

**EQUITABLE SHARING OF BENEFITS FROM THE OIL RESOURCES IN
KENYA**

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SCHOOL OF LAW

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DECLARATION

I, NYABUTO WYCLIFE OMWANGE, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

SIGNED:.....

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This thesis has been submitted with my approval as the University Supervisor.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
API	American Petroleum Institute
CDF	Constituency Development Fund
CDFB	Constituency Development Fund Board
CDP	County Development Plan
CEMIRIDE	Centre for Minority Rights Development
CSR	Corporate Social Responsibility
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NLC	National Lands Commission
RAS	Revenue Allocation System
SWF	Sovereign Wealth Fund
TISA	The Institute for Social Accountability
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USA	United States of America

CHAPTER ONE

1.0 Background

On 26 March 2012 Tullow Oil announced that it had discovered in excess of 20 metres of net oil pay in the Ngamia-1 exploration well in Kenya.¹In a press release on the same date, the statement provided that the well, located in the Turkana County of Kenya Block 10BB, was drilled to an intermediate depth of 1,041 metres and had been successfully logged and sampled. Moveable oil with an American Petroleum Institute (API) greater than 30 degrees had been recovered to the surface. This oil has similar properties to the light waxy crude discovered in Uganda.²Effectively, the above discovery put Kenya as a potential oil exporter of the future. Tullow oil has since commenced drilling the Ngamia-1 well and it has extended its exploration activities to areas around Turkana.

On 26 September 2013 Tullow Oil released another press statement announcing that it had made a new oil discovery at the Ekales-1 wildcat, located in Block 13T in Northern Kenya. “Results of drilling, wireline logs and samples of reservoir fluid indicated a potential net oil pay in the Auwerwer and Upper Lokone sandstone reservoirs of between 60 and 100 metres. Future flow testing was to confirm productivity from these zones.”³

This was the fourth consecutive wildcat discovery, in the first oil basin opened in Northern Kenya, since drilling had commenced in 2012. The Ekales-1 well is located between the Ngamia-1 and Twiga South-1 oil discoveries and the reservoir properties at this location

¹ Tullow Oil Press release, Ngamia Oil find, 26 Mar 2012.

<<http://www.tulloil.com/index.asp?pageid=137&newsid=752> > accessed 8 October 2014

² Tullow Oil Press release, Ngamia -1 Oil find, 26 Mar 2012.

<<http://www.tulloil.com/index.asp?pageid=137&newsid=752> > accessed 8 October 2014

³ Tullow Oil Press release, Ekales Oil find, 26 Sep 2013.

<<http://www.tulloil.com/index.asp?pageid=137&newsid=859&sharestorypanel=sharestory> > accessed 8 October 2014

appear similar to those previously encountered.⁴ The prospects for production are thus very high.⁵

Ever since the reports of Oil discovery in Turkana started appearing in the media, there have been varied reactions from the people of Turkana. Some reactions have been positive and others worrying. For instance, there have been calls by different leaders from Turkana telling the government that the people of Turkana should be the major beneficiaries of the oil find. In the Reuters news of October 31, 2013, there were reports that a member of parliament from Turkana had incited residents to riot against Tullow Oil Company.⁶ The Member of Parliament is now under investigation.⁷ Tullow oil has operations in the area prospecting for oil.⁸

The above stories paint a picture of disaster waiting to happen if the people of Turkana feel side-lined in the sharing of the benefits of the discovered oil. This research paper posits that conflict in Turkana as a direct result of the discovery of oil is inevitable going by the current trend of the leaders from the area.⁹ The thesis further argues that the people of Turkana have a right to get a larger share of the benefits accruing from the oil discovered on their land as compared to other communities or regions in the country.

⁴ Tullow Oil Plc, 'Ekales-1 Oil Discovery in Kenya', 26 Sep 2013. <<http://www.tullowoil.com/index.asp?pageid=137&newsid=859&sharestorypanel=sharestory>> accessed 8 October 2014

⁵ John Gachiri, 'Tullow puts Turkana oil at a billion barrels after new find' *Business Daily* (Nairobi January 15, 2014) <http://www.businessdailyafrica.com/Corporate-News/Tullow-puts-Turkana-oil-at-a-billion-barrels-after-new-find/-/539550/2147558/-/bvbu4ez/-/index.html>. Accessed 8 October 2014.

⁶ Reuters, 'Kenya MP accused of inciting protests against oil firm Tullow' (UK edition October 31 2013) <http://uk.reuters.com/article/2013/10/31/uk-kenya-tullow-idUKBRE99U0UX20131031>. Accessed 8 October 2014.

⁷ Editorial, 'Turkana MP under probe over riots against Tullow oil firm' *Daily Nation*, (Nairobi, October 30, 2013) <http://www.nation.co.ke/news/MP-under-probe-over-Turkana-riots/-/1056/2053848/-/3rffmsz/-/index.html>. Accessed 8 October 2014.

⁸ Tullow oil Plc, Key Statistics, 19 November 2014. <<http://www.tullowoil.com/index.asp?pageid=432>>. Accessed 3 March 2015.

⁹ Ibid (note 7)

1.1 Statement of the Problem

The oil discovery in Kenya, in the Turkana County, has focused national attention on the County. Expectations among Kenyans from the other parts of the country have equally been raised. However, the expectations from all these quarters have not been well managed and this inevitably may lead to various conflicts in future when people realise that their new found hope in the oil discoveries is just but a mirage.

There is increased belief among the Turkana people that the oil belongs to them since it has been discovered in their County, their land. However, the reality is that this is contrary to the provisions of both the Constitution of Kenya and the applicable statutes.¹⁰ As a matter of fact, Article 62(3) of the Constitution vests ownership of the natural resources within the country in the National Government. The Article states that “Public land classified under clause (1) (f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.”¹¹ Article 62(1) (f) of the Constitution defines land to include minerals and mineral oil. Similarly, the Petroleum (Exploration and Production) Act 1986 provides that all petroleum resources within Kenya belong to the Government. Section 3 of this Act provides that “All petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other person.”¹²

The above provisions of the Constitution notwithstanding, Article 69 (1) (a) and (h) of the Constitution requires the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and also to ensure that the accruing

¹⁰ Petroleum (Exploration and Production) Act 1986, Kenya.

¹¹ Article 62(3) of the Kenyan Constitution 2010.

¹² CAP 308 of Laws of Kenya, 1986.

benefits are shared equitably. The state is also required to utilise the environment and natural resources for the benefit of the people of Kenya under the same Article of the Constitution.

Despite the above clear legal provisions, the pronouncements and the behaviour of some of the members of parliament from the area (Turkana) suggest that it will not be business as usual if the community of Turkana is side-lined in the management of the oil resources discovered in the area.¹³ This behaviour has had the effect of inciting the locals against any person considered as an outsider in Turkana County and the oil companies operating in the area on the pretext that these ‘foreigners’(meaning people who are not ethnic Turkana) are disinheriting the local community of their natural endowment.¹⁴ This has raised concerns on the sharing of revenue and other benefits from the oil discovered in Turkana among the National Government, the Turkana County Government and the Local Community in an equitable manner to pacify the local residents of the area.

The above concerns therefore leave one wondering whether there is an appropriate legal framework in Kenya to actualise the declaration of the Constitution under Article 69 (1) (a) and 69 (1) (h) and if there is no law to give effect to Article 69(1) (a) and (h), what does the legislature need to take into account in coming up with laws to implement that requirement?

1.2 Hypothesis

It is the contention of this study that Kenya does not have a clear legal and institutional framework for the governance of the revenue from the oil resources in the country to ensure that the government meets the constitutional threshold of Article 69 to ensure that the local source communities like that of Turkana equitably benefit from the accruing benefits of the exploitation of oil from their land.

¹³ Lucas Ng’asike, ‘We have lost hope in Tullow Oil, Turkana residents say’ *The Standard*, (Nairobi, November 2, 2013) <<http://www.standardmedia.co.ke/?articleID=2000096718&storytitle=we-have-lost-hope-in-tullow-oil-turkana-residents-say>>. Accessed 8 October 2014.

¹⁴ Ibid (note 13)

1.3 Identification of the issues

The issues that validate the above argument include the fact that the people of Turkana have property rights to the community land on which the oil has been discovered. From decades of inhabiting the place, the people of Turkana have developed a special connection to the land and money alone cannot be sufficient to compensate them and therefore it is only fair that they should benefit more from the sharing of the benefits accruing from the exploitation of the oil. This will only be a small way of the Government in appreciating this fact.

Secondly, although the provisions of the law vest ownership of the natural resources in the National Government, the Constitution at Article 69¹⁵ lays an obligation on the State to utilize the environment and natural resources for the benefit of the people of Kenya and while at it, the state should ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, as well as ensure the equitable sharing of the accruing benefits. This is provided in the following words under Article 69(1) (a) of the Kenya Constitution, “The state shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.” This thesis will interrogate what impact this provision will have on the sharing of the accruing benefits from the oil resources.

Finally, this study seeks to define who will be considered as the local community for the purpose of sharing the benefits with the National Government as recommended in this work.

1.4 Theoretical Framework

This study is based on the broader property law theory as well as the broader social conflict theory. The two theories are discussed below starting with the broader property law then thereafter, the broader social conflict theory.

¹⁵ Article 69(1) (a) of Kenya Constitution.

Property rights specify how persons may be benefitted and harmed with relation to one's property, and therefore, who must pay whom to modify the actions taken by persons.¹⁶ The Black's law dictionary defines property as the right to possess, use and enjoy a determinate thing, either a tract of land or a chattel. Property law is about relationships amongst people in terms of control, use, and transfer of resources that have value.¹⁷ This kind of law concerns rights available to the owner for both real and personal property.

There are several theories about acquisition of property rights in land. These theories include: First possession, subsequent acquisition,¹⁸ positivism and legal realism among others.¹⁹

First possession has several sub-theories under it and they include acquisition of property by discovery where the property rights belong to the person who makes the initial discovery; acquisition of property rights by capture. Lastly under first possession there is acquisition of property rights by creation, this is where there is the expenditure of mental or physical effort and the product of that application whether tangible or intangible vests in the person who brought the product into being.²⁰ Subsequent acquisition of property rights theory is made possible through acquisition by find, adverse possession and acquisition through gift.

Lastly, positivism and legal realism theorists argue that property rights are only possible through creation of the law, therefore, property rights are the creation of the sovereign. In this regard then, this theory will be relevant to this study since it makes logical conclusion that if the sovereign makes it possible for people to enjoy property rights, then the same sovereign can limit the rights of the property owners with regard to their enjoyment.

