



REGULATING OIL AND GAS RESOURCES BETWEEN MAINLAND TANZANIA AND TANZANIA ZANZIBAR: IS IT A LEGAL CHALLENGE?

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Abstract:

This study analyses legal challenges of the system of laws regulating oil and gas resources between Mainland Tanzania and Zanzibar. The article reviewed existing laws regulating oil and gas resources and identified that the law provides a different system for regulating oil and gas resources between Mainland Tanzania and Zanzibar. It further examines whether regulating laws are adequate to regulate oil and gas resources without resulting in new challenges. The findings show that, the duo system of laws regulating oil and gas resources between Mainland Tanzania and Zanzibar suffers from practical and operational challenges such as: Ownership and Control of Oil and Gas Resources, differences in Regulatory Institutions, powers to issuance of exploration licenses, challenges relating to legislative authority over oil and gas, Challenges relating to exploitation of offshore oil and gas resources, and challenges relating to oil and gas revenue sharing between Mainland Tanzania and Zanzibar.

The data for this study, were sourced from legal documents such as: statutes, legal text, court decisions, government bills and policies and from government ministries, officials from regulatory institutions, members of the parliament, legal practitioners (advocates), investors in the oil and gas sector, and NGOs from both parts of the Union. Documentary reviews and field interviews were used as data collection methods. Based on the findings from data analysis, the researcher proposes potential mechanisms to enable the United Republic of Tanzania (Mainland Tanzania and Zanzibar) to explore and exploit oil and gas resources without resulting in resource conflict. Therefore, the study recommends for laws regulating oil and gas resources to be amended, to provide a coordinating committee among institutions, harmonization of laws governing oil and gas resources, to establish an oil and gas revenues sharing system, and for oil and gas to remain a union resource.

Keywords:

Regulating, Oil, Gas, Resources, Challenge, Tanzania

1. Introduction

In Tanzania, oil and gas have become the most interesting resources in relation to sharing resources between Zanzibar and Mainland Tanzania. Oil and gas are sharable resources between Mainland Tanzania and Zanzibar because they are part of the list of union matters² and have been regulated by union laws for many years. However, in the long run Zanzibaris expressed their dissatisfaction with the system regulating oil and gas resources believing that the system favors Mainland Tanzania (Pedersen & Bofin, 2015). This resulted in the reforms of the Zanzibar Constitution of 1984, the petroleum Act, No. 21 of 2015 the Zanzibar oil and gas (Upstream) Act, No. 6 of 2016 which has introduced a separate system of regulating oil and gas resources in Tanzania.³ Based on such reforms, each part (Tanzania Zanzibar and Mainland Tanzania) have sovereign power over oil and gas. However, these reforms are not reflected in the Constitution of the United Republic of Tanzania, which is the main document thus posing regulatory challenges. Therefore, the present study analyzes challenges caused by the mentioned existing contradiction.

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² See first schedule of the Constitution of the United Republic of Tanzania of 1977

³ See section 2 (2) (a) (b) the Petroleum Act, No. 21 of 2015 also section 4 of the Oil and Gas (Upstream) Act, No. 6 of 2016

2. The Methods of the Study

This study was guided by doctrinal legal research and supported by empirical research. The researcher used a doctrinal research approach to collect information from documents such as: statutes, legal books, court decisions, policies and government reports. Literal and purposive interpretation of legal documents were used in relation to study objectives. The aim was to see if the law regulating oil and gas resources between Mainland Tanzania and Zanzibar is consistent and meets the intended objectives of the legislature. The researcher used data collected from interviews to complement documentary information. Thus, the researcher collected data using documentary review and interviews

The participants in this study were selected through the use of purposive sampling technique. Purposive sampling allows the researcher to use informants who have sufficient knowledge on the studied subject. The criteria for involvement in the study included experience, knowledge and skills in the oil and gas sub sector in particular to laws regulating oil and gas resources between Mainland Tanzania and Zanzibar. The rationale for using purposive sampling technique was to ensure data are collected from the most informed people. The selection of the sample was by picking respondents from identified institutions and getting informants who possess relevant knowledge and skill to the study topic (Denscombe, 2010).

Data collected from documentary review and those from field interviews were narratively presented using heading and sub heading showing legal challenges relating to oil and gas resources between Mainland Tanzania and Tanzania Zanzibar. Thus, content analysis used to present data both from documentary review and interview and inductive content analysis was employed.

2.1 The system Governing Ownership and Control of Oil and Gas Resources in Tanzania

Tanzania is a union state between Mainland Tanzania and Zanzibar, the Constitution of the United Republic of Tanzania provides the list of union matters among which is oil and gas resources.⁴ The Constitution of the United Republic of Tanzania has set a foundation relating to ownership of natural resources including oil and gas and the territorial sovereignty between Mainland Tanzania and Zanzibar.⁵ The Constitution provides that natural resources are the property of the state and used to benefit the people of the United Republic. The state ownership has been construed as a solution to resource conflict but the main issues have been on regulating, controlling and sharing of revenue (Anderson, 2013). Natural resource ownership differs in unitary states and in federal states. In unitary state natural resources ownership deals much with national development and how individuals benefit from natural resource exploitation. While in federal states the constitutional provisions deal with how natural resources are shared among heterogeneous communities and the central government.⁶

Literature reveals that, in many federal systems, autonomous ownership and control over natural resources has been a point of legal concern as regard to competing interest over natural resources between the national governments and state governments (Haysom & Kane, 2009). This is because the constitutions provide for state ownership over natural resources without showing how provinces, local authorities or hosting communities are involved in the development and sharing of benefits from those resources. Therefore, Tanzania, like other states, its legal framework, mainly the Constitution, provides for the protection and ownership of natural resources by providing that natural resources as the property of the state authority and used for the benefit of the people of the United Republic.⁷ Based on this, the United Republic as a sovereign state has the duty to manage, protect and regulate oil and gas resources within the United Republic. The sovereignty of the United Republic of Tanzania is provided under article 1 and 2 (1) of the Constitution which provides that, Tanzania is one State and is a sovereign United Republic. The Constitution further declares the territory of the United Republic to be the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters.⁸

The sovereign and territorial sovereignty of the United Republic of Tanzania is the result of the article of the union of 1964 which sets the foundation of the United Republic and the union between the former Republic of Tanganyika and

⁴ See item 15 of the first schedule of the Constitution of the United Republic of Tanzania of 1977

⁵ see article 1, 2(1) and 27(1) of the United Republic Constitution of 1977

⁶ Good example is Nigeria particularly in Niger delta

⁷ See article 27 (1) of the Constitution of the United Republic of Tanzania 1977

⁸ See Article 2(1) of the Constitution of the United Republic of Tanzania 1977

the People's Republic of Zanzibar. The articles of Union of 1964 and the Constitution of the United Republic of 1977 list some issues to be regulated by the Government of the United Republic (Majamba, 2016). These issues are referred to as a list of Union matters as provided under the first schedule of the Constitution of the United Republic of Tanzania of 1977.

