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Local Content and the Energy Justice Framework

3.1 Introduction

Oil and gas have been vital in the development of economies in both developing and developed regions. The energy sector has played a pivotal role in employment generation, economic development, creation of industries and creation of wealth for nations.\(^1\) The presence of oil and gas brings about the adoption and implementation of energy law. Heffron states that “the importance of energy law and environmental law is in providing legislation to manage the natural resources of a country, and in their potential for changing human and societal behaviour; another important characteristic is that of policy formulation”.\(^2\) Though energy law manages the changing human and societal behaviour towards oil and gas. But human behaviour alone is not the primary driver of energy law. Energy law has five main drivers, namely: safety, security, economics, infrastructure and justice.\(^3\) These drivers are fundamental in creating the

\(^1\)Heffron, R.J., 2014. *Energy Law: An Introduction*. Springer.

\(^2\)Ibid.

\(^3\)Heffron, R.J. and Talus, K., 2016. The evolution of energy law and energy jurisprudence: Insights for energy analysts and researchers. *Energy Research & Social Science*, 19, pp. 1–10.
foundation for local content policies to crack through the enclave nature of the oil and gas industry.

Oil and gas have an energy lifecycle, and the energy lifecycle starts from extraction, production, operation and supply, consumption and finishes at the waste management stage.\textsuperscript{4} The energy lifecycle does not exist mechanically; instead, there is a human element that engages in the creation of every stage of the energy lifecycle. This human element can also be determined as societal preferences. The changes in societal preferences encourage the different drivers of energy law in different jurisdictions dependant on the policy maker’s intentions. We are putting together societal preferences, oil and gas and the energy lifecycle. It is essential to define energy law “as the regulation of energy-related rights and duties of various stakeholders over oil and gas over the energy lifecycle”.\textsuperscript{5} Energy law is also essential for policy formulation, as much as energy law and policy is concerned with markets, the security of supply and efficiency. Justice as a driver of energy law is what will be used to create a theoretical framework that offers policy guidelines on how to crack through the enclave of the oil and gas industry, especially in developing countries. The local content policy is a production development policy, and this would call for the theoretical framework of such a policy be built under resource law and policy rather than energy law and policy.\textsuperscript{6} But justice is a driver of energy law and not resource law. The two-tier principles of energy justice, the first being the triumvirate of tenets—distribution, procedural and recognition of justice.\textsuperscript{7} The second tier will be the eight-core principles, namely: availability, affordability, due process, transparency and accountability, sustainability, intra-generational equity, inter-generational equity and responsibility.\textsuperscript{8} A

\textsuperscript{4}Ibid.
\textsuperscript{5}Heffron, R.J. and Talus, K., 2016. The evolution of energy law and energy jurisprudence: Insights for energy analysts and researchers. Energy Research & Social Science, 19, pp.1–10.
\textsuperscript{6}This is because resource law and policy deals with development policies, industrial policies as well as maximisation of government revenue.
\textsuperscript{7}Heffron, R.J. and McCauley, D., 2017. The Concept of Energy Justice Across the Disciplines. Energy Policy, 105, pp. 658–667.
\textsuperscript{8}Sovacool, B.K., Heffron, R.J., McCauley, D. and Goldthau, A., 2016. Energy Decisions Reframed as Justice and Ethical Concerns. Nature Energy, 1(5), p. 16024.
key reason as to why justice is needed in the adoption and implementation of local content policies is the susceptibility of having corrupt local content policies in an enclave oil and gas industry. That leads to catastrophic results such as having a resource curse in countries like Nigeria, The Democratic Republic of Congo and Angola. Hence to ensure fairness and equality in society, in essence, resolve inequalities, the book employs a justice framework throughout the local content adoption and implementation.

3.2 Energy Justice and Local Content Policies

Energy justice is a new interdisciplinary phenomenon that aims to apply principles of justice in energy policy, energy production and systems, energy consumption, energy activism, energy security and climate change.9 The principles of energy justice will be extended to the adoption of local content policies in this book, as a means of identifying the present injustices, extending the definitions what “local” means in local content by developing new approaches towards local content policy implementation and lastly availing remedy options for jurisdictions that have already adopted unfavourable local content policies in their energy lifecycle. Justice is a means of ensuring and recognising that all human beings are equally worthy to the distribution of good and bad things.10 As much as energy justice is to be used in understanding the distribution of ills in adopting and implementing local content policies. It is important to note that justice in energy emerged due to environmental pollution that brought about environmental justice.11

