorney General and Mwembeshi Resources Limited, 2014/HP/A.006, April 2014, pg 15.

28 *ibid* 8.

29 *ibid* 12.

30 The Environmental Management Act, s112.

secondly, and given that the board may dismiss the application for review under section 113, the aggrieved may appeal to the Minister who also may dismiss or consider the appeal, and the Minister may also refer the application or appeal back to the board;³¹ and thirdly, any person not satisfied with the Minister may appeal to the High Court of Zambia.³²

Problems begin when the Minister fails, for whatever reasons, to settle grievances against an EIA approval, and refers the matter back to the board of the Agency who, in the first place, may have given an unsatisfactory verdict which prompted the aggrieved persons to appeal to the Minister. Secondly, the process becomes controversial when the Minister disregards the scientific findings and recommendations of the person(s) assigned to conduct an inquiry. Rightly so, the law makes it clear that such inquiry findings and recommendations are not preemptory and cannot be binding on the Minister.³³ In essence, the Minister is not under an obligation to heed the findings or recommendations of the inquiry notwithstanding the fact that this may be an expert-based scientific inquiry. The legality of this provision was interpreted literally and upheld by High Court stating that '[t]he Minister of Lands is not bound by findings and recommendations of the person conducting the inquiry when determining an appeal or review'.³⁴

On the one hand, there is a legally weak caveat safeguarding the Minister's potential abuse of statutory powers by directing that the Minister shall have regard to the purpose of the Act in determining any application for review. But on the other hand, the Minister shall not be bound by the expert opinion expressed in the inquiry recommendations. The Ministerial discretion to disregard expert recommendation sits at odds with the precautionary principle whose bedrock is scientific certainty and/or lack of it in decision-making. In practice, therefore, the Ministerial discretion to disregard expert scientific inquiries, findings and/or recommendations shuts the fulcrum of scientific certainty, planning and decision-making in the enforcement and

implementation of the precautionary and prevention principles of environmental law. The exercise of this ministerial discretion in practice strangles the precautionary principle at its birth. As such, it turns the EIA process into a subjective, controversial and highly contested system on the part of those that do not agree with the Minister - the very reason why matters are escalated to the High Court of Zambia, in the hope that the courts will cure the subjectivity in the EIA approval. Yet the courts must adjudicate these matters by reference to the very statute that originate the subjectivity.

While section 29 of the EMA generally provides and defines the normative culture of EIAs in Zambia, section 30 empowers the Minister to make regulations for the effective administration of Strategic Environmental Assessments (SEA) and EIAs. These regulations are meant to categorize projects which are considered to have an effect on the environment, and those which are required mandatorily to conduct an EIA.³⁵ Ostensibly, the spirit of section 30 is to limit subjectivity in the approval process by creating some guiding criteria of indicators which EIA statutory regulations must enforce in practice.

2.2 Mines and Minerals Development Act 2015 and S.I No. 29 of 1997

EIAs in the Mines and Minerals Development Act 2015 are specifically tailored to regulate safety, health and environmental protection in mining operations.³⁶ It borrows its substantive definition of EIA from the EMA as the principal legislation on environmental matters in general and on EIAs in particular. As such, the Directors of Mines Safety and the Agency may cause such impact studies to be carried out when considered necessary.³⁷

EIAs in mining operations are regulated by a principle norm that the exploitation of minerals shall ensure safety, health and environmental protection.³⁸ This principle has a material effect on the approval of mining

31 *ibid* s115.

32 *ibid* s116.

33 *ibid* s115 (2) c.

34 Zambia Community Based Natural Resource Management Forum (n 27) 15.

35 Environmental Management Act, s30 (2) a.

36 The Mines and Minerals Development Act No.7 of 2015, preamble.

37 *ibid* s80 (2).

38 *ibid* s4 (c).

operations; so grave that a mining license cannot be issued, and effectively, mining operations cannot be permitted without prior satisfactory EIA approval from the Agency.³⁹ Further, the role of the Director of Mines Safety in EIAs is bound by section 39 of EMA which enacts that; an appropriate authority shall not issue or grant any license, permit or any other authorization for the doing of any activity by any person, which may have an adverse effect on the environment, before the appropriate authority first consults the Agency as to whether the issuing or grant of the license, permit or other authorization will have an adverse effect on the environment.