¹⁶ Dukeminier J., *Property* 3rd Edition (1993) 42.

¹⁷ Singer J.W., *Property law: Rules, policies and practices* (Boston, MA: Little, Brown, 1993).

¹⁸ Dukeminier J., *Property* 3rd Edition (1993) 3 and 103.

¹⁹ *Ibid* (note 18)

²⁰ *Ibid* (note 18)

Nicholas Blomley, in 'Law, Property and the Geography of Violence: The Frontier, The Survey and the Grid,'²¹ states that 'to have property in land is to have the right to some use or benefit of land. Such a right is necessarily relational, being held against others.' For purposes of this study, focus will mainly be on positivism and legal realism as theories for the creation of property.

The free online dictionary defines conflict as the state of disharmony between incompatible or antithetical persons, ideas or interests, it's a clash. Anthony Oberschall argues that "conflict results from purposeful interaction among two or more parties in a competitive setting."²² He uses the word competition to mean opposition in the goals of the parties involved. In a conflict, the parties involved may or may not be aware of the incompatibility of the potential future positions which they will occupy with regard to their interests. Social conflict therefore refers to "conflict in which the parties are an aggregate of individuals, such as groups, organizations, communities, and crowds, rather than single individuals, as in role conflict."²³

Coser defines social conflict as "a struggle over values or claims to status, power, and scarce resources, in which the aims of the conflict groups are not only to gain the desired values, but also to neutralize, injure, or eliminate rivals."²⁴

Paige on the other hand contends that "conflict is the product of interaction: It is the interaction of two groups, and their characteristics that determines the forms of conflict."²⁵

Paige elaborates the above point by giving an example where she provides a hypothetical

²¹ Nicholas Blomley, 'Law, Property and the Geography of Violence: The Frontier, the Survey and the Grid' department of Geography, Simon Fraser University, *Annals of the Association of American Geographers*, 93(1), 2003, pp. 121–141. Accessed 4 August 2014

²² Anthony Oberschall, 'Theories of Social Conflict' *Annual Review of Sociology*, Vol. 4 (1978), pp. 291-315 <http://www.jstor.org/stable/2945973?origin=JSTOR-pdf> Accessed 29 July 2014.

²³ Ibid (note 22)

²⁴ Coser, L, 'Continuities in the Study of Social Conflict,' New York: Free Press. (1967), 272 pp.

²⁵ Paige, J, 'Agrarian Revolution,' New York: Free Press. (1975), 435 pp

scenario in a setting where there are two groups in an agricultural export economy. The rural elite and the cultivators. To further elaborate this claim:

The commercial hacienda economy is characterized by cultivators and elites both deriving their incomes from land. Because of low technology and productivity, and because of a competitive disadvantage in world markets, more land must be acquired by either group for increased incomes. Thus the hacienda economy tends to provoke bitter conflicts over land. The form such conflict usually takes is the agrarian revolt. When cultivators derive their income from wages and rural elites from ownership of land, which is typical of migratory labour estates or of a sharecropping economy, the power of rural elites rests on political control that enables them to maintain a hold over land, capital and labour. Conflict will then ultimately center on control of the political system and will take on revolutionary forms, of either the socialist or nationalist variety. When rural elites derive their income primarily from the control of capital (i.e. exports, marketing, machinery, storage, and transportation), and cultivators derive their income from land, a situation characteristic of small-holdings export agriculture, Paige hypothesizes that commodity movements for limiting the power of middlemen will take place. The plantation economy, the remaining possibility, consists of elites deriving income from capital, and cultivators earning wages. It gives rise to conflicts over wage levels within the context of labour movements. In sum then, when rural elites earn their living from control of land, conflict is more intense and aims at the overthrow of the structure of domination. When rural elites derive their living from capital, conflict is over a greater share of the economic pie and has a reformist, rather than a revolutionary character.²⁶

Ralf Dahrendorf concludes that “wherever men live together and lay foundations of forms of social organization, there are positions whose occupants have powers of command in certain contexts and over certain positions, and there are other positions whose occupants are subjected to such commands. The distinction between "up" and "down"-or, as the English say, "Them" and "Us"-is one of the fundamental experiences of most men in society and, moreover, it appears that this distinction is intimately connected with unequal distribution of power.”²⁷

²⁶ Supra (note 25)

²⁷ Ralf Dahrendorf, ‘Toward a Theory of Social Conflict’ the Journal of Conflict Resolution, Vol. 2, No. 2 (Jun., 1958), pp. 170-183. <http://www.jstor.org/stable/172974?origin=JSTOR-pdf> Accessed 29 July 2014.

The objective of using the social conflict theory in this study is to try and demonstrate that competing needs of people and the fact that there are scarce resources to meet these needs may result into incompatible outcomes that will definitely lead into some form of conflict. The conflict theory has its roots in the works by Karl Max and it postulates that society is in a continuous conflict due to competition for limited resources. Therefore, social conflict theory sees society as a place for conflict based on inequalities.

The theory presupposes that conflict or struggle between individuals and groups who have opposing interests or who are competing for scarce resources is the essence of social life, competition and conflict occur over many types of resources in many settings, but power and economic resources are the principal sources of conflict and competition, consequently, conflict and struggle typically result in some individuals and groups dominating and controlling others, and patterns of domination and subordination tend to be self-perpetuating, dominant social groups have a disproportionate influence on the allocation of resources and on the structure of society.²⁸

Therefore, the oil resources found in Turkana have naturally attracted a lot of attention from the government and other interest groups such as investors and the local community. This interests are bound to clash and they are competing against each other. For instance, the government will look to exploit the oil resources for the benefit of the whole country yet the local community expects that they will benefit more than the other communities from the oil by virtue of the fact that it is being exploited from their land and therefore as the community in the proximity, they should have the larger share as compared to other communities of the benefits. This might not be the thinking of the government. Similarly, the other stakeholders such as the companies that are bound to exploit the oil will want to do this at the least cost to

²⁸ Stephen K. Sanderson in George Ritzer, ed., 'Blackwell Encyclopaedia of Sociology', (2007) Oxford: Blackwell, pg. 662

their budgets. This does not therefore allow them to factor into their budgets issues of passing benefits directly to the local community. Using the conflict theory, we will be in a position to anticipate and manage the impending conflict in Turkana.

1.5 Literature Review

It is acknowledged widely that sound management of revenue from oil resources in most developing countries is and has been difficult to realize. It is even more difficult to have governments dutifully honour benefit sharing with communities where the oil resources are mined from. Many states are caught up in the piecemeal attempt to pacify the local communities where the resource is mined through reactionary regulation rather than through a proper and legally sound blue print.

There have not been many scholars who have explored the issue of revenue sharing between the state and the communities where the resource is mined from. This especially so with regard to the petroleum resources. However, few scholars have written generally on the issue of benefit sharing with local communities with regard to other minerals and other natural resources without specifically considering the issue of revenue from oil resources.

However, a large body of scholarly work exists dealing with issues of management of revenue from petroleum resources within the country and their effects to the economy of the country generally. A sampling of some of the scholarly works demonstrates lack of focused literature on the issue of revenue sharing directly with the local communities from which oil resources are mined. Perhaps the best attempt at looking at the role of benefits sharing from natural resource where oil is one of them has been made by Christabel Nyamwaya in her work titled, 'Benefits Sharing on Extractive Natural Resources with Society in Kenya'.²⁹ She contends that since natural resources in developing countries form the main or predominant

²⁹ Christabel Nyamwaya, 'Benefits Sharing on Extractive Natural Resources with Society in Kenya', (2013) Kenya Human Rights Commission. Accessed 11 September 2014.

source of wealth for the country, this attracts intense interest from the country as a whole. While the whole country demands a share of the natural resource, the local community as well fights to have its fair share of the national cake. She therefore argues that given the importance of the natural resources in such economies it is therefore important to develop a conceptual clarity in the issues that relate to the governance of the natural resources. She further discusses three broad areas of governance of natural resources, she divides them into ownership of natural resources, allocation of the power to manage and develop natural resource and lastly, the treatment of natural resource revenues.³⁰ However, she only concentrates her efforts in the mining sector (mining of solid minerals) yet my study is going to concentrate on the oil industry. She also looks at a broad range of benefits accruing to the local community where mining takes place and among other benefits she considers employment of the local population, tax payments as well as community investment projects. She also considers direct payments to the citizens, development of funds, trust and compensating for damage generated during mining operations. According to her, the sharing may be mandatory or voluntary.³¹ Her point of departure from this study is that she primarily concentrates on the types of benefits that people may claim under different benefit sharing arrangement yet this study concentrates on the fact whether the people of Turkana have an entitlement in the first place to claim to participate in the sharing of revenue and other benefits from the oil resources in Turkana.

Kariuki Muigua in 'Utilizing Africa's Natural Resources to Fight Poverty', looks at the issue of utilizing natural resources as a source of subsistence for communities as a human right.³² He argues that the use of natural resource to fight poverty is also a means of enhancing human dignity and human freedom. The author further argues that since international

³⁰ Supra (note 29)

³¹ Supra (note 29)

³² Kariuki Muigua, 'Utilizing Africa's Natural Resources to Fight Poverty', (2014) p2. Accessed 11 September 2014.

instruments³³ make it the duty of the state to protect basic human rights, it is therefore the role of the state to also ensure that the local communities who rely on land as one of the anticipated natural resources are able to effectively use that resource to earn a living. It therefore goes that if the state is to exploit the oil resources in Turkana and displace the people of Turkana from their land where their livelihood emanates from, they should be compensated for such disruption on their lives and also have other incidental benefits that accompany a development project. The proposition of this author is very relevant to this study since it helps in the establishment of the entitlement of the people of Turkana to a share in the revenue derived from the exploitation of resources found within their land.

Chloe Parker in her work, 'Benefit Sharing Mechanisms,'³⁴ discusses the concept of benefit sharing and classifies the options that are available under benefits sharing. Parker classifies the options into two major classes as either monetary benefit sharing or non-monetary benefits sharing. According to the author, monetary benefit sharing includes things such as revenue sharing, preferential rates, property taxes, equity sharing or full ownership and development funds.³⁵ On the other hand, she classifies non-monetary benefits into livelihood restoration and enhancement, community development as well as catchment development.³⁶ It should be noted however that her approach to benefits sharing is from the water resources sector. This study will not be on the water sector but on the oil sector, however, the work of this author will be of so much value in this work since it helps put into perspective what different classes of benefits sharing exist.