The foundation of energy justice is on the principles of environmental justice. The notion of environmental justice was developed with

9Jenkins, K., McCauley, D., Heffron, R., Stephan, H. and Rehner, R., 2016. Energy Justice: A Conceptual Review. Energy Research & Social Science, 11, pp. 174–182.
10McCauley, D.A., Heffron, R.J., Stephan, H. and Jenkins, K., 2013. Advancing Energy Justice: The Triumvirate of Tenets. International Energy Law Review, 32(3), pp. 107–110.
11Ibid.
regard to the unequal distribution of environmental ills (such as environmental pollution). Local content policies are developed for the sole purpose of creating channels for local participation as well as value addition of the raw oil and gas being extracted. Energy justice aims to avail all the individuals across all areas, with safe, affordable and sustainable energy—the principles of energy justice advocate for the synergy of energy policy across the whole energy system. The energy policy is adopted and implemented to address “the unequal distribution of ills on the whole energy lifecycle”. The merge between energy law and local content is because energy policy also advocates for social justice. Local content is a means of attaining social justice to the local population due to the presence of oil and gas. Social justice goes beyond the current government and industry concerns with regard to energy security, economic development and technology as a means of taking into account morality while making decisions.

The morality consideration in decision making, with regard to oil and gas, does not create a fair distribution of ills in the energy industry—local content policy though applicable in the regional, national and local spheres of energy resource governance. The injustices suffered by the affected or marginalised parts of society due to local content policy will not be remedied by social justice.

The theory of energy justice will ascertain the distribution of dividends and ills of the policy; the theory will further show who the local content policy benefits in the energy lifecycle whether the policy benefits the local population close to the oil and gas through the community content approach. Or whether the policy aims to benefit the whole nation that has the oil and gas through the national content policy and whether the policy follows a more cosmopolitan approach of engaging the whole region that has oil and gas through a regional content

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12 McCauley, D.A., Heffron, R.J., Stephan, H. and Jenkins, K., 2013. Advancing Energy Justice: The Triumvirate of Tenets. *International Energy Law Review*, 32(3), pp. 107–110.

13 Jenkins, K., McCauley, D. and Forman, A., 2017. Energy Justice: A Policy Approach. *Energy Policy*, 105, pp. 631–634.

14 McCauley, D.A., Heffron, R.J., Stephan, H. and Jenkins, K., 2013. Advancing Energy Justice: The Triumvirate of Tenets. *International Energy Law Review*, 32(3), pp. 107–110.

15 Heffron, R.J., Rønne, A., Tomain, J.P., Bradbrook, A. and Tálus, K., 2018. A Treatise for Energy Law. *The Journal of World Energy Law & Business*, 11(1), pp. 34–48.
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approach. The three typologies of local content need to be assessed if they have been adopted through a correct and righteous procedure that recognises all injustices and sectors of the society. This assessment can only be done through energy justice three core themes distributional justice, procedural justice and recognition justice.16

3.3 Socio-Legal Snapshot of Local Content Policies

The local content policy has been implemented as a measure to boost economic development in numerous resource-rich countries from the developed world to the developing world. These policies have been instrumental in driving economies to prosperity. But the implementation and adoption process has been a transplanted mechanism from developed countries to developing countries. This might be attributed to colossal donor dependence. But the results have not been similar in this regard. The two mechanisms of legal transplantation, namely the “copy-paste” method that purely transplants and copy-pastes the legal doctrines and framework of one jurisdiction to another. Secondly, the synchronisation-harmonisation process that goes beyond the copy-paste act. The second mechanism is an actual transition process that adapts the whole legal framework into the local legal culture then merges the legal principles into the local institutional design progressively as more models are imported.

Developing resource-rich countries are fond of adopting legal doctrines from developed countries. This is mostly due to donor dependence, international consultants and intellectual dependence on developed countries. Tanzania, Kenya, Angola, Nigeria and Uganda have adopted a national content policy similar to Norway, and Brazil. Such transplantation of the national content policy has been seen when Nigeria adopted similar policies after the discovery of their oil and gas resources with the help of NORAD (a Norwegian NGO). The case study

16Heffron, R.J., Rønne, A., Tomain, J.P., Bradbrook, A. and Talus, K., 2018. A Treatise for Energy Law. The Journal of World Energy Law & Business, 11(1), pp. 34–48.
examines as to whether other nascent developing oil and gas producers are prone to similar results as Nigeria due to the transplantation of the national content policy. This examination will assess the political, institutional, social and cultural design of these countries. At the same time, they are assessing the state of these economies before the oil and gas resources. The major hurdle is whether Kenya, Uganda and Tanzania will yield better results from the national content policy.