Unlike the EIA process under the EMA and its attendant regulations, the mining-EIA process makes peremptory rules in respect of who qualifies to conduct an EIA in practice.⁴⁰ This plays a crucial gate-keeping role regulating the entry into EIA professional practice and conduct – a missing link in the ZEMA EIA regulations which has been a subject of controversial contestations. The Mining-EIA regulations require qualified scientists to conduct scientific studies as part of the specialized Mining-EIA.⁴¹ The enforcement and implementation of the precautionary and prevention principles in this case cannot be contested. The requirement for environmental scientists to conduct scientific studies upon which planning and decision-making should be based significantly reduces room for subjective approvals and decision-making in the mining-EIAs. As such, the Mines and Minerals Development Act and its concomitant EIA regulations are not subject of this analysis.

2.3 Environmental Protection and Pollution Control Act 1990

The repealed Environmental Protection and Pollution Control Act (herein truncated as EPPCA) contains no specific provisions to establish EIA as a legal/regulatory mechanism for environmental protection and pollution control. Section 96, however, provides for the Minister's discretionary powers to make regulations, by statutory instrument, for anything

which had to be prescribed under the Act for the protection of any aspect of the environment and for the control of pollution in the environment. The current EIA regulations in force (the EIA Regulations, S.I No.28 of 1997) derive from this provision yet they remain in force by virtue section 15 of the Interpretations and General Provisions, Chapter Two of the Laws of Zambia.⁴² The regulations derive their subsidiary authority from the exercise of powers contained in sections 6 and 96 of the EPPCA. Section 6 establishes functions of the Environmental Council of Zambia (ECZ the Council) under which the Council was mandated to, inter alia, conduct studies and make recommendations on standards relating to the improvement of the environment and maintenance of a sound ecological system. In effect, the theoretical aspirations of the EIA regulations are defined by, and derive from, the repealed EPPCA, the practical effects of EIA are envisioned from the spirit of EMA. But while there is no illegality regarding such arrangements according to the Laws of Zambia, the EIA regulations in practice presents lacunas, weaknesses and inconsistencies associated with the very reasons why the EPPCA was repealed and replaced in the first place. The discussion now narrows down to examine the EIA regulations and the process it establishes in detail.

3 EIA REGULATIONS, PROCESS AND PRACTICE

3.1 The EIA Regulatory Framework

The EIA review process is regulated by the Environmental Protection and Pollution Control

³⁹ *ibid* s25 (a).

⁴⁰ The Mines and Minerals (Environmental) Regulations, S.I No. 29 of 1997, reg 4.

⁴¹ *ibid* reg 3(b).

⁴² Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder.

(Environmental Impact Assessment) Regulations, S.I No 28 of 1997 (herein referred to as the EIA Regulations). The process begins with submission of six copies of a complete project brief to the Agency according to regulation 5. The project is then transmitted to the authorizing agency within seven days for comments. If the Agency is satisfied that the project will have no significant impact on the environment, or that the project discloses sufficient mitigation measures to ensure ‘acceptability’ of the anticipated impacts, the Agency shall, within forty days of receiving the project brief from the developer, issue a decision letter, with conditions as appropriate, to the effect, to the authorizing agency.⁴³ While the meaning of ‘acceptability’ in this context is the key basis for decision-making, there is no scientific criteria outlined within the regulatory process and in practice to determine ‘acceptability’. What is presented in both EIA process on paper and in practice is that the developer only needs to outline sufficient mitigation measures against the predicted impacts in order to guarantee approval of the project brief. As the case is, it is the developer who predicts, calculates, assesses and determines environmental risk and presents to the Agency together with what the developer proposes as mitigation measures.