³³ Such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

³⁴ Chloe Parker, 'Benefit Sharing Mechanisms', (2012) OECD water resources and sanitation set. Accessed 11 September 2014.

³⁵ Ibid (Note 34)

³⁶ Ibid (Note 34)

Professor Albert Mumma in ‘The Role of Local Communities in Environmental and Natural Resources Management: The Case of Kenya’ argues that there has been a state hegemony based on the state legal system over the community based legal system and the effect of this has been to alienate local communities from their environment and natural resources.³⁷ He demonstrates the fact that however much the communities have tried to assert their rights of ownership and access to these natural resources as well as their management rights, this has been to no avail. He cites the example of the Endorois and their struggle to have their rights over Lake Bogoria recognised but to no avail.³⁸ Although the author’s main argument is advocating for the need to adopt customary systems of natural resource management, he discusses important aspects such as how communities were disinherited of their natural resources. This is very integral component to this study in trying to find out whether local communities where minerals are found are justified in their clamour for benefit sharing.

Wilson Winstons Muhwezi and others in their work, ‘Crafting an Oil Revenue-Sharing Mechanism for Uganda’³⁹ looks at the different ways that the Government of Uganda may consider in coming up with benefit sharing mechanisms. The authors go further to justify why there should be a sharing mechanism for benefits accruing from the oil discovered in Uganda. The authors further go ahead to discuss countries that have had an experience of managing income from oil resources and what mechanisms that they have put in place to ensure that the revenue from the oil resources benefits all the people of the country. Their work although closely related to this study is only accurate as far as Uganda is concerned but it will help form a comparative aspect to this study.

³⁷ Albert Mumma, ‘The role of local communities in environmental and natural resources management: The case of Kenya’ in Leroy & others (Ed), *Compliance and enforcement in environmental law* (2011). Accessed 15 September 2014.

³⁸ *CEMIRIDE (on behalf of the Endorois community) v Republic of Kenya, African Commission on Human and Peoples Rights Communication 276/2003*.

³⁹ Wilson Winstons Muhwezi and others, ‘Crafting an Oil Revenue-Sharing Mechanism for Uganda’ ACODE Policy Research Series No. 30, 2009. Accessed 15 September 2014.

Similarly, Michael W. Howard looks at the factors that have made the Alaska Fund in the United States of America so successful.⁴⁰ The author looks at what legitimizes and justifies the claim for equal share of the dividends from the oil fund and he looks at three factors. First, the need to make income equal for all people, secondly, the need to have a resource based income as a means of being free from domination of employers and lastly, 'that private interests should pay a rent to use shared resources.'⁴¹

Ondotimi Songi argues that the legal regime in Nigeria has denied the host communities ownership rights on the land that natural resources have been found.⁴² He however proceeds arguing that although this had been the case with successive Nigerian governments, there now were in place plans to introduce a Petroleum Industry Bill (PIB) that is meant to guarantee benefits sharing with the host communities by at least 10 per cent. This study ties in with Songi's work since it will help from a comparative study in forming conclusions what governments take into account when planning to share accruing benefits from natural resources with the local communities.

Therefore, this study seeks to update the knowledge on the entitlement of local communities to participate in sharing of the revenue and other benefits derived from minerals found in their immediate community using as a basis available research as reviewed above. This study will also endeavour to define who comprises of the local community with regard to sharing of the accruing benefits from the oil resources discovered in Turkana after having considered the practice of the same concept from other countries that have tried implementing this practice. The study will therefore inform the policy needs that the Kenyan government needs

⁴⁰ Michael W. Howard, 'How Alaska citizens benefit equally from shared wealth' Scholars Strategy Network. June 2012. Accessed 3 March 2015.

⁴¹ Supra (note 40)

⁴² Ondotimi Songi, 'Resource Control, Community Participation and Nigeria's Petroleum Industry Bill'.

to have in place to ensure that there is benefit sharing in this sector that meets the constitutional threshold of Article 69 of the Kenyan Constitution.

1.6 Objectives and research questions

The main objective of this research is to determine whether the people of Turkana have any basis to lay a claim for a bigger share of the accruing benefits from the oil that has been discovered in their County and if yes, who will be considered as the local community for the purpose of partaking in the sharing of the benefits.

To achieve these objectives, the study will be guided by the following research questions:

- 1) Does the applicable legal framework support benefits sharing with local communities?
- 2) On what basis are the people of Turkana County as the local community claiming a bigger share of the benefits accruing from the oil discovered in the area?
- 3) Who is the local community in Turkana?

1.7 Methodology

This research adopted a library, desk and comparative study approaches. Published as well as unpublished materials such as books, journal articles, research papers, reports, internet sources and newspapers were utilised.

The above materials form the primary and secondary sources of information for this study. The primary sources of information for this work included the Constitution of Kenya (2010), Kenyan Statutory laws such as the Petroleum (Exploration and Production) Act 1986 and the Income Tax Act 1974. I also benefited from information contained in proposed Bills in the National Assembly such as the Energy Bill 2014, Mining Bill 2014 as well as the Natural Resources (Benefit Sharing) Bill 2014.

The secondary sources of information included journal articles, newspaper articles as well as website sources of information. The internet provided materials that would otherwise be difficult to obtain. They constituted a broader base of this research. This is in terms of what has been written on and that is related to this topic and the various recommendations made. Such data was used to build upon the foundation of the study as well as expose the weaknesses in the current legal dispensation in the country to govern this issue. The study is both descriptive and towards the end analytical.

1.8 Limitation of Scope

This research will be limited to the sharing of the benefits accruing from the oil discovered in Turkana County and not for all natural resources in the country.

1.9 Chapter Breakdown

This study is divided into five chapters in the following order. Chapter one is this introduction. It contains the background, statement of the problem, hypothesis, identification of the issues, theoretical framework, literature review, objectives and the research questions, methodology and limitations amongst other things.

Chapter two discusses the applicable legal framework in Kenya for oil resources with regard to ownership and entitlement to benefits from the natural resources. The chapter looks at the ownership of petroleum resources that are found within the country, it then proceeds to look at what entitlement to benefits from the natural resources do the local communities have if any as per the law as currently is. Chapter three defines the concept of benefit sharing as used in this work and discusses the mechanisms that have been applied elsewhere to ensure that communities benefit from resources in their locality, under the chapter, the issue of the proposed sharing ratios are discussed. Chapter four defines who the local community is and looks at challenges of defining local community. The chapter further examines the role that

will be played by the County Governments under the management of revenue from benefit sharing agreements. Finally, chapter five is the conclusion and it contains the recommendations from the study.

CHAPTER TWO

OWNESHIP AND ENTITLEMENT: THE LEGAL FRAMEWORK IN KENYA

2.1 Introduction

This chapter discusses the constitutional and other legal frameworks that are used to regulate oil resources as one of the natural resources in the country. This discussion is important in the sense that it lays the foundation for regulation, entitlement to any benefits that may accrue from the natural resource as well as determining who has the primary role of ensuring that the benefits from the resource are shared equitably as envisaged by Article 69 (1) (a) & (h) of the Constitution of Kenya. The key legislations relating to the upstream petroleum sector includes the Constitution of Kenya, the Petroleum (Exploration and Production) Act, chapter 308 of the Laws of Kenya, regulations made under the Petroleum Act and the Ninth Schedule to the Income Tax Act, chapter 470 of the Laws of Kenya. Part V of the Energy Bill and the Natural Resources Policy 2012 are also important with regard to this part.

On the question of entitlement, the study fronts an argument that relies on the link between human rights and the environment and contends that for people to enjoy their human rights to the fullest extent, they must be able to exploit the environment within which they live. Therefore, any attempts to delink the presence of the natural resources in a particular place from the people who inhabit that environment will be an affront to their human rights. The chapter will fortress this argument by relying on International Human Rights law.

2.2. Definition of mineral oil resources under the Constitution and under statutes

Article 260 of the Constitution defines natural resources as “the physical non-human factors and components, whether renewable or non-renewable, including rocks, minerals, fossil fuels and other sources of energy.” Similarly, the same Article also defines land to include natural

resources. “Land includes natural resources completely contained on or under the surface.”⁴³

Article 62 (1) (f) of the constitution makes a clarification on the specific type of land that includes natural resources as provided for under Article 260, this is only in reference to public land. The Article states that public land includes all minerals and mineral oils as defined by law. The law being referred to under this Article of the Constitution is the applicable statute law.

The Petroleum (Exploration and Production) Act⁴⁴ defines petroleum as mineral oil and includes crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.⁴⁵

The Ninth Schedule to the Income Tax Act⁴⁶ provides the same definition for petroleum as the one provided by the Petroleum Act.⁴⁷

2.3 Ownership and entitlement to benefit sharing from the oil resources in the country

2.3.1 Constitution of Kenya

From the above definitions, we have noticed that Article 62(1) (f) of the Constitution defines mineral oil as part of public land. Therefore, Article 62(3) of the Constitution vests ownership of land as defined under Article 62(1) (f) all the way to Article 62(1) (m) in the government since it is the National Government that is charged with management of land through the National Land Commission. “Public land classified under clause (1) (f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.”⁴⁸ It is important to note that

⁴³ Article 260 of the Constitution of Kenya.

⁴⁴ CAP 308, laws of Kenya, 1986.

⁴⁵ Section 2, CAP 308

⁴⁶ CAP 470, laws of Kenya

⁴⁷ Petroleum means mineral oil and includes crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales and tar sands.

⁴⁸ Article 62(3) of the Constitution of Kenya 2010.

the government holds the above minerals in trust for the people of Kenya. The management of the land under this Article ⁴⁹ has been bestowed on the National Land Commission (NLC).

The NLC is established under Article 67(1) of the Constitution and among its functions are the ones specifically mentioned under Article 67(2) (a) & (d). These are, among others, to manage public land on behalf of the National and County Governments and to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities. It remains to be seen how the NLC is going to discharge this mandate since it appears to be a duplication of the functions of the minister as provided for under the Petroleum (Exploration and Production) Act⁵⁰

According to Article 69 (1) (a) and (h) of the Constitution, the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits as well as utilize the environment and natural resources for the benefit of the people of Kenya.

It is therefore the role of the State to ensure that the manner in which they are going to exploit, utilize, manage and conserve the mineral oil resources meets the constitutional threshold that has been provided above. This will require the state to come up with policy measures that can be scrutinized by all the stakeholders to determine whether all the obligations on the state above have been met.