Under the framework of Union matters, Zanzibar surrendered its autonomy on all those matters as provided for in the First Schedule to the Constitution. Item 15 to the list of union matters provides for Mineral resources, including crude oil and other categories of oil and natural gas to be among the resources surrendered to the union government. The analysis of the list of union matters reveals that the sovereignty of the government of the United Republic over oil and gas resources has roots from the Constitution. The Constitution of the United Republic determines where sovereignty over oil and gas resources lies between the Union Government and the Revolutionary Government of Zanzibar. This is by providing oil and gas in the list of union matters and placed in the authority of the government of the United Republic.⁹

The sovereignty of Tanzania Zanzibar was also discussed in the case of *SMZ versus Machano Khamis Ali & 18 others*¹⁰ where the court stated that the international Persons called Tanganyika and Zanzibar ceased to exist as from 26th April, 1964 because of the articles of Union. The two states merged to form a new international person called the United Republic of Tanzania. When resolving the question as to where the sovereign relies, the court concluded that both Tanganyika and Zanzibar, and not Zanzibar alone, surrendered their treaty-making powers to the United Republic of Tanzania. The nation cannot surrender the treaty power to another, at the same time claim to exist as a sovereign state.

Therefore, oil and gas being part of the list of union matters, Zanzibar just like its sister Tanganyika, has no sovereign right over oil and gas resources. The state with the sovereignty right over oil and gas resources is the United Republic of Tanzania (Union Government). Further, the Constitution obliges the Government of the United Republic to ensure that the natural resources and heritage are harnessed and applied for the common good of all Tanzanians.¹¹ The same position is maintained by the natural gas policy 2013 which provides that; natural gas resources found in Tanzania belong to the people of the United Republic of Tanzania and must be managed in a way that benefits the entire Tanzanian society.

However, Article 2(1) of the Zanzibar constitution provides the territorial boundary of Zanzibar that: the area of Zanzibar consists of the whole area of the Islands of Unguja and Pemba and all small Islands surrounding them and includes the territorial waters that before the Union formed the then People's Republic of Zanzibar. The provision of the article means that oil and gas resources found in the territorial waters of Tanzania Zanzibar are governed by the Constitution of Zanzibar. Further article 23(2) of the Constitution of Zanzibar vest natural resources in the authority of the state. This article states that, "that every person has the duty to protect the natural resources of Zanzibar, the property of the state Authority."

According to the above article, natural resources within the territory of Zanzibar are owned by the government of Zanzibar on behalf of the people of Zanzibar. Complimenting to the above position, in 2016 the government of Zanzibar passed the Oil and Gas (Upstream) Act, to regulate oil and gas existing in the territorial land, the islets, internal water, territorial sea, contiguous zone, exclusive economic zone and any other area as provided under the Constitution.¹² In addition, the Act provides that the entire property, and the control of petroleum in its natural condition, and any land or territorial waters in Zanzibar is vested in the Government on behalf of the people of Zanzibar.¹³ And that petroleum resource is the public property of the People of Zanzibar and the Government shall hold petroleum rights for the benefit of the People of Zanzibar.¹⁴ Therefore, despite oil and gas being in the list of

⁹ See article 34 of the United Republic of Tanzania 1977

¹⁰ Criminal Application No. 8 of (2000) Court of Appeal of Tanzania at Zanzibar

¹¹ See article 9 (c), (j), and (i), and article 27 of the Constitution of the United Republic of Tanzania 1977.

¹² Section 2 of Act No. 6 of 2016

¹³ See section 4 (1) of the Oil and Gas (Upstream) Act, No. 6 of 2016

¹⁴ See section 4(2) of the Oil and Gas (Upstream) Act, No. 6 of 2016

union matters the laws regulating oil and gas in Tanzania Zanzibar guarantee the revolutionary government of Zanzibar ownership and control over oil and gas resources within Zanzibar.

By providing Tanzania Zanzibar powers over oil and gas resources in Zanzibar is contrary to the Constitution of the United Republic of Tanzania which provides oil and gas resources in the list of union matters and in the authority of the government of the United Republic. It is a clear interpretation that all mineral resources within the territory of the United Republic belong to the sovereign of the United Republic. That any operation relating to oil and gas resources whether carried out by Mainland Tanzania or Tanzania Zanzibar has to be on behalf of the United Republic.

The differences in the systems regulating oil and gas resources between Mainland Tanzania and Zanzibar have resulted into challenges on state sovereignty over natural resources, the ownership and control over oil and gas resources among the parties to the Union. Furthermore, data from literature and interview show that the Petroleum Act, 2015 and the Zanzibar Oil and Gas (Upstream) Act, 2016 which have separated the ownership, control and use of oil and gas resources are contrasted from the Constitution of the United Republic of Tanzania which provides for common use and management of oil and gas resources.¹⁵ Thus, these laws are ultra vires to the Constitution of the United Republic of Tanzania and likely to be challenged and declared unconstitutional by a competent court of law.¹⁶ For example, the law provides for oil and gas found within Tanzania Zanzibar to be governed according to the law passed by the House of Representatives and for Mainland Tanzania according to the law passed by the parliament.¹⁷ This position of the laws makes each side consider itself sovereign and autonomous over oil and gas resources while the list of union matters which places the resources in the authority of the government of the United Republic has not been amended. Also, under the present regulatory framework, it is possible for the two governments each to develop its own policy without considering the needs of the other part of the union. Consequently, in the absence of the union policy making institution which could provide common principles and standards to govern oil and gas resources, different policies may result in conflicting standards in managing shared union resources. Addressing this challenge one of the interviewees noted that, the union government has to work hard to make sure that it has in place agreed policies, laws and regulations regulating oil and gas resources in the United Republic of Tanzania. By having an agreed comprehensive framework, it will facilitate the harmonization of laws and will make it easy to manage the resources even where there are different managing institutions.¹⁸