This logic in the EIA process has a significant relationship to the conscious or unconscious conception environmental risk implicit in the drafters’ minds – that environmental risk comes with the implementation of the project and not necessarily inherent in the nature and scope of the project idea as it relates to the type of environment in which the project is to be operated. This reduces opportunities for relying on scientific certainty for planning and decision-making on the part of the Agency mandated to enforce and implement the precautionary principle. The members of public who dispute this logic, seeing it as illogical against the precautionary principle, undertake all necessary steps to contest what they view as controversial EIA approvals arising out of this logic. The claim of the appellants (being a group of environmental organizations) in the Zambia Community Based Natural Resources Management

Forum EIA High Court case was fundamentally premised on this argument.⁴⁴

But where the Agency determines that the project is likely to have significant impacts on the environment, it shall require that an Environmental Impact Statement (EIS) be prepared in accordance with the regulations, and shall inform the developer accordingly within forty days of receiving the project brief from the developer.⁴⁵ Following the sequential order of regulations five to seven, a project brief is the primary document upon which the Agency determines whether a project satisfies the ‘acceptability’ threshold to proceed with a project brief or to be subjected to an Environmental Impact Statement (EIS). In practice, this is an expensive undertaking for Second Schedule projects (Large scale projects requiring an EIA under regulation 7) owing to the fact that every project must first develop a project brief before the Agency can determine, from that brief, whether the project requires to be subjected to a full EIA or not. To avert the huge cost that come with such a requirement, project developers and their EIA consultants use their discretionary judgements to decide, by themselves, whether their projects require a project brief (under the First Schedule) or a full EIA under the Second Schedule. This has yet raised questions – in whose powers does the decision to undertake a Project Brief or full EIA lie? In the EIA regulations, it is clearly the Agency, based upon the scrutiny of a Project Brief. But in practice, the project developers and their EIA consultants make the decision.

Rightly so, developers and their EIA consultants are guided by the two regulatory Schedules provided by the Agency to determine which projects need a Project Brief and which ones require a full EIA. On the one hand, regulations 5 to 7 are peremptory mandating all projects to start with a Project Brief which, according to both the explicit definition of ‘Project Brief’⁴⁶ and the spirit of regulation 7, is the first step in the EIA

⁴³ Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, S.I No.28 of 1997, reg 6(2).

⁴⁴ Zambia Community Based Natural Resources Management Forum and Five others (n 27) pg 3-4.

⁴⁵ EIA Regulations (n 43) reg 7.

⁴⁶ Project Brief means a report made by the developer including preliminary predictions of possible impacts of a proposed project on the environment and constituting the first stage in the environmental impact assessment process.

process irrespective of the nature and scope of the proposed project. On the other hand however, the First and Second Schedules explicitly guide the developers to judge their own projects regarding whether such projects require a mere Project Brief or a full EIA. At the same time, the determination of whether a project requires a Project Brief or full EIA is the discretion of the Agency based on the assessment of the ‘acceptability’ of predicted environmental risks and their impacts in the submitted Project Brief, according to regulation 7.

For those projects requiring a full EIA, part IV of the EIA regulations outlines a detailed review process in which the developer is required to submit twelve copies of the EIS to the Agency.⁴⁷ The twelve copies are meant to be distributed to a host of interested and/or affected stakeholders outlined in regulation 16 such as; the relevant ministries, local government units, parastatals, non-governmental and community-based organizations, all of which, are not required to conduct their own independent scientific assessments against the proposed project, but only required to comment on the submitted EIS based on their own opined perspectives. The submitted EIS is entered into a registry of EIAs and within seven days, the Agency transmits a single copy of the EIA to the authorizing agency for comments.⁴⁸ The authorizing agency or another authority the Agency is working with has the discretion to carry out such procedures as deemed appropriate. In the spirit of the precautionary and prevention principles, it would ordinarily be expected that such procedures be independent scientific assessments to provide checks and balances against the developers’ assessments and prediction of environmental risk and impacts in the submitted EIS. But in practice, the other authorizing agencies only offer comments based on their opinions regarding their perspective of the proposed project after reading the submitted copy of the EIS as required under regulation 15.

Should the developer’s EIS be rejected based on opinions of other authorizing agencies, the developer has legitimate grounds to challenge such a decision; to

argue that his/her project has been rejected based on opinions rather than scientific assessment. Such an argument become even stronger when the developer presents the best available technology to substantiate the scientific certainty which the Agency and other authorizing agencies may not be able to provide in justification of the precautionary principle.