Taken in their totality, this study argues that the above provisions impose a mandatory obligation on the government to ensure that, first, the benefits from the mineral oil resources are shared among the people of Kenya but secondly, that this sharing of the accruing benefits must be equitable. A broad interpretation of equitable in this sense extends to include the fact

⁴⁹Article 62(3) of the Constitution

⁵⁰ Sections 4 and 5 of CAP 308, laws of Kenya.

that the communities on whose land the resources are mined from should get a bigger share of the benefits in relation to the other Kenyans.

As a matter of fact, Article 66(2) of the Constitution goes further to reinforce the above interpretation in these express terms that Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

The Petroleum Act vests all petroleum found within the boundaries of the country in the government. “All petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other person.”⁵¹ This is consistent with the position in the 2010 Constitution of Kenya, which states that all minerals and mineral oils shall vest in the National Government in trust for the people of Kenya.⁵²

It should be noted that under the Act, the power to administer the mineral oil resources rests on the minister.⁵³ This is different from the position in the Constitution where this function has been bestowed upon the NLC.⁵⁴

Section 133 of the Energy Bill 2014 vests ownership of the mineral oil resources in the Government. All petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the National Government in trust for the people of Kenya, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other person. Section 134 of the Bill provides that all petroleum resources shall be managed in accordance with the provisions of

⁵¹ Section 3 of CAP 308, 1986.

⁵² Article 62(3) of the Constitution of Kenya.

⁵³ Section 4 and 5 of CAP 308, laws of Kenya.

⁵⁴ Ibid (note 52)

the Constitution and this Act. The Cabinet secretary to the relevant ministry may adopt acceptable international standards in the management of resources provided that such standards are not inconsistent with this Bill.

The Bill gives life to Article 69 (1) (a) and (h) of the Constitution at Section 135. It provides that the proceeds raised from the exploitation of petroleum resource shall be shared out between the National Government, the County Government and the Local Community.⁵⁵

2.3.2 Natural resource benefit sharing as a Human Right for the Turkana people

The Turkana are the second largest pastoral tribe in Kenya. They are nomadic (move from place to place) and they live in the Northern part of Kenya around Lake Turkana.⁵⁶ “Their land is mostly dry desert regions and they depend on the rainy seasons for survival. Because water is so scarce in the area, they often fight with other tribes over territory. Traditional beliefs of the Turkana have hardly been affected by western civilization. Something different from the other tribes in Africa, the Turkana do not allow circumcision among its people. Women are only considered adults after they are married and men can marry as many wives as they can afford. In the Turkana tribe, a married woman will wear different type of jewellery from what single woman can wear.”⁵⁷

The Turkana are a marginalized community in Kenya. The Constitution of Kenya defines a marginalized community at Article 260 “as a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole, a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole. Marginalized community can also

⁵⁵ Section 135(1) of the Energy Bill 2014, accessed 18/9/14.

⁵⁶ Omo Valley in Ethiopia, ‘Ancient African Tribes,’ <<http://www.omovalley.com/The-Turkana-tribe-live-around-the-Turkana-lake-in-Kenya.php>> accessed 3 October 2014.

⁵⁷ Ibid (note 56)

be an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy or pastoral persons and communities, whether they are nomadic, or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.⁵⁸The Turkana are nomadic and pastoralists and they have therefore met this criteria and they are therefore a marginalized community.⁵⁹

The Turkana are also indigenous peoples as defined by applicable international legal instruments. It should be noted that there is a general misconception especially in Africa with regard to the use of the word indigenous people. The term indigenous has previously been used to refer to ‘first inhabitants’, this is not the meaning that has been given by the African Commission on Human and Peoples Rights.

The African Commission’s Working Group of Experts on Indigenous Populations/Communities states that:

A strict definition of indigenous peoples is neither necessary nor desirable. It is much more relevant and constructive to try to outline the major characteristics, which can help us identify who the indigenous peoples and communities in Africa are. This is the major internationally recognized approach, advocated by the United Nations bodies dealing with the human rights of indigenous peoples such as the UN Working Group on Indigenous Populations.⁶⁰

As a result of the above position taken by the working group, the following approaches have been adopted to identify indigenous peoples, *Self-definition* has been fronted as the first approach, this applicable where a certain community defines itself as being indigenous

⁵⁸ Article 260 of the Constitution of Kenya.

⁵⁹ *Supra* (note 56)

⁶⁰ Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities submitted in accordance with ‘Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (2005) 48. Accessed 3 October 2014.

peoples. *Special attachment to and use of their traditional land* is the other approach and lastly, *experience of subjugation, marginalization, dispossession, exclusion or discrimination* on account of different culture, way of life or mode of production from the national hegemonic and dominant model.⁶¹

Erica-Irene Daes of the United Nations Working Group on Indigenous Populations provides a four point criteria of identifying indigenous peoples. She states that the indigenous peoples:⁶²

- i. The occupation and use of a specific territory;
- ii. The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- iii. Self-identification, as well as recognition by other groups, as a distinct collectivity;
- iv. An experience of subjugation, marginalisation, dispossession, exclusion or discrimination.

The above four elements do not have to be present at the same time and it will suffice that only a single criteria is met.

2.3.3 The position of the current African and International Human Rights Law

The African and International Human Rights law regimes are concerned with the rights of people within states as opposed to the concern of International law which limits itself to the rights of states among themselves in relation to title to territory.⁶³

International Human Rights Law requires that indigenous peoples' ownership and other rights to their lands, territories and resources be legally recognised and respected. The land

⁶¹ Supra (note 60)

⁶² UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982

⁶³ Jérémie Gilbert and Valérie Couillard, 'International law and land rights in Africa: The shift from states' territorial possessions to indigenous' people's ownership rights' in Robert Home (ed), 'Essays in African Land law'(PULP 2011)

rights under human rights law have been connected to a variety of other rights, including the prohibition against discrimination, the right to property, the right to cultural integrity and the right to self-determination.⁶⁴

Under the African Charter on Human and Peoples' Rights (ACHPR), a number of rights have been provided that are meant for the protection of the indigenous peoples' land and other property rights. An analysis of these provisions reveals an important gap between the human rights practical situation of the indigenous peoples and the protection provided by legal standards in the international legal instruments. This is because implementation remains challenging, nevertheless, the instruments form the core guiding principles to which states have committed themselves as members of intergovernmental bodies, through their ratification and participation in the adoption of these instruments.⁶⁵

2.3.4 The Indigenous Peoples' Property Rights to their land

The Universal Declaration of Human Rights of 1948 (UDHR)⁶⁶ is the basis for the recognition, protection and promotion of human rights the world over. The preamble of the UDHR states that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 17 of the UDHR provides that everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

⁶⁴ Supra (note 63)

⁶⁵ Jérémie Gilbert and Valérie Couillard, 'International law and land rights in Africa: The shift from states' territorial possessions to indigenous' people's ownership rights' in Robert Home (ed), 'Essays in African Land law'(Pretoria University Law Press 2011) 54

⁶⁶ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> accessed 3 October 2014.

The UDHR is the basis for the formulation of the International Covenant on Civil and Political Rights, (ICCPR) 1966⁶⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966⁶⁸. Article 47 of the ICCPR provides that nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Similarly, the ICESCR at Article 1.2 provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The above provisions of these legal instruments should be construed to provide an enabling environment for people, including indigenous peoples to full enjoy their rights that includes property rights.

Similarly, Article 14 of the ACHPR⁶⁹ guarantees the right to property. The Article provides that the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. This provision appears to be providing a lee way for states to limit the enjoyment of this right to property but it should be noted that this Article 14 is to be read in conjunction with other Articles of the Charter as well as other applicable laws.

Article 21 of the ACHPR also provides that all indigenous peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the

⁶⁷ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> accessed 3 October 2014.

⁶⁸ International Covenant on Economic, Social and Cultural Rights; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

⁶⁹ African Charter on Human and Peoples' Rights adopted on 27 June 1981, CAB/LEG/67/3 rev. Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf accessed 3 November 2014.

people. In no case shall a people be deprived of it. In case of spoliation the dispossessed people shall have the right to the lawful recovery of their property as well as to an adequate compensation. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

The right to property over land is further buttressed with the right to development under the African Charter. Article 22 of the ACHPR provides that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development. This provision is important in that it enables the right holders under Article 14 and 21 of the Charter to develop their land.

The African Commission on Human and Peoples Rights in 2009 issued a decision on the first case received regarding indigenous peoples' rights to land, the case had been submitted by the Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community against the government of Kenya.⁷⁰ The Endorois were claiming that the government of Kenya had wrongfully disinherited them of their land next to Lake Bogoria through creation of a national reserve. The community applied to the High Court in Kenya to have the government compelled to compensate them and thereafter grant them unconditional access to the lake and the grazing area around the lake since their livelihood in terms grazing their cattle and the practise of their culture depended on the lake. The courts in Kenya dismissed their application and therefore the community approached the African commission.

⁷⁰ Complaint No 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. Decision adopted by the ACHPR in May 2009 and endorsed by the AU Assembly of Heads of State in February 2010.

The African Commission held that several articles of the Charter namely, Articles 1, 8, 14, 17, 21 and 22 of the African Charter had been violated, referring respectively to: the duty of States to recognise the rights enshrined in the Charter; the right to practice religion; the right to property; the right to culture; the right of peoples to the free disposal of their natural resources; and the right of peoples to development. According to Jérémie Gilbert and Valérie Couillard, this ground-breaking decision has become the most important precedent in International Human Rights Law with regard to indigenous peoples land rights in Africa.⁷¹

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁷² provides that Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.⁷³ States are required to provide effective mechanisms for prevention of, and any action which has the aim or effect of dispossessing them of their lands, territories or resources.⁷⁴ The provision above is reinforced by Article 10 of the same instrument. It provides that Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.⁷⁵

Similarly, Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. The people have the right to own, use, develop and control the lands, territories and resources that they possess by

⁷¹ Jérémie Gilbert and Valérie Couillard, 'International law and land rights in Africa: The shift from states' territorial possessions to indigenous' people's ownership rights' in Robert Home (ed), 'Essays in African Land law'(PULP 2011) 57

⁷² UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html> accessed 3 October 2014.