Explaining how to resolve the existing differences, one officer working with the oil and gas regulatory authority recommended the establishment of a union policy making central committee due to internal and external transboundary nature of oil and gas resources. That one of the functions of this committee should be advising the decision makers on how to deal with oil and gas resources without affecting the interest of each party of the union and the union itself. The government of the United Republic and the Revolutionary government of Zanzibar has to cooperate and coordinate in policy marking in order to bring the harmonized oil and gas policy, accepted by both parties to the union. And thus, in absence of consensus policy framework management and administration of oil and gas resources between Mainland Tanzania and Zanzibar will be facing challenges. The policy challenges will have automatic impact in the regulatory framework hence resulting in oil and gas conflict between Mainland Tanzania and Zanzibar. The oil and gas resources found in the territorial jurisdiction of the United Republic of Tanzania have to be managed and regulated by the laws of the United Republic and be shared by all parties to the Union. The contrary will be in violation of the Constitution of URT and against the sovereign rights of the Union Government over oil and gas resources.

3. Challenges Arising from Institutions Regulating Oil and Gas Resources in Tanzania

The governing laws establish institutions governing oil and gas resources, where each part of the union has its own institutions regulating oil and gas resources.¹⁹ For example Mainland Tanzania have TPDC operating as national oil

¹⁵ See Article 9 (c), (i), (j), and Article 27 of the Constitution of the United Republic of Tanzania 1977

¹⁶ See article 64(3) of the Constitution of the United Republic of Tanzania 1977

¹⁷ See section 2(2)(a), (b), (4)(b) and section 4 of the Petroleum Act. No 21 of 2015

¹⁸ Interview response from the one member of parliament held at Dodoma on 18th may, 2020.

¹⁹ See Section 2 (2) (a), (b), section 4(2), (3) of the Act, No. 21 of 2015, also section 2 and 4 of the Zanzibar Oil and Gas (Upstream) Act, 2016

company, PURA responsible for regulating upstream oil and gas resources and EWURA responsible for regulating midstream and downstream operations while in Tanzania Zanzibar there are Zanzibar petroleum development company (ZPDC) a state owned company, Zanzibar petroleum regulatory authority (ZPRA) and Zanzibar utility regulatory authority (ZURA) all operating in Zanzibar. The main objective for the establishment of separate institutions was for effective control and regulation of oil and gas resources as between the two governments. However, these institutions are not coordinated although regulating shared resources. Institutions established in Zanzibar have been operating according to oil and gas law of Tanzania Zanzibar and for those in Mainland Tanzania, have been following the laws governing oil and gas resources in Mainland Tanzania.²⁰

During a field interview one of the legal experts working with oil and gas regulatory authorities said, the law has not made it clear on which union institution bearing in mind that Tanzania is a union state therefore supposed to have a union institution to oversee union interest. As a result, each institution is seen to be superior according to the law to which it is subject and thus leaving the gap on what might be a union institution responsible for regulating oil and gas resources. Therefore, it is in the perception of legal experts that despite establishment of separate institutions regulating oil and gas resources between Mainland Tanzania and Tanzania Zanzibar, union institutions are necessary for the harmonization of internal and external interest of the union.

Although the system of using separate institutions in regulating oil and gas resources is said to be better in countries which have developed strong legal framework and institutional quality rather than in countries with low institutional quality and political stability (Doric & Dimovski, 2018). But for Tanzania it was very early to establish a dual system and separated institutions while still suffering from legal challenges between Mainland Tanzania and Tanzania Zanzibar.

3.1 Coordination and Cooperation among Oil and Gas Regulatory Institutions

The findings suggest that exploration and exploitation of oil and gas requires coordination and cooperation within the state, among companies and with neighboring countries sharing exploration boundaries and blocks (Cecile, 2015). Countries can cooperate and coordinate to carry out joint exploration through Joint Venture Development Agreement (JVDA) or may enter a unitization agreement with the aim of sharing exploration expenses and revenues at the agreed terms (Kashif, 2018).

The cooperation and coordination between Mainland Tanzania and Tanzania Zanzibar, is very limited only to overlapping blocks and the governing laws have not managed to identify main areas which require coordination and cooperation between the two governments even before taking any investment decision.²¹ When held an interview with one lawyer and policy experts he identified areas which require coordination and cooperation which include, policy development, licensing and award of exploration blocks, offshore oil and gas exploration, oil and gas disputes settlement, oil and gas revenue management, and observance of oil and gas exploration international standards.²² Thus, parties to the Union are advised to coordinate and cooperate especially on the above identified areas and to work very closely in order to avoid future oil and gas related conflicts.

Commenting on the powers of Tanzania Zanzibar to coordinate with other states respondents advised that, powers be exercised with precaution because Zanzibar external supremacy is not yet determined thus, its right to cooperation and coordination with other states is not absolute but subject to laws of the United Republic.²³ This study further found that because of lack of external territorial sovereignty over oil and gas resources it is neither Mainland Tanzania nor Tanzania Zanzibar meets international standards which require state cooperation and coordination where exploration blocks have extended beyond the jurisdiction of the United Republic. That section 78(5) of the petroleum Act provides only for the government of the United Republic to look for strategies which promote cooperation with the foreign country in which the petroleum deposits extend with a view to ensure the most efficient coordination of petroleum operations.

²⁰ See section 2 and 4 of the Oil and Gas (Upstream) Act, 2016 and section 4(1), (2) and (3) of the Petroleum Act, No. 21 of 2015

²¹ Information obtained from one of the informants working in legal firm in Dar es Salaam conducted on 6th February, 2020

²² The argument given by legal and policy experts from the University of Dodoma held on 27th and 28th January, 2020

²³ Response from advocate Bendera during field interview conducted in Dar es Salaam on 8th January, 2020.