Should such contentious issues arise at a preliminary stage of EIA process, the Agency has a discretion to organize or cause to organize public hearings in the locality of the proposed project.⁴⁹ According to regulation 17, the Agency shall consider the EIS and all comments it has received under regulations 15 and 16 to determine whether to issue a decision letter in accordance with regulation 21 (issue of letter of decision by the Agency) if the Agency is of the ‘opinion’ that it will reach a fair and just decision through a public hearing,⁵⁰ or if the Agency considers it necessary to protect the environment.⁵¹ In the said public hearings, the Agency shall appoint a person who, in its opinion, is qualified to preside over the public hearing and who shall serve on such terms and conditions as may be agreed between the Council and the person so appointed.⁵² The person appointed to preside over the public hearing shall, within fifteen days from the termination of the public hearing, make a report of his findings to the Agency.⁵³

A few concerns arise out of this process and the seriousness of these concerns is seen in the practical implications of EIA conduct:

Firstly, there is a high level of discretionary judgements that both the Agency and the other authorities have to rely on. This discretion is created by the weak form of the legal language used throughout the review process such as – the use of ‘may’, ‘consider’ and ‘opinion’. It weakens the bindingness of the process while creating room for the Agency to rely on its own discretionary opinions, administrative procedures and subjective judgements.

⁴⁷ EIA Regulations (n 43) reg 14 (1).

⁴⁸ *ibid* reg 15.

⁴⁹ *ibid* reg 16 (2).

⁵⁰ *ibid* reg 17(2) a.

⁵¹ *ibid* reg 17(2) b.

⁵² *ibid* reg 18(2).

⁵³ *ibid* reg 18(4).

Secondly, and related to the first, the Agency does not demonstrate its own independent technical/scientific authority, capacity and strengths in assessing, examining, monitoring and evaluating environmental risks and impacts. Rather, the framework clearly dictates the Agency's reliance on; i) the comments of other authorizing agencies or authorities such as, the local authorities and line Ministries in their comments: it is not clear what happens if the other authorizing agencies have a dissenting view opposed to the Agency's approval, ii) the developers' own propositions in the EIS or project brief, iii) comments and submissions from public hearings, and iv) report of the appointed person presiding over the public hearings.

While this may be a good sign of democratic environmental governance in normative terms, it also depicts the technical weaknesses of the Agency lacking strong scientific standards in environmental decision-making. This weakness creates regulatory subjectivity evinced in EIA approval disputations and contested decisions. If, as the case is, there is a technical committee of reviewers the Agency relies on, the EIA regulations do not outline the selection and criteria used to select the members of that committee. What qualifications should the reviewers possess seeing that EIAs arise out more than thirty socio-technical, socio-environmental and scientific specialties listed in the First, Second and Third Schedules of the regulations in tandem with regulations 3 and 7? These questions are answered through the Agency's administrative procedures which does not cure the subjectivity in the approval process, but reinforces it.

Thirdly, how does the Agency deal with all the public comments it receives from an EIS? Administrative practice shows that the Agency categorizes these comments into what it deems crucial and those that are considered more opinionated than technical. Understandably, it is practically impossible to give equal consideration to all the comments, as conflicting as they may be, at any time. But if comments of a section of interested and affected parties could be considered and treated as less important 'opinions', what does public participation mean to those whose comments are judged 'less important'? Experience also shows that it is the section of the interested and affected parties whose comments and views might have been considered 'less important' who actually contest and

appeal against the Agency's decisions even to the High Court.

Fourthly, the professional conduct of EIAs themselves is increasingly becoming questionable. Unlike the Mining-EIA regulations which are peremptory on the environmental and mining scientists mandated to conduct an EIA, including their qualifications and experience, the ZEMA EIA process has grey areas in this respect. The developer decides but does not determine who should conduct their EIA according to regulation 9. The developer submits names and qualifications of persons that must prepare the EIS but the Agency has a discretion to approve and/or reject the proposed names without providing a criteria for approving and/or rejecting the names of EIA consultants. Further, the Agency gives justificatory reasons for any rejection of proposed EIA consultants but it is not mandated to provide justificatory rationale for who qualifies to conduct an EIA.⁵⁴ In the event of rejected names, the Agency shall request that another name be submitted for consideration, yet no specifications are given as to what criteria such a counter-proposed name should satisfy. In essence, the Agency has an administrative, not a legal, discretion to decide who should, and who should not, conduct EIAs in Zambia.