⁷³ Article 5 of UNDRIP

⁷⁴ Article 8(2)(b) of UNDRIP

⁷⁵ Article 10 of UNDRIP

reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States are therefore required to give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.⁷⁶

Further, Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact. Finally, Article 45 of the UNDRIP provides that Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

The UDHR, ICCPR, ICESCR have attained the status of International law norms and they are therefore binding on Kenya. As for the ACHPR, it is binding on the Kenyan state by virtue of Article 1. The Article provides that The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them. Further to that, Article 26 of the Vienna Convention on the Law of Treaties provides that every treaty in force is binding upon the parties to it and must be performed by them in good

⁷⁶ Article 26 of UNDRIP

faith. Similarly, Article 2(5) and 2(6) of the Kenyan Constitution make the above instruments part of the law of Kenya.⁷⁷

2.3.5 Indigenous peoples' property rights and benefits sharing from oil

Having established above that the Turkana are indigenous peoples⁷⁸, and that they have property rights to the land that they currently occupy.⁷⁹ The Turkana hold land rights as a community and these rights cannot be attributed to individuals neither can the rights be appropriated by a single individual. Under the Kenyan Constitution, land is divided into Public, Private and community land.⁸⁰ Community land is held by communities identified on the basis of ethnicity, culture or similar community of interest.⁸¹ Any unregistered community land shall be held in trust by County Governments on behalf of the communities for which it is held. The Constitution provides that Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.⁸²

However the Constitution of Kenya has defined any land where mineral oil resources are found to be public land. Public land is all minerals and mineral oils as defined by law.⁸³ Consequently, as per Article 62(3) of the Constitution, this public land is vested in the National Government. Public land classified under sub-article (1) (f) to (m) shall vest in and

⁷⁷ Article 2(5) and (6), the general rules of international law shall form part of the law of Kenya. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

⁷⁸ The Turkana are a nomadic pastoralist community in Kenya, the constitution of Kenya at Article 260 recognizes that nomadic and pastoralist communities are marginalized. The African commission's working group identifies marginalization as one of the criteria of identifying a community as an indigenous community.

⁷⁹ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities submitted in accordance with 'Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005) 48. Accessed 3 October 2014.

⁸⁰ Article 61 of Kenya Constitution.

⁸¹ Article 63(1) of the Kenya Constitution.

⁸² Article 63(3) and (4) of Constitution of Kenya

⁸³ Article 62(1) (f) of Constitution of Kenya.

be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.⁸⁴

Effectively, despite the Turkana having protected unregistered property rights in their land as indigenous peoples, by virtue of Article 62(3) of the Constitution, their property rights appear to be extinguished in favour of the State. This means that all land that is currently occupied by the Turkana and oil is discovered under those lands, they will automatically change their status and become public land. The Constitution has not indicated the procedure of changing the status of this land. Without a legal procedure to spell out how the community that is about to lose their communal land will be compensated, this is against the provisions of the ACHPR. Parliament is yet to come up with any statute either to govern this process.

Article 63(5) of the Constitution has indicated that Parliament is supposed to come up with legislation to provide the procedure of converting community land to the other classes of land that are available but this is yet to happen. However, given the lifestyle of the Turkana, even if there were to be a statute providing how this conversion of land from communal land to private land were to happen, any amount of compensation will not be enough. This is because it will not be sufficient to compensate what the People of Turkana will lose with money. Their nomadic lifestyle can only be sustained if they are provided an alternative land that is of equal quality to the one that they will lose.

This study argues that the most ideal form of compensation that can be provided to the Turkana will involve the state looking into ways to re-integrate the Turkana people with the new economic activity from the mining of the oil. This is because the Turkana have a distinct lifestyle that relies heavily on the lands that they occupy where they have developed adaptation practices that have suited them to exploit the land. This is different from other

⁸⁴ Article 62(3) of the Constitution of Kenya

regions in the country where exploitation of natural resource may be commenced in that most other communities in the country have adopted a modern way of living that does not rely primarily on the exploitation of the land for survival. Therefore, simply relocating the community to another land may not be the best option. Integrating the community will allow them to remain on a big chunk of their ancestral land while the oil companies extract the oil. The community can also be integrated into the workforce for the project ensuring that for those whose part of the lands will be actively engaged in the extraction of the oil, they can get an alternative source of livelihood.

2.4 Conclusion

From the above analysis, the study has been able to achieve three objectives. First, the study has established that as per the Constitution and the applicable statutes, the legal framework vests ownership of the mineral oil firmly in the government. Secondly that the current administration and management of the mineral oils has now been bestowed in the hands of the NLC and not in the hands of the minister and that therefore, the law needs to change to reflect this fact. We have however seen that even though the Petroleum Act has not been amended to reflect this status quo, the proposed Energy Bill 2014 has provisions to reflect the stand of the Constitution. Lastly, the chapter has successfully demonstrated that even though the government has ownership of the natural resources, it holds those resources in trust for the people of Kenya and that the local communities have other rights under International Human Rights law that entitle them to participate in the benefit sharing from the natural resources. The Constitution requires the government to ensure that the exploitation of the resources is sustainable and equitable.

CHAPTER THREE

THE CONCEPT OF BENEFITS SHARING EXPLAINED

3.0 Introduction

This chapter explains the concept of benefits sharing and tries to distinguish benefit sharing from the concept of compensation. The chapter will further discuss the different arrangements under benefits sharing and thereafter classify the arrangement based on the justification that belies that arrangement.

3.1 What is benefit sharing?

Benefit Sharing is the commitment to channel some kind of returns, whether monetary or non-monetary, back to a range of designated participants. These participants could be the affected communities, source communities or source nations with regard to natural resources exploitation.⁸⁵ The main idea under benefits sharing is to share the benefits from the development of the natural resources with the populations concerned.⁸⁶

In Kenya, the senate has come up with a Bill to provide a legal framework on how benefits from natural resources will be shared. This is called the Natural Resources (Benefit Sharing) Bill 2014.⁸⁷ The Bill has been sponsored by Senator Dr Agnes Zani, chairperson, Select Committee on Legislation on Royalties Accruing from Natural Resources in the Counties. This committee of the Senate is an ad hoc Committee on Legislation on royalties accrued from the exploitation of Natural Resources from the Counties, it was established by a Senate Resolution on 26 June, 2013. The Committee was established to initiate legislation to require

⁸⁵ Cori Hayden, "Benefit-Sharing: Experiments in Governance", P2P foundation, available at <http://p2pfoundation.net/Benefit_Sharing > accessed 2 October 2014.

⁸⁶ Chloe Parker, "Benefit sharing mechanism", 2012. Accessed 2 October 2014.

⁸⁷ Kenya Law, Senate Bills 2014, available at <http://kenyalaw.org/kl/index.php?id=4248> accessed 4 November 2014.

investors to pay a percentage of their turnover as royalties to the counties where they operate and to determine the criteria to be used in payment of percentage of royalties by investors in the counties where the exploitation of natural resources occurs; how the revenue the revenue accrued will be utilized by the country and counties; and any other relevant issue that may arise in regard to other existing Legislation.⁸⁸

Among the key provisions of the benefit sharing Bill 2014 is that a three-tier governance framework be adopted for the management of natural resource revenues in Kenya namely, a National Natural Resource Council, a County Natural Resource Committee and a Community Natural Resource Committee. These structures would sit respectively at the National, County and Community levels with the spirit of public participation built into them. This approach mirror's Kenya's overall governance framework, and promotes the constitutional aspiration of self-actualization within each administrative unit of public life.⁸⁹

The Bill also has proposes the use of the royalties from the exploitation of the natural resources at the different levels of government depending on the developmental priorities at those government levels. The report from the Senate committee states thus:

“At the national level, the use would normally extend to the broad parameters identified under Art.201-203 of the Constitution, and would include –

- i. Economic stabilization programmes/expenditure
- ii. Sustainability of natural resources
- iii. Equalisation (fiscal)

At the county and community levels, these would include –

- a) Capacity building in budgetary financing, entrepreneurship
- b) Civic education
- c) Consider the objects of devolution as per Art.174 of the Constitution.

⁸⁸ KeNRA, A Report of the Ad Hoc Committee on Legislation on Royalties Accrued from Exploitation of Natural Resources in the Counties, Published on Wednesday, 04 June 2014. Found at <http://kenra.or.ke/index.php/whats-new/166-a-report-of-the-ad-hoc-committee-on-legislation-on-royalties-accrued-from-exploitation-of-natural-resources-in-the-counties> Accessed 4 November 2014.

⁸⁹ Ibid (note 88)

- d) Direct distribution to pre-defined stakeholders (institutionalised – grants/bursaries)
- e) Creation of fiscal management tools such as trust funds
- f) Local content development programmes

At County and community levels, the amount allocated is to be used for Restoration activities; projects aimed at improving standards of living for youth, women, underprivileged and disabled persons. Such projects should be identified on the basis of consultation between county officials and community representatives and the civil society.

For sustainability objectives, a portion of the amount apportioned to the county should be allocated to a perpetual fund to be used only in case of an emergency of considerable magnitudes identified through criteria to be set by the senate but in consultation with communities.”

The above Senate report⁹⁰ provides the rationale on the ratios of benefit sharing suggested in the Bill as under the sub-topic below.

3.2 Proposal on Benefit Sharing Formula under the draft Natural Resources Bill

The Senate committee visited a number of select County Governments as indicated in their report and they also indulged the opinions of various consultants to help determine the ratios. The recommendation of the Consultants on the benefit sharing formula for royalties from natural resource was as follows:⁹¹

- A. “Out of 100% total royalty –
 - i. 70% be earmarked for distribution between National and County Governments;
 - ii. 30% to go directly into a Special Fund – to be divided 70% into a Futures Fund and 30% to a Natural Resource Fund.
- B. Out of 70 % divisible Royalty Revenues –

⁹⁰ A report of the ad hoc committee on legislation on royalties accrued from exploitation of natural resources in the counties, found at <http://kenra.or.ke/index.php/whats-new/166-a-report-of-the-ad-hoc-committee-on-legislation-on-royalties-accrued-from-exploitation-of-natural-resources-in-the-counties> accessed 4 November 2014.

⁹¹ Ibid (note 90)

- i. 70% goes to the National Government; and
 - ii. 30% goes to source County
- C. Out of the 70% that goes into the National Government –
 - i. 70 % can be earmarked for economic stabilization, budget support, etc;
 - ii. 30% can be redirected to fiscal equalization.
- D. Out of the 30% that goes to source County –
 - i. 30% can be earmarked for source community;
 - ii. 70% is directed to the general development of the Source County.