Therefore, the law regulating oil and gas resources has to declare coordination and cooperation mandatory to institutions regulating oil and gas between Mainland Tanzania and Tanzania Zanzibar. Also, considering that oil and gas are union resources and the two governments share the offshore exploration boundaries, cooperation and coordination is of most importance in the development of the oil and gas sector in Tanzania.

3.2 Challenges relating to Exploration Licenses between Mainland Tanzania and Zanzibar

Since oil and gas have been considered union resources were regulated by union laws. Licensing and exploration permits have been issued by the government of the United Republic of Tanzania. The exploration license issued by the government of the United Republic (union government) was valid and enforceable to Mainland Tanzania and Tanzania Zanzibar. Through this system, Tanzania entered a concession contract with BP to undertake exploration along the coast of Tanzania which included the islands of Mafia, Pemba, and Unguja (Mmari. et al; 2019). However, there was no discovery made until 1974 when the first PSA was signed with AGIP on the Shell/BP concession area which was followed by the discovery of natural gas in Mnazi Bay in 1982.²⁴

The matter started changing from the second licensing round in 2005 where seven blocks were offered, all allocated in Zanzibar. In this round license were awarded to Shell exploration which managed to meet the set evaluation criteria and awarded blocks 9-12 as against Global Resources which did not meet the criteria. However, Shell did not commence exploration due to discontent from the government of Zanzibar against the union government on the question of the mandate to offer exploration licence for blocks in Zanzibar. It was from the second licensing round Zanzibar disclosed its dissatisfaction with TPDC and the union government on offshore oil and gas resources, Zanzibar claimed that offshore blocks located in Zanzibar are within the mandate of the government of Zanzibar (Nyika, 2018).

Further noted that for the third and fourth licensing round TPDC and the union government launched blocks which were allocated in the territorial waters of Mainland Tanzania. The licensing process excluded blocks in Tanzania Zanzibar pending negotiation on the constitutional and political contentions around oil and gas exploitation between Mainland Tanzania and Zanzibar. Following the increase of discovery of natural gas in the offshore and existing licensing challenges, the union government decided to initiate legislative reforms on oil and gas laws to accommodate Zanzibar's interests. Thus, the government through parliament amended and repealed oil and gas laws including the Petroleum Act 2008 by introducing the Petroleum Act, No. 21 of 2015 which provides for separate licensing authority between the government of the United Republic and the Revolutionary government of Zanzibar.

The process for awarding exploration license and development permit for Mainland Tanzania assigned to Petroleum Upstream Regulatory Authority (PURA), as provided under section 4 of the Petroleum Act, 2015 for PURA to regulate and monitor upstream oil and gas resources for Mainland Tanzania; it also prepares and negotiates the production sharing agreement (PSA). Also, Section 11(1) of the Petroleum Act 2015 requires PURA to advise the minister of energy on the grant of exploration license and development permit. However, the process ends with the cabinet which is considered to be the main organ in the process of awarding development permits as there is no oil and gas development project that can take place without approval of the cabinet.²⁵ For that reason, for the exploration license and production permit to be valid for Mainland Tanzania, it has to pass through PURA, the Minister of energy, and the cabinet for approval. For Tanzania Zanzibar section 5(1) (b) of the Oil and Gas (Upstream) Act, 2016 provides that licensing authority is vested to Zanzibar Petroleum (Upstream) Regulatory Authority (ZPRA) and is responsible for the upstream operation. While section 32(1) and (5) of the Oil and Gas (Upstream) Act, 2016 provides that Zanzibar Petroleum Development Company (ZPDC) acts on behalf of the government and protects the government commercial interest in petroleum operation. And Zanzibar Utility Regulatory Authority (ZURA) responsible for midstream and downstream operation. This is due to the reasons that section 4(3) of the Petroleum Act 2015 separated oil and gas operations by vesting all strategic operations for Mainland Tanzania to be controlled by the Cabinet and for Tanzania Zanzibar to be controlled by the Revolutionary Council.

²⁴ Exploration history available at <http://tpdc.co.tz/upstream.php> accessed on 14th July, 2020

²⁵ See section 47(2), (3) and (4) of the Petroleum Act, No. 21 of 2015

It is through these dual systems of laws that each side of the union has powers over its own resources and discretion to enter exploration and exploitation contracts and it is free to choose the country to cooperate and coordinate with.²⁶ Thus, the sovereignty of the government of the United Republic over oil and gas resources as provided under the Constitution of the United Republic of Tanzania has been ousted by the two principal legislations regulating oil and resources between Mainland Tanzania and Tanzania Zanzibar.²⁷

The issuance of exploration license and awarding of oil and gas development permit are no longer dealt with by the union government, rather the United Republic and Revolutionary government of Zanzibar each has its own means of regulating, licensing and awarding of development permit. However, challenges arise on the licensing boundaries in the offshore areas including the Deep Sea, determination of exclusive economic zones between the government of the United Republic and the Revolutionary government of Zanzibar and how Zanzibar to cooperate internationally independent from the United Republic.

It was advised during the field interview that looking at the oil and gas regulatory framework and the territorial boundaries of the United Republic it is better for oil and gas fields to be operated jointly between the government of the United Republic and the Revolutionary government of Zanzibar. Thus, for each government operating its own oil and gas resources is more likely to result in conflict than operating jointly. By accepting to operate as a joint partner with equal share it will reduce conflicting interest and maintain the sovereignty of the United Republic over oil and gas resources. This is due to the fact that, for a country like Tanzania whose offshore area is shared between the government of the United Republic and the Revolutionary government of Zanzibar, Joint development agreement is important for operating overlapping blocks and shared deposits. It was further noted that joint venture agreement has been important to countries where national oil companies cannot manage to invest and operate in the oil and gas sector independent of international oil companies which have technology, capital and skills.

3.3. Legislative Authority

The constitutions set the foundation and provide bodies with authority to make and administer laws regulating exploration and exploitation of natural resources (Haysom & Kane, 2009). The legislative systems differ from federal states to unitary states. The legislative authority is what sets the system for regulating, controlling, management and determines the right to natural resource ownership (Haysom & Kane, 2009). Legislative authority and regulatory institutions are duty bound to set and implement rules regulating oil and gas resources in Tanzania.