3.2 Public Participation

Notwithstanding the fact that public participation lacks a globally-agreed definition, it actually presents a divergence of definitions, often contested, from a plethora of perspectives.⁵⁵ The Constitution of Zambia does not provide a conceptual meaning of public participation, neither does the EMA nor the EIA Regulations themselves provide a statutory working definition of public participation. It is helpful enough for this analysis, however, that the Constitution of Zambia, EMA and the EIA regulations provide a clear conceptual perspective of the value of public participation. This value is rooted, firstly, in the normative perspective of public participation enshrined in Article 255 of the

⁵⁴ *ibid* reg 9(3).

⁵⁵ Anne Glucker and others, 'Public Participation in Environmental Impact Assessment: Why, Who and How?' (2013) 43 *Environmental Impact Assessment Review* 104-111, 105.

Constitution, i.e. effective participation of people in the development of policies, plans and programs;⁵⁶ secondly, in the normative perspective enacted as a right to information which is intricately associated with the right to be informed in section 91 of the EMA, and thirdly, in the instrumental perspective of regulation 10 of the EIA regulations.

The normative perspective value holds public participation as an avenue for influencing decision-making in environmental matters, to enhance the democratic capacity and social learning of the interested and affected parties.⁵⁷ On the other hand, the instrumental perspective value holds public participation as an avenue for generating legitimacy in the decision-making process, a conflict resolution mechanism and a means of reflection in respect of what benefits or risks a proposed project brings to the fore.⁵⁸ In practice, however, there is an ostensible combination of the two perspective values in EIA. This combination is somewhat an inevitable overlap more for the sake of augmenting each other's' goals than to create an antagonism.⁵⁹ But the challenge comes when these two values clash in the approval process and in the courts.

It is common knowledge that courts in Zambia rely more on statutes [enacted with a strong normative values of public participation] than on provisions of the regulations [with an instrumental value]. Therefore, when Honourable Justice Kondolo reiterated that an EIA case whose magnitude revolved around a large-scale mining operation evoked great public interest,⁶⁰ he was indirectly referencing respect for both the normative and instrumental values of public participation vested in those members of public interested in, and affected by, the proposed project. But unlike the instrumental perspective, the normative perspective drives even the people who are not directly affected by the proposed project to contest an EIA

approval. The Zambia Community Based Natural Resource Management Forum case⁶¹ typifies this scenario - as the first five appellants represented a group of environmental organizations who were not directly affected by the proposed project. Meanwhile, the perspective value of public participation in the EIA Regulations is purely instrumental and contrasts the purely normative perspective values of public participation enshrined in the Constitution and in the EMA.

Regulation 8 requires that a developer ensures that public views are taken into account during the preparation of the Terms of Reference for an EIS. The use of the term 'ensure' is itself a weaker form of legal language by which the developer is required to show commitment or effort in incorporating public views in their plans. As such, the compliance requirement on the developer's part is to simply demonstrate 'effort' and show 'commitment' not a substantively positive obligation to take public views into account. In effect, the developer cannot be liable for failure to take public views into account as the provision only requires them to demonstrate effort, as long as they are able to show that they did undertake all practicable steps to do so.

In the final analysis, public participation is stripped off its value and remains at the mercy (or at the discretion) of the developer's 'effort' or 'commitment' rather than a substantively mandatory requirement to take public views on board. This lacuna in the practice of EIAs weakens the cogency of the Constitutional normative perspective value of public participation and as enacted in section 91 of EMA. Effectively, the rules reduce a statutory 'normative right' to an 'instrumental privilege' at the mercy of the developer's effort, which effort, has an emphasis on the instrumental perspective value of public participation, especially, the use of public participation for reflection and for rubber-stamping legitimacy in the approval process. In empiricism, on the one hand, both the normative and instrumental perspectives of public participation are critiqued for creating an ambiguity which does not outline what public participation is purposed to achieve in practice.⁶² In regulatory ethos, on the other hand, this ambiguity

56 The Constitution (n 2) Art 255(l).

57 Anna Glucker and others (n 55) 106-107.

58 *ibid* 106-107.

59 Donald P Moynihan, 'Normative and Instrumental Perspectives on Public Participation: Citizen Summits in Washington, D.C' (2003) 33(2) *American Review of Public Participation* 164-188, 180.

60 Zambia Community Based Natural Resource Management Forum and Five others (n 27) pg 12.

61 *ibid* 3.