### 3.3.1 Distributional Justice

The first tenet of energy justice is distributional justice; Walker thinks that energy justice includes the unequal allocation of environmental benefits and ills as well as the uneven distribution of the responsibilities that are associated thereof.\(^\text{17}\) Distributional justice also advocates for the distribution of benefits and ills within the energy system. Local content policies are applicable holistically in the energy systems because from exploration to waste management in energy lifecycle, and local integration is needed to break the enclave nature of the oil and gas industry.

When adopting and implementing local content policies, a decision tree is usually adopted to this mandate. The first step in the decision tree is involved with identifying the country’s objectives. In this stage of the local content decision tree, the policy should be adopted along with the different objectives of different stakeholders, and the expectations of these stakeholders should be taken into account.\(^\text{18}\) With regard to the ideal implementation of local content policies in resource-rich countries call for mapping out the different stakeholders involved and their objectives towards the oil and gas. But principles of distributional justice can allocate the uneven distribution of ills and benefits in resource-rich countries when it comes to adopting and implementing local content policies.

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\(^{17}\)Walker, G., 2012. *Environmental justice: Concepts, Evidence and Politics*. Routledge.

\(^{18}\)Valerie Marcel and others, 2016. A Local Content Decision Tree for Emerging Producers (Energy, Environment and Resources Department Chatham House: The Royal Institute of International Affairs).
in the energy lifecycle. Oil and gas are usually found in remote, undeveloped regions of a resource-rich country. Local content policies have practically favoured the political elite instead fairly distributing the benefits of the oil and gas. Local communities in resource-rich countries have suffered the ills of the presence of oil and gas rather than their benefits. Local content policies have been used by the political elite to use patronage as a means to secure political loyalty.

### 3.3.2 Procedural Justice

Procedural justice advocates that all stakeholder within an energy system should be awarded and follow equitable procedures. Hence all stakeholders should be engaged in the energy systems in a non-discriminatory manner. The second step in the local content decision tree regards to the access to information on the resource potential and the evaluation of how the economy can absorb foreign direct investment. This step of the local content decision tree, there is a need to avail information on the national skill base, information on the industries that need support as well as the relevant infrastructure that is needed for the adequate development of oil and gas. Procedural justice advocates that in such a process, the public must be involved in decision making after been given full information on the oil and gas. Davies states that “procedure justice requires participation, impartiality and full information disclosure by the government and industry accompanies by appropriate and sympathetic mechanisms”.

In adopting and implementing local content policies, most resource-rich countries (especially in developing nations) have not been able to avail and disclose information to the public readily. Furthermore, the lack of reliable information on the available competencies within a country or region makes the multinational corporations seek outside sources since they do not know the capabilities and competence of the local suppliers.

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19Heffron, R.J., Rønne, A., Tomain, J.P., Bradbrook, A. and Talus, K., 2018. A Treatise for Energy Law. *The Journal of World Energy Law & Business*, 11(1), pp. 34–48.
20Todd, H. and Zografos, C., 2005. Justice for the environment: developing a set of indicators of environmental justice for Scotland. *Environmental Values*, 14(4), pp. 483–501.
This makes local content policies fail to take into account the long-term objectives of the economy. Due to the lack of information, it is difficult for the energy industry within a country to bring about industrialisation, economic diversification, and even strengthen value creation.

### 3.3.3 Recognition Justice

Recognition justice entails that people must be availed all political rights, as well as being free from physical threats. Recognition justice is undermined in many forms through cultural and political domination, insults, degradation and devaluation. The recognition injustice generally entails that there must be a recognition of societies norms and principles regardless of their social, cultural, ethnic, racial or gender differences. Recognition justice in the local content decision tree should be found in the strategic plan to build capacity to meet the demands of the energy sector as well as who does the monitoring and review of the local content policy within an energy resource-rich country. Recognition justice in a local content decision tree enhances the recognition of marginalised communities and groups in the oil and gas lifecycle.

When developing local content policies, the recognition of different capacity gaps within different communities facilitates the increase in coordination and efficiency of the local content policy. Most developing countries have adopted the national content approach towards the local content policy. This approach usually neglects the communities that have the oil and gas in their vicinity and concentrate on the metropolitan areas rather than the remote host communities. The community content approach towards local content also emphasises the community is having the oil and gas rather than the rest of the host country. National and community content approach do not meet the standards of recognition.