The legislative framework of the United Republic of Tanzania appears to be of a two-tier system. Article 2(4) of the Constitution of the United Republic of Tanzania provides for two legislative organs (i) the parliament of the United Republic of Tanzania and, (ii) the House of Representatives. According to article 64(1) and (2) of the same Constitution, the Parliament of the United Republic of Tanzania has legislative sovereignty over all union matters and non-union matters for Mainland Tanzania, and the House of Representatives has legislative sovereignty over non-union matters for Tanzania Zanzibar. Also, the Constitution provides oil and gas in the list of union matters which evidences that it is the parliament of the United Republic of Tanzania which has the sovereign right to legislate over oil and gas resources. Clarifying on the legislative authority between the two legislative organs the Constitution of the United Republic of Tanzania provides:

Any law enacted by the House of Representatives concerns any matter in Tanzania Zanzibar which is within the legislative jurisdiction of Parliament, that law shall be null and void, and likewise if any law enacted by Parliament concerns any matter which is within the legislative jurisdiction of the House of Representatives that law shall be null and void²⁸ The interpretation of this article is clear that it is the parliament which has legislative authority over oil and gas resources as they are forming the list of union matters. The house of representative has no mandate to legislate on matters which are within the legislative jurisdiction of the parliament and if it does so the whole process is nullity. Provided that oil and gas are still in the list of union matters the two governments have to respect the Constitution

²⁶ Interview conducted with officers in the Attorney General's Office in Dodoma, held on 17th December, 2019

²⁷ Reported one of the respondents working with Ministry of Energy during the field interview conducted on 18th February, 2020, at Dodoma Government City

²⁸ See Article 64(3) of the Constitution of the United Republic of Tanzania, 1977

and powers bestowed in the Parliament. The contrary will be the violation of the Constitution of the United Republic of Tanzania.

The constitution provides further that: The Constitution of Zanzibar shall apply to all matters pertaining to Tanzania Zanzibar which are not Union Matters, and the constitution of the United Republic shall have the force of law in the whole of the United Republic, and if any law conflicts with the Constitution, the Constitution shall prevail and that other law, shall be void.²⁹ However, contrary to the Constitution of the United Republic of Tanzania, and without any amendment to the constitution, the parliament of the United Republic of Tanzania has passed a law that provides for each part of the union to use its laws to govern exploration and exploitation of oil and gas resources. For example, the Petroleum Act provides that: The regulation of petroleum resources from upstream, midstream, and downstream activities... where such operations or activities are undertaken within Tanzania Zanzibar, shall be governed and administered by institutions following the laws of Tanzania Zanzibar.³⁰

The above provisions permit the House of Representatives to legislate on oil and gas resources which under the United Republic Constitution are union matters, and to that effect, the House of Representatives has passed the Oil and Gas (upstream) Act, 2016 as specific law regulating oil and gas resources in Tanzania Zanzibar.

The contradiction between the Constitution of the United Republic of Tanzania, the Petroleum Act, 2015 and the Oil and Gas (upstream) Act, 2016 have three effects: First, these laws can be declared unconstitutional as they are violating the provisions of the Constitution of the United Republic of Tanzania. Second, no union institution regulates oil and gas resources and third, the parliament of the United Republic has no legislative power and the union government has no authority over oil and gas resources found in the territory of Tanzania Zanzibar. This is because the existing regulatory framework authorizes Zanzibar to regulate oil and gas resources following laws and institutions of Tanzania Zanzibar. Thus, despite the constitutional provision which declares oil and gas as union resources, the legislative powers of the parliament and powers of the union government to over oil and gas resources is limited only to oil and gas resources within Mainland Tanzania.

The analysis of statutory provision and interview with field respondents also reveals that the regulatory framework did not consider that oil and gas are shared resources between Mainland Tanzania and Tanzania Zanzibar and whether the two governments share exploration boundaries. Also, it was revealed that by introducing a dual system of law regulating oil and gas resources, the legislative process was becoming more complex because it is not well known as to whether oil and gas resources belong to the legislative mandate of the Parliament of the United Republic, or each part has the mandate to legislate over oil and gas resources.

As a result, each government uses its laws and institutions to regulate oil and gas resources. For example, the Revolutionary government of Zanzibar uses House of Representative to legislate and uses the Zanzibar Upstream Regulatory Authority (ZPRA), Zanzibar National Oil Company (ZPDC), and the ministry of water, energy, and minerals to manage, regulate and exploit oil and gas resources within Tanzania Zanzibar. The government of the United Republic uses the Parliament of the United Republic to legislate and uses the Petroleum Upstream Regulatory Authority (PURA), EWURA, ministry of energy and TPDC as institutions dealing with oil and gas in Mainland Tanzania. Therefore, the practical challenge is on how to manage oil and gas as shared union resources in absence of common union laws and institutions regulating these resources.

Also, laws passed by the Parliament to governing oil and gas resources are supposed to comply with the provisions of article 132(2) of the Zanzibar Constitution of 1984 amended 2010 which provides that; the law enacted by the Union Parliament to apply in Zanzibar first shall be submitted to the House of Representatives by the responsible Minister. It means that no union law can operate in Zanzibar unless submitted to the house of representatives. Therefore, even laws regulating oil and gas resources are required to comply with the requirement of sub article 2 before applying in Tanzania Zanzibar. The Constitution requirement to submit laws enacted by the Parliament to the house of representatives poses a constitutional challenge as to which legislative organ has final mandates over union matters including oil and gas resources

²⁹ See Article 64(5) of the Constitution of the United Republic of Tanzania, 1977

³⁰ See section 2(2)(b) of the Petroleum Act, No. 21 of 2015

However, one of the respondents aired that if the above article was made for the protection of Zanzibaris interest it should be understood that the Parliament (union parliament) includes members from Zanzibar whose presence in the parliament is for representing the interest of Zanzibaris in relation to union matters. And it is a constitutional requirement that any constitutional amendment provided under the second schedule be supported by the votes of not less than two-thirds of all Members of Parliament from Mainland Tanzania and not less than two-thirds of all Members of Parliament from Tanzania Zanzibar³¹. The requirement of two-third was to make sure that members from Mainland Tanzania and Tanzania Zanzibar are effectively involved before any alteration of union matters. Thus, for the house of representatives to inquire into the law passed by the Parliament is questioning the supremacy of the Parliament to legislate on union matters.