The above proposals for Sharing royalty benefits were based on the following rationale:-

- 1) A desire to maintain the minimum constitutional criterion of ensuring a minimum of 15% revenues reach each County – which, according to the proposed formula, actually receive a total of 21% of all royalty revenues generated by natural resource exploitation in Kenya, while the rest of the country benefits from 49% of all royalties – applied in economic stabilization and fiscal equalization measures;
- 2) A desire to invest for the future generations – on whose behalf this formula would invest no less than 21% of all royalties;
- 3) A desire to ensure environmental conservation and management – for which the formula dedicates 9% of all royalties;
- 4) A desire to balance development against growth – bound up in the 49% allocated to general budget support, which ought to be invested.
- 5) A desire to balance derivation against balanced development – for which counties receive 21% of all royalties, regardless of their proximity to the natural resource exploitation. This is divided as follows: 6.3% is proposed for distribution to host communities, and 14.7% to be distributed to the host County Government to support balanced county development.

The experts were of the opinion that once the revenue has been distributed to the Counties, the below parameters should be considered for division of the revenue in view of the development needs in Kenya

- a. Equality of development across all counties – so that Kenya can achieve both growth and development (a classic manifestation in countries suffering the natural resource “curse” phenomenon);
- b. Population (education, social and health investments);
- c. Land, ecological and environmental management and conservation;
- d. Budget support – general responsibilities of the National Government;
- e. Financial efficiency;
- f. Financial responsibility
- g. Any other priority expenditure linked to both growth and development.”

In the latest version of the Natural Resources (Benefit Sharing) Bill 2014, at section 26, the Bill provides the below ratios:

The revenue collected shall be shared as follows, twenty per cent of the revenue collected shall be set aside and shall, subject to subsection (2), be paid into a sovereign wealth fund established by the National Government; and eighty per cent of the revenue collected shall, subject to subsection (3), be shared between the National Government and the County Governments in the ratio of sixty per cent to the National Government and forty per cent to the County Governments.

The monies paid into the sovereign wealth fund under subsection (1) (c) shall be paid into the following funds constituting the sovereign wealth fund as follows: sixty per cent of the monies shall be paid into the future fund and forty per cent of the monies shall be paid into the natural resources fund. At least forty per cent revenue assigned to the County Governments

under subsection (1) (b) shall be assigned to local community projects and sixty per cent of that revenue shall be utilized in the entire county.

Where natural resources bestride two or more counties, the Authority shall determine the ratio of sharing the retained revenue amongst the affected counties. In determining the revenue sharing ratio of retained revenue amongst counties sharing a resource as prescribed under subsection (4), the Authority shall take into account -

- a) the contribution of each affected county in relation to the resource,
- b) the inconvenience caused to the county in the exploitation of the natural resource;
- and,
- c) any existing benefit sharing agreement with an affected organization.

The Authority shall review the revenue sharing ratio after every five years and present its recommendations to Parliament for approval.

It should be noted that the Mining Bill 2014 that was passed by the National Assembly on 28 October 2014 also provides a sharing ratio of seventy percent to the National Government, twenty percent to the County Government and ten percent to the community where the mining operations occur.⁹² This was an amendment to include a provision for this under Section 156 of the previous Bill.⁹³

Among the shortfalls of the proposed Natural Resources (Benefit Sharing) Bill 2014 is the fact that it does not address the issue of who will receive the money meant for the local community. Be that as it may, this Bill has good provisions for benefit sharing and it has a high likelihood of being passed by the National Assembly going by the observation of one Member of Parliament. Hon. Ms. Abdalla noted that “if we (the Committee) do not provide a

⁹² The National Assembly Hansard Report for 28 October 2014, <<http://www.parliament.go.ke/plone/national-assembly/business/hansard/tuesday-28th-october-2014/view>> accessed 4 November 2014.

⁹³ The Mining Bill 2014

formula for revenue sharing, this Bill will not see the light of day because of the Members. We are proposing that the royalties paid to the Government shall be shared in the following formula: 70 per cent to the National Government, 20 percent to the County Government and 10 per cent to the community where the mining operation occurs. So, this is to avert the problems that Members and counties have of not receiving adequate compensation for their resources.”⁹⁴

The draft Natural Resources (Benefit Sharing) Bill 2014 at Section 2 defines a benefit as any gains or proceeds or profits from exploitation of natural resources. The Bill further defines benefits sharing as the sharing of the benefits arising from the utilization of natural resources in a fair and equitable way, a commitment to channel some returns, whether monetary or non-monetary, back to the range of affected communities where the natural resource resides.

Benefit sharing with the local communities therefore refers to a commitment to channel some of the returns generated by the operation of a project back to the local communities where natural resources are exploited. The main justification for benefits sharing is that, usually when the natural resources are exploited, the benefits go to urban communities and other communities far away from where the resource is exploited while at the same time the directly affected communities are the ones bearing economic, environmental and social costs of the infrastructure project hence they should benefit more. In this regard, it has been recognized, that modern compensation policies for local communities where resources are exploited should involve not only basic in-kind and cash compensation for lost property utilisation and lost access to resources, but also measures that aim to restore and improve the livelihoods of the affected populations in the long term.⁹⁵

⁹⁴ Kenya National Assembly Hansard report on 28 October 2014, PG 89-90.

⁹⁵ Christabel Nyamwaya, ‘Benefits sharing on extractive natural resources with society in Kenya’, (2013) Kenya Human Rights Commission. Accessed 11 September 2014.

Christabel Nyamwaya in her work, benefits sharing on extractive natural resources with society in Kenya⁹⁶, identifies two broad categories of benefit sharing. She classifies them into monetary and non-monetary benefits sharing. Monetary benefit sharing involves part of the cash flows from the project being redirected into the community. This can be through a number of ways such as revenue sharing, preferential rates, property taxes, equity sharing / full ownership and development funds. On the other hand, non-monetary benefits include integrating project benefits into the local system of life. This could be through livelihood restoration and enhancement as well as through community development.

The concept of benefits sharing was made more popular under the Convention on Biological Diversity (CBD) of 1992⁹⁷ and its' Nagoya Protocol of 2010.⁹⁸ Among the objectives of the CBD is the fair and equitable sharing of benefits arising out of the utilization of genetic resources.⁹⁹ Articles 15 and 19 of the convention talk about access to and benefits sharing respectively. The Nagoya Protocol lays down the legal framework for the effective implementation of the above objective of the CBD. The Protocol's objective is to provide for the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity.¹⁰⁰ While the concept of benefit sharing is very well developed under the above legal regimes, it is not very well developed for other natural resources but the conceptual framework can be applied to those other resources to ensure that the issue of communities benefiting from the natural resources found in their locality is taken care of.

⁹⁶ Ibid (note 95)

⁹⁷ The Convention on Biological Diversity (CBD) was signed at the Earth Summit in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993.

⁹⁸ The Nagoya Protocol on Access and Benefits Sharing (ABS) was adopted on 29 October 2010 in Nagoya, Japan and will enter into force 90 days after the fiftieth instrument of ratification. Its objective is the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity.

⁹⁹ CBD Secretariat, found at <http://www.cbd.int/abs/about/> accessed 29 October 2014.

¹⁰⁰ CBD Secretariat, found at <http://www.cbd.int/abs/about/> accessed 29 October 2014.

3.3 Benefits sharing distinguished from the concept of compensation

The word compensation is a derivative of the word compensate. The Oxford dictionary defines the word compensate to mean the act of Giving someone something, typically money, in recognition of loss, suffering, or injury incurred.¹⁰¹ The free legal online dictionary provides an interesting definition of the word compensation as the payment a landowner is given to make up for the injury suffered as a result of the seizure when his or her land is taken by the Government through Eminent Domain.¹⁰² Therefore, it appears that any payment that an individual receives as reparation to the loss that one suffers such as the loss of property rights or for injury suffered is merely called compensation and its aim is to pay for the damage or inconvenience caused.

On the other hand, benefit sharing is a compound word that has been formed by combining the word benefit with the word share to make up benefit-sharing. The Oxford online dictionary defines the word benefit to mean an advantage that something gives you.¹⁰³ The same dictionary has also defined the word as a payment made by the state or an insurance scheme to someone entitled to receive it.¹⁰⁴ The word share has been defined as a part or portion of a larger amount which is divided among a number of people, or to which a number of people contribute.¹⁰⁵ Therefore, benefit sharing under natural resources means that the communities where the natural resources are found receive a fair and equitable share of the benefits resulting from the use of those resources.

¹⁰¹ Oxford Dictionaries, < <http://www.oxforddictionaries.com/definition/english/compensate>> accessed 29 October 2014.

¹⁰² Oxford dictionaries < <http://legal-dictionary.thefreedictionary.com/compensation>> accessed 29 October 2014.

¹⁰³ Oxford dictionaries <http://www.oxfordlearnersdictionaries.com/definition/english/benefit_1> accessed 29 October 2014.

¹⁰⁴ Oxford dictionaries <<http://www.oxforddictionaries.com/definition/english/benefit>> accessed 29 October 2014.

¹⁰⁵ Oxford dictionaries <<http://www.oxforddictionaries.com/definition/english/share>> accessed 29 October 2014.

It appears that from the above definition, the issue of compensation is to place a person at a level they should have been had the intervening event not have happened while benefit sharing places the same person at a better position that he would have been had the intervening event not have happened. This study is interested in benefits sharing and not compensation. This is because benefit sharing will put the local communities at a better place than they would have been had it not been for the discovery of the oil resources while compensation will only make good the loss that they will suffer as a result of the mining activities and this is not desirable since compensation only without extra benefit can be equated to disinheriting the local communities of their natural heritage found within the confines of their land that is meant to be utilised for their wellbeing.

3.4 Basis for benefits sharing

There are two bases for benefits sharing, one is benefit sharing as a matter of right and secondly, benefit sharing as a means of Corporate Social Responsibility (CSR). The obligation to compensate the people who lose some rights such as land rights in a community due to exploitation of natural resources is not enough, organizations that exploit these resources need to do something further than just the one-off payments they make to those individuals who lose their land rights and other economic rights, they need to share extra benefits that come with developing a natural resource such as improving livelihoods by building social amenities and schools. Christabel Nyamwaya puts it as “Resource extraction projects can operate only when a social license to do so is granted by the surrounding communities. To gain and retain a social license, companies typically need to go beyond the government’s requirements for taxation and compensation and actually invest in community development. Unless mining companies address these changing expectations of benefit sharing, they may fail to obtain and retain a social license to operate. In turn, community rejection of a project because of inadequate or inappropriate compensation can disrupt the

project and swing popular opinion against mineral development in the country.”¹⁰⁶ Therefore, benefits sharing promotes positive attitudes towards the exploration and management of natural resources.