62 Donald P Moynihan (n 59) 165.

prevents the codification of clear standards by which to judge, and through which to enforce, public participation.⁶³

Ultimately, the meaning, value and effectiveness of public participation in EIA decision-making is highly contested on three fronts: Firstly, to what extent are public views, interests, opinions and concerns taken into account; secondly, who makes and determines the final approval of proposed projects when members of the public express dissenting views against the proposed project? And thirdly, there is contrast, in both theory and practice, between the instrumental value perspective in the letter of the EPPCA-based EIA regulations of 1997 and the normative value perspective in the Constitution and in the spirit of the EMA with regards to public participation. Ultimately, the instrumental value of public participation benefits the legitimization of the developers' approval more than the normative values of the public.

3.3 Decision-making

Regulation 20 provides that, in making its final decision, the Agency shall take into account the following: (i) the impact predictions made in the environmental impact statement, the predictions made by the developers themselves; (ii) the comments made under regulations 15 and 16; (iii) the report of the persons appointed to preside over a public hearing as they merely report on the comments gathered from the public hearing, and (iv) where applicable, other factors which the Agency considers crucial in the particular circumstance of the project.

As already alluded to under the review process, the Agency's decision-making is highly subjective because it is not based on scientific criteria but relies on predictions of the developer, expert and lay opinions and comments gathered from stakeholders in support of, or in opposition to, the project, together with what the Agency may consider crucial in the particular circumstance of a project. While EIAs arise out of scientific fields as stipulated in the three regulatory Schedules, the approval process is itself not scientific in tandem with the application of the precautionary

principle. Consequently, EIA approval decisions are a reflection of subjective perspectives, opinions and public comments, subjective and discretionary judgements of the Agency and other authorizing agencies. Ultimately, EIA invoke controversy, contestations and a conflict of interests.

3.4 The Believer's Perseverance Syndrome

Regulatory empiricism shows that values, norms and belief systems have the strongest influence on compliance.⁶⁴ In fact, values, norms and beliefs systems are so strong that they can be used as instrumental and consensual bases for compliance and/or non-compliance with the law.⁶⁵ In the absence of scientific criteria, peoples' normative and instrumental values, morals and belief systems inform behaviour, which in turn, shapes and influences decision-making.⁶⁶ This is referred to as the Believer's Perseverance Syndrome, i.e. a tendency for people to look primarily or exclusively for information that allows them to confirm or prove their beliefs, morals, normative or instrumental dispositions towards an issue.⁶⁷ Devoid of scientific criteria for decision-making, the EIA process in Zambia relies on the Believer's Perseverance Syndrome in which the comments, opinions, assumptions, predictions and perceptions of the Agency, members of the public and stakeholders, the developers' EIS, comments and opinions of the persons appointed to preside over public hearings, and the Minister's decision over EIA conflicts, all depict conflicting values, morals and beliefs of different people including a minister's political views.

Therefore, while conflicts of interest, controversies and disagreements are inevitable, who possesses the right to judge another person's value system, morals and beliefs other than the judge in the courts of law? Without objective EIA criteria upon which the courts can rely to resolve conflicts, controversies and disputations, the EIA process remains a subjective

⁶³ *ibid* 165.

⁶⁴ Tom Tyler, 'Methodology in Legal Research' (2007) 13(3) *Utrecht Law Review* 130-141, 133.

⁶⁵ *ibid* 137.

⁶⁶ *ibid* 133.

⁶⁷ *ibid* 139.

regulatory ethos. This explains why EIA cases lose their substantive cogence when they appear before the courts of law. They change into the claimant's and defendant's value arguments around whose values are more at risk than the other: whose values and beliefs, therefore, needs to be accorded judicial protection? At this level, EIAs are no longer fundamentally about enforcement and implementation of the precautionary and prevention principles of environmental law for environmental protection. Instead, EIAs become a subjective authorization formality to legitimize the developers' proposed projects as opposed to environmental protection.