The divergent of the laws calls for harmonization of union laws as the same was recommended by the court in the case of *Seif Shariff Hamad v. Serikali ya Mapinduzi ya Zanzibar* where the court said that “relevant authorities on both sides of the Union, to take necessary steps to harmonize these conflicting sections and other sections of the two constitutions which are potentially irreconcilable”. Without harmonization of laws governing oil and gas resources it will be very difficult to enforce the laws enacted by parliament for union matters within the jurisdiction of the government of Zanzibar. Responding to the existing inconsistency of the laws one of the respondents was of the view that, the parliament misdirected itself by passing the law which alters the Constitution of the United Republic of Tanzania without first amending the Constitution itself. The divergences are happening because of the constitutional provision which still maintains oil and gas resources in the list of union matters. The solution is to amend the Petroleum Act and not the Constitution; amending the Constitution will have an effect on the system of laws governing the union. It was further discovered from the documentary review that the enactment of the Petroleum Act, 2015 and the Zanzibar Oil and Gas (upstream) Act, 2016 which separated the regulatory framework was a result of the proposed constitution 2014 which removed oil and gas from the list of union matters.³² However, it is not known when the proposed constitution will come into effect as it is still a proposal and depends on the interest of the political regime in power. It was further noted that, legislative process was faced with political challenges because politicians use oil and gas as a political agenda to win the election and also enact laws which favored their political interest. As Ragnar argued for countries to establish strong and independent legal institutions responsible for regulating oil and gas resources. The author has cited countries like Chad, Angola and Nigeria where petroleum funds were misused due to political decisions rather than using them for long-term public economic investment projects (Ragnar, 2016).

3.4. The Territorial Jurisdiction between Mainland Tanzania and Tanzania Zanzibar

The territory of the state is determined by internal supremacy of the government institutions and external supremacy of the state (Shaw, 2003). Zanzibar has internal supremacy for non-union matters and its institutions are autonomous in regulating non-union resources. However, it lacks external supremacy of the state which determines the international sovereignty of the state. The sovereignty and jurisdiction are determined by territorial integrity upon which the state can exercise its exclusive powers.³³ The exclusive powers of the state include; powers to decide on its natural resources, the powers which Zanzibar does not have for many years³⁴ (added one respondent). However, the present powers given to Zanzibar over oil and gas resources are not exclusive and autonomous because the law provides Zanzibar with the right to use and not ownership.³⁵ For example, Section 4 (1) of petroleum Act 2015 provides that: The entire property in and control over petroleum in any land to which this Act apply are vested in the United Republic and... but without prejudice to any right to explore, develop or produce petroleum granted, conferred, acquired or served under this Act or the relevant law Tanzania Zanzibar.

On the other hand, by providing Zanzibar with powers to grant exploration licenses over union natural resources in the absence of union institutions and without involving the government of the United Republic is the violation of

³¹ See article 98(1)(b) of the Constitution of United Republic, 1977

³² see article 74(3), also see the first schedule of the proposed constitution, 2014

³³ Ibid.

³⁴ Anonymous respondent working with Haki Rasilimali a non-governmental organization in Dar es salaam interviewed on 9th March, 2020.

³⁵ Interview with legal and policy experts, working with Zanzibar Petroleum Regulatory Authority, conducted on 14th February, 2020.

territorial integrity of the state as defined under the international system which provides for respect of territorial integrity of the state (Shaw, 2003).

Territorial sovereignty is what determines the ownership and possession of property including natural resources as it was determined by Roman law. Territorial sovereignty grants property rights, therefore, the state authority is provided with ownership and possession of natural resources forming part of the land which also belongs to the state. For the case of Mainland Tanzania and Tanzania Zanzibar the territorial sovereignty of Zanzibar and Tanganyika were surrendered to the United Republic of Tanzania by constitutional means, that is by agreement through the article of the union of 1964. It is from this agreement the territorial sovereignty passed from the previous sovereign to the newly established United Republic of Tanzania (Union Government). The process involved the transfer of oil and gas resources to the control of the union government as provided under the first schedule of the Constitution of the United Republic of Tanzania.

3.4.1. The Offshore Oil and Gas regulatory challenges in Tanzania

The Territorial Sea and Exclusive Economic Zone Act and the United Nations Convention on the Law of the Sea, shows that the offshore area belongs to the United Republic of Tanzania. By providing that the territorial sea of the United Republic of Tanzania is measured along the coast of the United Republic including the coast of all islands...officially recognized by the government of the United Republic. It provides further that the sea bed and internal waters of the territorial sea of the United Republic shall be deemed to be and always to have been vested in the Government of the United Republic. Also, it is the government of the United Republic provided with the sovereign right to explore, exploit and manage offshore oil and gas resources. In addition, the offshore resources are mostly regulated by international laws, and Zanzibar international status to regulate and control offshore oil and gas resources independent of the government of the United Republic is not yet determined. Separating the laws governing oil and gas resources have resulted into the conflict between national laws and international laws because the United Nations Convention on the law of the sea does not recognize Zanzibar's territorial waters independent from the United Republic.

Separating regulatory framework is more challenging for the government of Zanzibar on how to enforce bilateral and multilateral agreements which Tanzania has entered with other nations on protection of natural resources.³⁶ This is because under the existing regulatory framework oil and gas resources on part of Tanzania Zanzibar are not regulated by laws of the government of the United Republic and the government of Zanzibar is not bound by union laws governing oil and gas resources as it was before the 2015 and 2017 amendments. Thus, regulating oil and gas using different laws not only causes challenges to the domestic system but also the international legal framework. The change of laws governing oil and gas resources necessitates the changes of other laws including the Territorial Sea and Exclusive Economic Zone Act, which provides regulation of offshore resources.

Information obtained from the Ministry of Energy shows that separating management and administration of oil and gas resources between the government of the United Republic and the Revolutionary government of Zanzibar raises the question of territorial boundaries between the two governments. This is because by forming the United Republic of Tanzania, the former states surrendered their territorial boundaries and came up with the single sovereign Republic of Tanzania whose territorial jurisdiction includes the whole area of Zanzibar and of the former Tanganyika. Therefore, by providing each government with autonomous powers to regulate offshore oil and gas resources without providing boundaries, it gives the interpretation that each should use boundaries which were used before the union. The process which is contrary to the articles of the union of 1964 which resulted in the formation of the United Republic of Tanzania and replaced the territorial boundary of the Republic of Zanzibar and Tanganyika. Also, to date there is no specific law that provides for the offshore area for Tanganyika and Zanzibar.