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21 Schlosberg, D., 2003. The Justice of Environmental Justice: Reconciling Equity, Recognition, and Participation in a Political Movement. *Moral and Political Reasoning in Environmental Practice* (Vol. 77, p.106).

22 Fraser, N., 2009. Social Justice in the Age of Identity Politics. *Geographic Thought: A Praxis Perspective* (pp. 72–91).

23 Ibid.
justice as other parts of the community are neglected due to the lack of having oil and gas or the unavailability of skills, capital and competence.

3.4 The Implementation of Energy Justice in Local Content Policy Adaptation and Implementation

The triumvirate of tenets of energy justice, namely distribution, procedural and recognition justice is applicable in local content policy through the adaptation of restorative justice. It should be noted that restorative justice is the only means that energy justice input into practice.

The local content policy decision tree starts with assessing the national vision of the economy. To analysing and assessing the energy resource potential, to evaluating the absorptive capacity of the economy, filling the gap to meet the demands of the energy sector that can be met by the local capacity development lastly the monitoring and review as the enforcement segment of the decision tree. Developing countries due to political capture, the lack of capital and technology, corruption and the inability of the local suppliers to meet the demands of the sophisticated energy sector. The local content policy has been characterised by massive irregularities such as rent-seeking, and local content policies have been used for political patronage. Local content policies are costly for developing countries to implement this enhances fronting, where locals use corrupt means to represent foreign multinationals. Such tendencies have created injustices for the host communities, especially in developing countries.

The injustices brought by local content policies need to be attended, and a resolution needs to be met for the adequate adoption and implementation of these policies. The only manner in which energy justice can amend the ills of local content policy is through the adaptation of restorative justice in further local content implementation. Restorative justice emanates from the presence of harm being experienced by victims or societies.24 It is rehabilitative. Thus it extends the purpose of

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24Heffron, R.J. and McCauley, D., 2017. The Concept of Energy Justice Across the Disciplines. Energy Policy, 105, pp. 658–667.
the law from being punitive to being more inclusive and rehabilititating the offenders back into society. Sullivan and Tifft state that “restorative justice makes society think about how to respond to injustices that have occurred and also in defining what injustices society give attention to in the first place”. 25

Though restorative justice has mainly been developed in criminal law, in this book restorative justice is essential in finding ways to respond to the harm being done by the adoption and implementation of inadequate local content policies. Restorative justice is the mediator on how policies can avoid political patronage, rent-seeking and fronting. These policies can facilitate economic diversification without favouring political and ethnic elites. Ovadia explains the effects of local content policies in Nigeria by stating that “there are some positive signs that the policies will have an impact across more significant segments of the Nigerian population, the benefits are stacked in favour of the elite”. Nigerian content represents a significant alteration in the political and economic structure of Nigeria’s oil and gas industry.

In comparison, the effect of Nigerian content policies on the industry will play out in a domestic and geopolitical context. The Nigerian petroleum elite has made an organised and concerted effort to design and implement policies to maximise their benefit in terms of power and wealth. Ovadia states that “If a more capitalistic economy emerges from these policies, it will be because those elites have made a conscious effort to embrace new strategies of accumulation based on the production of value for the Nigerian economy”. 26 In responding to such harms, restorative justice will force policymakers to take into account principles of energy justice while designing, adopting and implementing local content policies in throughout their energy lifecycle. Heffron and McCauley state that “in some cases, these costs of restoration would be prohibitive and consequently that energy activity would cease or not be proposed”. 27

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25Sullivan, D. and Tifft, L., 2006. Introduction: The Healing Dimension of Restorative Justice—A One-World Body. *Handbook of Restorative Justice* (pp. 1–16).

26Ovadia, J.S., 2013. The Making of Oil-Backed Local Capitalism in Nigeria. *New Political Economy*, 18(2), pp. 258–283.

27Heffron, R.J. and McCauley, D., 2017. The Concept of Energy Justice Across the Disciplines. *Energy Policy*, 105, pp. 658–667.
the application of the principle to local content policy, for this book, the national and community content policies will not be discussed as a channel for efficient integration of the local population into the energy value chain. The two policies have a considerable influence of the political elite since the national policymakers are designing the policy, making the policy vulnerable to patronage and corruption, making the policy fall short on distributional and procedural justice.