It also includes a bid to conserve the environment and natural resources for the benefit of the current and future generations as well as to reduce pressure on natural resources by providing employment opportunities for communities by using natural resources more efficiently. The companies that are exploiting the resource can also train the local community on alternative skills to enable them continue exploiting the environment or even manage the current resources more sustainably.¹⁰⁷

3.4.1 Community benefits sharing as a matter of right

This is premised on the notion that most of the benefits from the exploitation of natural resources from communities goes to urban or other communities, industries and other national systems, while at the same time the directly affected local communities are left bearing economic, environmental and social costs of the project. This is despite the fact that these local communities have rights that are limited or interfered with during the process of exploiting these local resources. The idea under benefit sharing is therefore fronted that the local community has right not only to be compensated for the injuries that it suffers but also that some of the benefits from the exploitation of the resource should be used not only for reparations but also as a means of improving the livelihood of the community in general. This can be in terms of better infrastructure or transferring skills to members of the local community to ensure that they also participate in the economic activity of exploiting the resource. Therefore, the benefiting of the local community from the project is said to be the moral thing to do.

¹⁰⁶ Christabel Nyamwaya, ‘Benefits sharing on extractive natural resources with society in Kenya’, (2013) Kenya Human Rights Commission.p.27. Accessed 11 September 2014.

¹⁰⁷ Supra (note 106)

3.4.2 Community benefits sharing as a matter of Corporate Social Responsibility

This is where there is no legal or moral obligation for the people or organizations exploiting the natural resource to improve the livelihoods of the people where they are exploiting the natural resource. This is based on the argument that the exploitation of the resource does not cause any perceptible injury or damage to the local community or that the organization that is extracting the resource has not occasioned any hindrance to the local community in enjoying their normal life. In this case, even though the companies exploiting the resource do not have an obligation to improve the livelihoods of these communities, they however choose to pass on some of the benefits to the community out of their own will and good business practise.

Therefore, the benefits that are enjoyed by members of community who do not have any claim to such benefits grounded in law or any regulatory requirement are said to enjoy those benefits based on the goodwill of the companies exploiting the resource and it is only done out of their need to give back to societies where they operate in order to raise the general welfare of that community. It is purely dependent on the organization's Corporate Social Responsibility and they cannot be compelled to continue providing the same benefits in the event that they do not wish to continue sharing those benefits.

It should be noted that this study recommends that the primary responsibility to ensure that natural resources benefits are shared equitably lies on the state and not the companies that are exploiting the resources. This is because the mining companies enter into contract with the State and they also pay taxes to the State. It is therefore the role of the State to ensure that the revenue that it collects from these companies is shared with the Local Communities equitably since in these scenarios the State acts as the agent of the Local Communities.

3.5 Mechanisms of benefits sharing

There are various mechanisms to redistribute benefits accruing from extraction natural resources, these include things such as a community fund, local ownership, benefits in kind, indirect social benefits, spinoff economic benefits, and direct distribution of benefits to the general public.¹⁰⁸ Other mechanisms include livelihood restoration and enhancement as well as community development.

A community fund envisages a scenario where either a lump sum or a regular payment is made into a fund that is managed for the benefit of the community where the resource is exploited from. A community fund arrangement appears to be a favoured way of sharing benefits since so many countries that have struck their luck in the area of natural resources have established community or sovereign wealth funds. A Sovereign Wealth Fund (SWF) is a state-owned investment fund investing mostly in real and financial assets such as stocks, bonds, real estate, precious metals, or in alternative investments such as private equity fund or hedge funds for the benefit of the citizens of a country. The money used in these funds mostly is derived from windfall revenues from extraction of natural resources. Some of the countries that have established sovereign funds include Norway, Libya and the USA state of Alaska.¹⁰⁹

Local ownership includes offering ownership of shares in a project to local citizens, either through their own investment or through a profit-sharing or part-ownership scheme.¹¹⁰ Benefits in kind on the other hand involves the resource exploiter directly providing or paying for local community facility improvements, environmental improvements, or constructing visitor facilities, schools and educational support, for example building hospitals, roads or recreation parks. This is

¹⁰⁸ Christabel Nyamwaya, 'Benefits sharing on extractive natural resources with society in Kenya', (2013) Kenya Human Rights Commission.p.27. Accessed 11 September 2014.

¹⁰⁹ Rob Wile, 'The 20 Sovereign Wealth Funds That Are Buying up the World,' *Business Insider*, (October 3, 2012) <<http://www.businessinsider.com/sovereign-wealth-funds-buying-up-the-world-2012-10?op=1> > accessed 30 October 2014.

¹¹⁰ Supra (note 108)

among the most visible benefits sharing mechanisms because it involves what can be seen by people and also what many people can utilize like building of roads and hospitals.

Indirect social benefits includes any other benefits accruing to the local community that are not directly quantifiable, ranging from things such as growth in prestige of the area being developed, eco-tourism to growth in knowledge through training of locals. Spin-off economic benefits includes things associated with local manufacturing or production such as through job creation and taxes to the local administrative units such as counties. Direct distribution on the other hand involves the Government paying cash benefits directly to the general public, example of the above include the Alaskan oil fund where money is directly channelled into the residents of the state. Alaska is one of the states that make up the USA. Michael W. Howard in ‘How Alaska citizens benefit equally from shared wealth,’ states that not long after Alaska became a state in 1959, oil was discovered on the North Slope. After years of debate about how to ensure long-term benefits from exploitation of the state’s shared oil wealth, the Alaska Permanent Fund was established in 1976.¹¹¹

The economy of this state is sustained mostly by income from the oil resources extracted in the state. The petroleum industry supports one-third of all Alaska jobs, generating 110,000 jobs throughout the state.¹¹² In 1977 oil production began from the largest oil field ever discovered in North America, Prudhoe Bay on the North Slope of the state of Alaska.¹¹³ Revenue started flowing into the treasury from royalties and taxes. Shortly thereafter the Alaska Permanent Fund was established by Constitutional Amendment to set aside a share of

¹¹¹ Michael W. Howard, ‘How Alaska citizens benefit equally from shared wealth’, Scholars Strategy Network.

¹¹² Alaska oil and gas association. <http://www.aoga.org/facts-and-figures> accessed 6 October 2014.

¹¹³ Scott Goldsmith, ‘The Alaska Permanent Fund Dividend: An Experiment in Wealth Distribution,’ 9th International Congress Geneva, September 12th-14th, 2002. Accessed 6 October 2014.

the revenues from oil production for future generations of Alaskans, in recognition of the inevitable depletion of the resource.¹¹⁴

In the state of Alaska each fall, every man, woman, and child gets an equal payment by check or electronic deposit – amounting to somewhere between \$1000 and \$1500, or four to six thousand dollars for a family of four. To receive the payment, one need only prove state residency; there are no means tests or work requirements. The money is each citizen's share of interest from the Alaska Permanent Fund, which is endowed from the oil wealth owned in common and rented for royalties collected from oil companies.¹¹⁵

For one to qualify to receive the benefits from the Alaska Permanent Fund, one must proof to be a resident in the state of Alaska and that one does not intend to move from the state of Alaska in the near future. It is important to note that the one must not have residency in another state or country.¹¹⁶ It is also important to note that the resident must have spent a whole year within the state of Alaska, this is probably meant to prevent people from emigrating from the other states to share in the distribution of the dividends from the oil fund.

The Alaskan example has a number of lessons that Kenya can learn if it hopes to distribute the benefits from the oil resources directly to the local communities or even if the country decides to invest the revenue in a fund and distribute the benefits later. This is the requirement that the state should have an accurate system of determining residency in particular administrative units. Therefore this calls for the Kenyan Government to maintain or come up with a system to document the people who belong to all its administrative units such as Counties to help in this regard.

¹¹⁴ Ibid (note 113)

¹¹⁵ Ibid (note 113)

¹¹⁶Alaska Department of Revenue, Eligibility Requirements, <<https://pfd.alaska.gov/Eligibility/EligibilityRequirements> > accessed 7 October 2014.

Livelihood restoration and enhancement basically has elements of the other mechanisms that have been discussed above that include the securing of income for members of the community through for example employment in the construction sector and in the operation of the project. Improved community development is achieved in the same way through increasing the access to quality of primary services, such as local water supply, electrification, transportation, health and education.

3.6 Conclusion

This Chapter has discussed the concept of benefits sharing and distinguished it from compensation. The chapter has further elaborated on the mechanisms of benefits sharing that are widely used elsewhere in the world. The chapter has also laid the basis for benefit sharing. From the above mechanisms of benefit sharing, no single mechanism can be said to be superior to the others and it appears that a combination of the mechanisms is the best approach that can be put in place since all of them are addressing particular challenges.

CHAPTER FOUR

IDENTIFYING THE LOCAL COMMUNITY AND THE ROLE OF THE COUNTY GOVERNMENTS

4.0 Introduction

This chapter will look at the challenges involved in identifying who will qualify as the local community with regard to sharing of benefits from the oil resources. After identifying the challenges in identification of local communities, the chapter will proceed to define who can be considered to be ‘local community’. The chapter will further suggest a criteria that can be adopted in the country to determine who will qualify as ‘local community’. The chapter will further discuss the role that County Governments can play in ensuring that the funds that are under their care as trustees for the local communities are safeguarded from misuse. Other issues will also be discussed.

4.1 Challenges in identifying local community

After setting out the case for entitlement to participate in benefit sharing from exploitation of natural resources found on the lands for indigenous communities such as the Turkana, the issue that comes up is how to identify the specific people who will benefit. There is consensus that the benefit sharing should be with regard to the immediate local community since they are the ones whose livelihood, way of living or environment is directly or indirectly affected by the resource extraction processes.¹¹⁷ In contention however is the criteria of determining who the local community is. This then begs the question, is the process of determining who qualifies to be local community for benefit sharing going to rely

¹¹⁷ Christabel Nyamwaya, ‘Benefits sharing on extractive natural resources with society in Kenya’, (2013) Kenya Human Rights Commission.p.27. Accessed 11 September 2014.

on the local district of origin, region, county, ethnic origin, ownership of land affected or even the entire country?

If one decides to go with the use of local district then this will require that residents of the district be well known through adequate documentation that is reliable and accurate. Secondly, the district boundaries need to be clearly identifiable. In Kenya, we have had cases of conflict with regard to district boundaries. Another issue that will also need to be taken care of is instances where the resource is trans-boundary. This means that more than one district will be involved in partaking in the sharing of the accruing benefits. The question that then begs to be answered is whether there will be a formula for determining what ratios will be applicable to the different districts given the fact that the districts could be contributing different volumes of the said resource output. The same questions are also relevant when one suggests that the benefits be shared depending on the region or county that the resource is extracted from.