Finally, using Julia Black's regulatory criteria, the EIA regulatory framework in Zambia fails in the following areas; (i) instrument failure due to a reliance on inappropriate regulatory instruments,⁶⁸ (ii) information failure due to lack of information about the problems being regulated,⁶⁹ evinced in the lack of scientific criteria for decision-making; (iii) implementation failure due to poor enforcement of what is commanded,⁷⁰ even the more reason why EIAs need to be regulated by a professional body, and (iv) motivation failure – meaning, those being regulated are not motivated enough to comply with the rules and can violate them without planning to do so.⁷¹

4 CONCLUSION

This paper has attempted to analyze the root of controversial approvals in the EIA legal framework of Zambia, particularly, in the EIA rules as stipulated in the Statutory Instrument No.28 of 1997. The paper finds that the legal form and character of the EIA rules, the lack of scientific criteria for evaluating

environmental risk in the proposed projects, and the clear contrast in the perspective values of public participation, create a subjective regulatory ethos. In such a framework, normative and instrumental values, ethics and belief systems become the lenses through which people subjectively view an issue before them based on their own world views to influence EIA decisions. Without science forming the basis of decision-making, EIA decisions are made subject to the divergent perspectives, opinions and comments which depict different, and often conflicting, values systems of all the interested and affected stakeholders. Ultimately, whose value system could be judged as legitimate or illegitimate? On what grounds could such normative and instrumental judgements be made? This question is ultimately reserved for the High Court judge to answer in the process of adjudicating the myriad of value-based arguments that arise out of EIA process.

In the practical essence, EIA controversies lose the technical cogency of EIA as an enforcement and implementation mechanism for the precautionary and prevention principles of environmental law and environmental management when they are presented before the judge in litigation. Under the prevailing regulatory ethos, the controversies and conflicts of interest arising out of this process are not only inevitable but understandable from the legal form of the EIA rules. To a large extent, this problem reflects the Agency's scientific capacity weaknesses locked within the framework of EIA law, and particularly, the Agency's present failure to bench-mark itself against, and to meet, the robust standards of practice set twenty years ago by the erstwhile Environmental Council of Zambia.

It is hereby proposed, therefore, that EIA regulations need not be amended but completely overhauled in order to locate their primacy in the spirit of the Constitution and the Environmental Management Act, 2011. While it is appreciated that the process of revising these rules is already under way, the risk of carrying forward the mischief of Statutory Instrument No.28, 1997, is as daunting as pouring old wine into new skins while the essence of the old wine remains the same. Therefore, the paper prays for the need to cure the subjective regulatory culture at the centre of the approval system. That the mischief is itself characterized by the legal form, nature and character of

68 Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) *Current Legal Problems* 103, 104-7.

69 *ibid* 105.

70 *ibid* 106.

71 *ibid* 107.

the rules, the development of new EIA rules should ideally revolve around the legal form, nature and character of the substantive rules themselves more than a mere revision of regulatory instruments.

The EIA rules should be enforcing an approval procedure whose fulcrum is a professional and scientific standard of practice. This further highlights two fundamental issues at play with the current EIAs in Zambia; the EIA legal procedure as managed and regulated by the Agency, and the EIA professional practice as currently managed by nobody and sub-optimally regulated by ZEMA. While ZEMA can revise the EIA rules to cure the high level of subjectivity in the approval process, pertinent questions will still linger; who should conduct EIAs in Zambia, how should they do it – what ethical, scientific and technical issues should define this practice as professional? These questions review subjective matters which, firstly, ZEMA has shown considerable lack of capacity to regulate; and secondly, as a consequence, they are matters of professional conduct from which ZEMA should rescue itself.

In addition, there is nothing within the current regulatory framework that mandates the Agency to regulate EIA professional practice. As the case is, the Agency is an interested and affected party playing the role of police, jury and judge in the approval process. This is the source of the often observed polarity that frequently emerges between the propositions and expectations of the developer and the demands of interested and affected parties; a polarity which the Agency often fails to manage. As a result, the EIA process breaks down whenever an EIA expert and the Agency fail to bridge the polarized gap between the developer's propositions and the expectations of interested and affected stakeholders.

Foregoing, it would be a professional gesture for the Agency to relinquish itself from issues of professional practice and concentrate on regulating the legal process. EIA practice should be regulated by a mandated professional body in the same manner as lawyers, doctors and engineers regulate their own professional practice through the Law Association of Zambia (LAZ), the Zambia Medical Association (ZMA) and the Engineering Institute of Zambia (EIZ), respectively. It should be the mandate of the professional body to establish professional standards

of practice around which licensed EIA practitioners will base their scientific, technical and ethical practices. The regulatory advantages such an approach brings to the fore cannot be overemphasized as it provides a decentric regulatory ethos which cures the empirically flawed assumptions of the current EIA process.

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