Due to the three tents of energy justice, they are not resonating with community content and national content policy. It is essential to identify how restorative can apply to local content policies. Local content policies are vital for the development of local workforce and industries suing oil and gas, through the development of forwarding and backward linkages. In this book, restorative justice is essential in developing a regional content policy and framework. The implementation of the regional content policy is done through regional cooperation among different countries. The interests of oil and gas being dealt with at a regional level can only amount to fruition if the interests of justice have been taken into account while adopting and implementing a regional content framework.

3.5 Levels of Energy Law and Restorative Justice

It should be noted that energy law is derived from three levels of law, namely international, national and local law. In the international segment, countries enter into international agreements. These agreements or international instruments become the driving force behind the energy sector among the party member states or the States that ratified the agreement. The segment is the national level of energy law, the country’s policymakers make decisions on behalf of the public with regard to energy law dependent on the aim of the government, the availability of finances and technology as well as the societal preferences at

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28 Heffron, R.J. and Talus, K., 2016. The Development of Energy Law in the 21st Century: A Paradigm Shift? The Journal of World Energy Law & Business, 9(3), pp. 189–202.
the time. Lastly is the local level of energy law, this is the smallest unit of energy law, and it is the level of energy law that involves the host community of oil and gas. In this level of energy law, individuals are personally affected by the presence of oil and gas in their community. The level of energy law applicable is the international energy law in terms of applying restorative justice principles into creating a regional content framework, whereby two or more different countries can have an agreement towards creating energy policy. The restorative justice will avail a transparent decision-making process since the eight principles of energy justice will provide the framework under which a regional content policy is created thereof.

It should be noted that restorative justice has previously been instrumental in different phenomena such as Environmental Impact Assessments, Social licence and Energy Financial Reserve Obligation. Through restorative justice the regional content policy will ensure (1) the availability of suppliers who can pool functional technical capacity to the energy industry, (2) the suppliers will avail goods and services that are affordable at an internationally competitive price, quality and readily available when needed, (3) the process of adopting and implementing a regional content policy will follow due process to avoid the loopholes found in the conventional local content policies, namely the national and community content, (4) the principles of good governance will be underpinned to minimise corruption and improve accountability among the energy industry stakeholders, (5) The regional content policy will be sustainable to adopt skills and technology that will be applicable even during the energy transition, (6) the regional content policy will avail everyone within the region that adopted the framework right to access a stake in the oil and gas through intra-generational equity as a principle of distributive justice, (7) the regional content policy also holds a moral responsibility to ensure that the exhaustion of the oil and gas within the region by the local must ensure that today’s children and future generations inherit a global environment at least no worse than the one we

29Heffron, R.J. and Talus, K., 2016. The Development of Energy Law in the 21st Century: A Paradigm Shift? The Journal of World Energy Law & Business, 9(3), pp. 189–202.
30Ibid.
received from our predecessor through principles of **inter-generational equity** and (8) the regional content policy must take into account the **responsibility** of the party States in ensuring that they create a competitive advantage for the local population while minimising the production of negative externalities.\(^{31}\)

### 3.6 Summary

Local content policies are pivotal in natural resource governance. But the demands of this industry are expensive and capital intensive, with a need for highly sophisticated skills that developing oil and gas producers do not possess. This maximises the enclave nature of the oil and gas industry, international oil and gas companies fly in with their backward and forward linkages intact minimising the depth and breadth of the oil and gas industry to other sectors of the economy. Inadvertently, hindering economic growth leading to a resource curse. This chapter addresses these issues from a conceptual basis using critical elements of justice-distributive, procedural, restorative, recognition and cosmopolitan. This interdisciplinary approach towards analysing local content policies address problems on social license to operate, cluster formations, skills pooling in cross-border actions and cooperation, accumulation of capital for the sole purpose of cracking through the enclave nature of the oil and gas industry in Sub-Saharan Africa.

There is a need for society to ensure a more equitable distribution of resources given the current state of the world due to COVID-19, energy transition and the oil price shocks of 2020. We are considering the timeline of the oil and gas life cycle and the gradual shift of investments from fossil fuels to cleaner sources of energy due to the energy transition. It is scary that the skills acquired by developing oil and gas producers in Sub-Saharan Africa might be redundant in a few years. Energy justice advocates for inter-generational and intra-generational equity. There is hope that local content can be designed, adopted and implemented in

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\(^{31}\)Sovacool, B.K. and Dworkin, M.H., 2015. Energy Justice: Conceptual Insights and Practical Applications. *Applied Energy*, 142, pp. 435–444.
light of energy justice. We can achieve a fair distribution of the benefits of our natural resource

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