Further findings obtained from government officials from Mainland Tanzania and Tanzania Zanzibar suggest that despite the nature of our union where we have two heads of governments, two legislative authorities, and judiciaries, and two Constitutions each autonomous in itself; the territorial boundary of the United Republic is recognized as one internationally. Second, the exclusive economic zone for the United Republic covers the area for both parts of the union. Third, separate control of offshore oil and gas resources requires each part of the union to determine its EEZ. Fourth, Zanzibar is not internationally recognized as a sovereign state and subject of international law hence it cannot

³⁶ The response from one of the government officials from the revolutionary Government of Zanzibar held on 21st January, 2020.

have absolute ownership and control of the offshore. Responding to international recognition of Tanzania Zanzibar, one of the interviewees argued that, internationally, it is very difficult for Zanzibar to stand as a sovereign state apart from the United Republic of Tanzania. He advised the government of Zanzibar when dealing with exploration and exploitation of oil and gas resources with international oil companies to appear in the name of the United Republic of Tanzania. He said further that, all contracts which Zanzibar has to sign should appear in the name of the United Republic of Tanzania even if it is using its laws and institutions.

Thus, there is a need for close coordination between the Revolutionary government of Zanzibar and the union government before Zanzibar signs an oil exploration and exploitation contract with IOCs. It was also explained that depending on the nature of the resource which is migrant, it has been difficult even for non-union countries to explore without cooperating with other states. The exploration and exploitation of oil and gas resources have been more successful in countries whose legal framework provides for cooperation, coordination, and sometimes operating oil and gas projects through unitization and joint development agreements. Therefore, for a country like Tanzania, separating the ownership, control, exploration, and management of oil and gas resources is not only a legal challenge but also economically expensive to operate different oil and gas exploration projects in one sovereign United Republic. It was further stated by one of the interviewees from the Attorney General's office in Zanzibar who advised that the inconsistency in the legal framework is likely to cause the effect to the union and be used as a political agenda which may affect the long-term relationship and cooperation among parties to the union. The differences in the regulating laws may result in resource conflict which will not benefit Mainland Tanzania or Zanzibar rather resulting in the breakage of the union. He continued advising that the existing inconsistency in the legal framework needs to be harmonized to make it compatible with the Constitution of the United Republic of Tanzania. Also, the union government has to establish the union institution to operate as an intersecting body responsible for checks and balances of the other operating institutions.

3.5. Oil and Gas Revenue Sharing between Mainland Tanzania and Zanzibar

Oil and gas resources are very important to the national economy of any country. In many countries, oil and gas resources form a major part of the national political, and economic policy, although managing oil and gas resources presents challenges that if not properly managed may make oil and gas resources a curse rather than a blessing (Anderson, 2013). The system of revenue sharing has been fundamental in most resource-rich countries. Countries which have managed to develop from natural resources their legal system provides resource revenue sharing. For many years Tanzania has not been able to accept the philosophy of resource revenue sharing between the two governments, local government, and host communities. It was because of socialism philosophy which provided that natural resources belong to the public for the benefit of the people of Tanzania. Thus, under socialism ideology the government has no need for each level of the government to have a specific share of resource revenue.

The view obtained from one of the respondents working with one NGO dealing with natural resources revealed that: different parts of the country especially those endowed with natural resources have started claiming their shares from natural resources. For example, mines in the lake zone regions, oil and gas from Lindi and Mtwara now Zanzibar are looking for their share from oil and gas resources. The natural resource regulatory framework has centralized everything starting from ownership, management, control, and resource use. The communities and regions which suffer the most are not getting their shares or are not legally privileged, hence they demand revenue sharing.

Although interviewees acknowledge that oil and gas are union resources, mainly the challenges were on how revenue generated from union mineral resources were being shared between the government of the United Republic and the Revolutionary government of Zanzibar. This is because the previous and present laws did not provide anything on revenue sharing and the union government is silent on what Zanzibar deserves. For example, tariffs and royalty paid from ongoing exploitation of natural gas have not been clearly shown how they have been shared between the government of the United Republic and the Revolutionary government of Zanzibar.³⁷

The statutory analysis and interview with field respondents also revealed that article 135 of the Constitution of the United Republic of Tanzania provides for the collection of revenues derived from various sources of the government of the United Republic and the Constitution establishes the consolidated fund of the government of the United

³⁷ Responses from legal practitioner from Mainland Tanzania and Tanzania Zanzibar held on 18th and 24th march 2020 respectively

Republic. However, the operation of the fund has not been practically open and its management and use seem to be for Mainland Tanzania and not for the government of Zanzibar. Also, it was claimed that the Constitution of the United Republic of Tanzania does not explicitly provide how the government of Zanzibar is involved in the authorization of expenditure from the union consolidated fund.³⁸

Despite information obtained from the ministry responsible for union affairs that the union government in collaboration with the government of Zanzibar has been taking measures to resolve different burning issues including oil and gas resources. It was further noted from the literature that during the signing of a memorandum on five union challenges, the representatives of the government of Zanzibar argued on how to share revenue from oil and gas resources. However, it was revealed that the two governments have already engaged the British AUPEC consultant to provide technical advice on the distribution of the resources revenue and that the consultant has submitted the proposal to the governments.³⁹ The information obtained from one of government officer in the responsible ministry showed that consultant recommended that oil and gas remain union matters.

Besides the above position, Section 2(4) (a), (b) of the Petroleum Act, 2015 provides separate regulation and management of revenues derived from oil and gas resources where it provides that; Revenues derived from oil and gas operations or activities within Mainland Tanzania shall be used by the government of Mainland Tanzania and those derived from oil and gas operations or activities within Tanzania Zanzibar shall be used by the Revolutionary Government of Zanzibar. The provision can be interpreted that oil and gas revenues are no longer a shared resource between the government of the United Republic and the Revolutionary government of Zanzibar except where there are operations or activities jointly carried out and following the agreement entered between the two governments. On the other hand, respondents from Zanzibar supported equal sharing of revenues between governments. And added that revenue sharing should be based on a formula which would be in percentage and stated in the Constitution of the United Republic of Tanzania and laws governing oil and gas revenue.⁴⁰

It was by referring to the Nigeria Constitution which provides for the National Assembly to determine the formula for the distribution of funds into the Federation Account. Section 162 (2) of the Nigeria Constitution provides that: The President, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall consider, the allocation principles especially those of population, equality of States, internal revenue generation, landmass, terrain as well as population density.

The proviso to section 162 (2) of the 1999 constitution requires that any approved formula for revenue allocation from the Federation Account shall reflect the fact that not less than 13% of the revenue accruing to the said Federation Account from any natural resources is allocated to the government of the state or territory where such resources are located. By referring to the constitution of Nigeria; we can come up with the agreed percent of the revenue sharing which will accommodate the interest of the government of the United Republic and the Revolutionary government of Zanzibar.

Given that fact, it recommended for the Constitution of the United Republic of Tanzania to state clearly how oil and gas resources should be shared between the two governments. That by having the Constitutional provision on oil and gas revenue sharing, it will end the current contradiction on whether oil and gas remain in the list of union matters.

Furthermore, where the Constitution of the United Republic of Tanzania does not provide for any formula or percentage regarding the distribution of oil and gas revenue, the union government has to form a joint development committee which will make sure that there is equal profit sharing between Mainland Tanzania and Tanzania Zanzibar. The main reason for having the provision on revenue sharing is to avoid future disputes. Also, recommended for the establishment of a union institution responsible for advising decision-making authority on oil and gas revenue sharing. Because oil and gas are union resources, if one party of the union misses the resources on its side can claim its share under the Constitution of the United Republic of Tanzania.

In addition, the statutory analysis revealed the continued contradiction of laws governing oil and gas resources because the Petroleum Act, 2015 provides its application to both Mainland Tanzania and Tanzania Zanzibar while in the real

³⁸ Response from anonymous officer in the office of Attorney General in Zanzibar held on 21st January, 2020

³⁹ <https://www.africa-press.com/tanzania/policy/govt-resolves-5-union-vexes>. Accessed on 18 October, 2020

⁴⁰ Response from anonymous officer in the office of Attorney General in Zanzibar held on 21st January, 2020

sense, it applies to Mainland Tanzania because under its section 2(2) (b) and (4) (b) provides for Zanzibar and the government of Zanzibar to establish and govern oil and gas resources according to the laws and institutions of Tanzania Zanzibar. The same applies to the Oil and Gas Revenues Management Act; 2015 which provides its applicability to Mainland Tanzania as well as Zanzibar in relation to the management of oil and gas revenue derived from exploration and production activities. Despite the comprehensiveness of the Act, it does not provide or mention how the government of Zanzibar is involved in the management of oil and gas revenue nor its share. For example, one interviewee said: By not providing Zanzibar's share from oil and gas resources it signifies the Zanzibar's position that oil and gas are not union resources and it becomes difficult for the oil and gas revenue laws to apply in Tanzania Zanzibar. As a result, Mainland Tanzania will continue using oil and gas revenues only for Mainland Tanzania the same way for Tanzania Zanzibar, and the government of the United Republic (union government) will remain with no power over oil and gas revenue in Zanzibar.

The identified challenges emanate from the Petroleum Act 2015 and Oil and Gas Revenues Management Act, 2015 which provide the basis for managing oil and gas revenue between Mainland Tanzania and Zanzibar. For instance, the Petroleum Act provides for Tanzania Zanzibar to manage and regulate oil and gas revenues according to the laws of Zanzibar and revenue derived from oil and gas operation within Tanzania Zanzibar to be used by the Revolutionary Government of Zanzibar. Talking about this issue an interviewee said: that instead of separating institutions for revenue management it should include in its constitution the provision on revenue sharing among states forming the union.

Therefore, for oil and gas resources to be considered as union resources, it is better for laws regulating oil and gas revenue to provide for equal access and equal sharing of revenues derived from exploration, development, and production of oil and gas operations. Added one of the interviewees that, there must be an equal ratio in the selection of leaders to lead and manage institutions responsible for managing oil and gas revenue. That Mainland Tanzania should not consider itself the most privileged party to take all oil and gas revenue management posts. Otherwise separating ownership and management of oil and gas revenues is ousting the constitutional powers of the union government over oil and gas resources. As a result, the union government remains with no voice on how oil and gas revenue is collected, managed, used, and shared between Mainland Tanzania and Zanzibar.

4. Conclusion

The information obtained from documentary reviews and field interviews reveals that there are legal and institutional challenges relating to exploration of oil and gas resources in Tanzania. The identified challenges were as follows; the dual system of laws regulating oil and gas resources between the two governments disputes the principle of state sovereignty over natural resources and the autonomous control over oil and gas resources by the government of the United Republic. The provisions of the laws are ultra vires the Constitution of the United Republic of Tanzania and likely to be challenged and declared unconstitutional by the competent court of law.

The sovereignty of the government of Zanzibar is only for non-union matters, thus denying the government of Zanzibar absolute rights to enter international treaties and contracts on the exploration and exploitation of oil and gas resources. It was noted that by introducing a dual system of laws regulating oil and gas resources, the legislative process is becoming more complex because it is not well known whether the legislative mandate belongs to the Parliament of the United Republic or the house of representative has a mandate to legislate over oil and gas resources without considering union matters.

By introducing different institutions, there is a need for close coordination and cooperation between the Revolutionary government of Zanzibar and the government of the United Republic before Zanzibar signs exploration and exploitation contracts with IOCs. Also, the system of laws regulating oil and gas resources raise challenges as to the applicability of international instruments ratified by the government of the United Republic, because under the present system Tanzania Zanzibar is not bound by oil and gas laws passed by the parliament of the United Republic. The study revealed that oil and gas revenue is becoming the main challenge because there is no clear revenue sharing between the government of the United Republic and the Revolutionary government of Zanzibar from natural gas and other minerals extracted by the government of the United Republic. Also, regulating laws are designed in such a way that the government of the United Republic being at the center and the Revolutionary government of Zanzibar becomes the latter in the governance of natural resources of the United Republic.

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