When one considers the suggestion that the criteria be based on the ethnic origin of the people that occupy the area where the resource is located, this raises a number of questions as well, such as, what if the resource is found in an area where there are many people of different ethnicities settled within the area? What other additional considerations will be in place to determine the particular ethnic group that is entitled to benefit. The other issue that comes up is with regard to those ethnic communities that are nomadic and are bound to move from one area to another in search of pasture for their animals is how will they be able to be identified for the purpose of benefit sharing? For example, the Turkana in Kenya are pastoralists who move between different geographic boundaries sometimes stretching past the national boundaries of Kenya and into Uganda to the north and Ethiopia to the north east. Similarly, there are those Turkana people who have migrated from the traditional lands of the Turkana and have now abandoned the traditional ways of the Turkanas. This group of

Turkanas has now embraced the modern way of life and they have not settled in the immediate land where the resources are being exploited to claim that they have either lost access rights to their land or that they have even been affected by any inconvenience from the exploitation of the natural resources given the fact that this group now lives in towns and cities? All the above are genuine issues that need to be sorted out before the state and any stakeholders decide what mode of identifying the beneficiaries to participate in benefit sharing is going to be adopted.

From the most recent national census exercise that was conducted in the country, the minister for planning disputed the total count of the Turkana people claiming that there had been an overshoot from the expected population totals.¹¹⁸ The issue of identifying who among the indigenous people qualifies to benefit from the accruing benefits is bound to be a major issue given the fact that their indigeneity depends on a number of characteristics that may not be present in some sections of the population.

The other factor that may be taken into consideration is the issue of ownership rights to the affected lands. This is so because it is only logical to be compensated if you have lost your rights to the land that is integral to your subsistence. This will therefore mean that not all the Turkanas will partake in the benefit sharing from the mining of the oil. It has been the argument of this study that the Turkana people being indigenous peoples as per the definition provided in this work have property rights in the lands that they have occupied for a long period of time. This land has sustained their subsistence as a people for grazing purposes and other cultural practices. This is their community land as per the constitutional definition of community land. The Constitution of Kenya requires that once any land is found to have resources such as mineral oil and crude oil, the status of that land immediately changes from

¹¹⁸ Editorial, 'Some Kenya Census results nullified,' *Capital News*, (Nairobi, August 31, 2010) <<http://www.capitalfm.co.ke/news/2010/08/some-kenya-census-results-nullified/>> accessed 29 October 2014.

either community or private land to public land¹¹⁹ and as such the management of that land now falls under the management of the National Land Commission (NLC) on behalf of the National Government¹²⁰. This study argues that that change of status of the land from community land to public land is unconstitutional and goes against the international principles for the protection of indigenous peoples that Kenya is bound by¹²¹ because the communities cannot be compensated fully by money. If this were to happen, it would be contrary to Article 40 (2) (b) of the Constitution of Kenya that says Parliament shall not enact a law that permits the State or any person to limit, or in any way restrict the enjoyment of any right under this Article (Protection of right to property) on the basis of any of the grounds specified or contemplated in Article 27 (4). Article 27(4) states that The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The participation of the Turkana people in the benefit sharing of the accruing benefits from the mining of the oil as a whole community or as a section the whole community depends on the property rights of the Turkana themselves with regard to their land rights.

This study proposes that ownership rights should be among the considerations while determining what the local community means for the purpose of participating in the sharing of benefits accruing from the Turkana oil. The other consideration should be pegged on residency within some radius in an administrative unit such as the Counties in the country.

¹¹⁹ Article 62(1) (f) of the Kenya Constitution.

¹²⁰ Article 62(3) of the Kenya Constitution

¹²¹ This is against the African Charter on Human and Peoples Rights (ACHPR) and the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP).

4.2 Local Community defined

The term local community has been used in the Constitution but the Constitution does not define it. The Benefit Sharing Bill 2014 that is meant to establish and enforce a system of benefit sharing in resource exploitation between resource exploiters, the National Government, County Governments and local communities, to establish the Natural Resources Benefits Sharing Authority and for connected purposes¹²² defines the term local community as:

“local community” means a people living in a ward or wards within which a natural resource as to be affected by its exploitation.”

This study faults this definition on account that it is bound to bring challenges with regard to identifying who the people who live within wards and any other administrative boundaries are. By the time of conducting this research, there was no agreed way of identifying citizens within a particular County. Secondly, the definition is not suitable to guarantee that the people of Turkana and other communities in Kenya who are pastoralist and that lead a nomadic life can be taken care of under this definition.

Christabel Nyamwaya¹²³ defines local community as “the population living close enough to a mine (sic) that their livelihood, way of living or environment is directly or indirectly affected by the mining project.” While this study does not entirely agree with this definition, the

¹²² Section 2 of the draft Natural Resources (Benefit Sharing) Bill 2014.

¹²³ Christabel Nyamwaya, ‘Benefits sharing on extractive natural resources with society in Kenya’, (2013) Kenya Human Rights Commission. Accessed 11 September 2014.

concept of proximity and the effect of the population closely affected by the resource extraction is the central theme in this research.

Therefore, this study defines the local community as the population living close enough to a natural resource mining project that their livelihood, ownership of property rights and way of life or environment is directly or indirectly affected by the project and that due to this project the population may be dispossessed of their lands or be transferred to another location altogether.

This definition takes into account the ownership rights and it is also most suitable to protect indigenous peoples whose only title to land is through community possession.

4.3 Proposed criteria to determine the local community

From the above definition of 'local community' as being the population living close enough to a natural resource mining project and that their livelihood, ownership of property rights and way of life or environment is directly or indirectly affected by the project and that due to this project the population may be dispossessed of their lands or be transferred to another location altogether, a number of issues for consideration stand out and this research recommends that the issue be the sole consideration to the authorities when determining the issue of who the local community is. The major consideration should be based on ownership of property rights to the land on which the natural resource is found on. This ownership will not only be limited to those who own titles deeds to the land but also those who are able to prove that they have title as a community. Secondly, proximity should be the second issue to be considered, the proximity should be set to cover people who are within a defined radius for example people within a radius of either 5 or 10 kilometres. Thirdly, the degree of disruption to the normal economic activities of the affected population and finally the issue of

damage to the immediate environment that the population occupies from the extraction of the natural resource, this should also be within some defined radius.

It should however be noted that all the above additional criteria are hinged on the base requirement of ownership of property (land rights) of the population that is immediate to the natural resource in question. It should be noted that the above criteria assumes that the Government has in place the means to identify which people belong to what administrative boundaries. This is critical to have in place since it will deter an influx of people to the administrative unit that will qualify for the benefit sharing. However, since this is an issue that is not in existence in Kenya currently, the study proposes that the Government deploys the data from the elections process in the country and build on it to come up with an accurate way of determining what people belong to individual administrative units within the country.

4.4 Who will receive money on behalf of the Local Community?

Section 31 of the Natural Resource (benefit Sharing) Bill 2014 establishes a Local Community Benefit Sharing Forum. This is composed of five people from the community. These five people will represent the interests of the people of the local community at the County Benefit Sharing Committee. They will also be the people who are better placed to receive the share payable to the community directly.

However, this poses a challenge when one tries to wonder how this money will be channelled to these chosen representatives, the questions arising include, will these people be running one Bank account to ensure that there is transparency in the use of the funds, will they appoint one member to receive the money directly to their personal account or will they have an official account for their committee?

The above are questions that need to be carefully negotiated such that the Local Community Benefit Sharing Forum can have a positive outcome as intended. The issue at hand then concerns the use of the correct legal entity that will survive the office terms of the elected officials of these bodies. This study proposes the setting up of a local community trust to be set up for this purpose since it will serve the purpose of safeguarding the benefits payable to the local community where many people are involved and it will require that all beneficiaries under the trust benefit equally. It will also ensure perpetual continuity instead of the uncertainty that may be brought about every five years when the indicated terms of the representatives come to an end.

4.5 The role of the Counties as Trustees

From the above discussions, one of the critical issues that has stood out is the issue of determining who the local community is, the study has recommended a criteria to be used in determining who the local community is, however, what has also stood out is the fact that this issue of local community is defined with regard to an administrative unit known as the County Government. The County Government has a role to play in the sharing of benefits in Kenya. This is partly due to the fact that for this to be a success, people must benefit both individually and communally. For communal benefits such as building of infrastructure and hospitals, a well-established body is required to be in charge of such projects, the best placed institution will be the county since it is the administrative unit closest to the communities.

Therefore, the County Government will be an important link in the transfer of benefits to the local communities. In doing so, the counties will be acting as trustees. Unfortunately, the County Government being a political unit may be prone to some political manipulations in the use of the funds meant to benefit the intended beneficiaries and misapply them monies to

projects that may be picked for political expediency. If the above scenario manifests, then the gains of benefits sharing will be lost.

Of importance then is to ensure that the money is spent in the way it was intended to be used. One of the ways to ensure this is the case is by having in place a mechanism to ensure that all the projects picked by the county units reflect the immediate need of the community. The best way to ensure that this happens is to have in place consultative meetings between the county and the community. Section 28 of the draft Natural Resources (Benefit Sharing) Bill 2014 establishes a County Benefit Sharing Committee. This Committee shall be comprised of the following: the County Executive Committee Member responsible for Finance; the Chairperson of the County Assembly Committee responsible for natural resources and five persons elected by the local community where the resource bestride representing the diversity of the local community. The functions of the Committee shall be to negotiate with an affected organization or organizations a County Benefit Sharing Agreement; monitor the implementation of projects undertaken in the County under the Benefit Sharing Agreement; determine the amount of money to be allocated to each local community from sums devolved under this Bill; convene public forums to facilitate discussions on proposed County Benefit Sharing Agreements before they are signed; convene public forums to initiate discussions on community projects to be supported from County earnings under this Bill and to advice the County Government on projects to be supported using sums received under this Bill.

Section 31 of the Bill further establishes a Local Community Benefit Sharing Forum that will be comprised of five people directly elected by the community in a public gathering of the local community. The functions of this forum will be to negotiate with the County Benefit Sharing Committee, a local community benefit sharing agreement; identify local community projects to be supported by money allocated to the Community by the County Benefit

Sharing Committee under this Act and to oversee the implementation of projects undertaken at the local community using money devolved under this Bill.

If the above provisions of the Bill are adopted, this will form the best check on the County units not to waste the money that will be entrusted to them under benefit sharing arrangements.

The best model to inform what to invest in from the money received under benefit sharing arrangements is the example provided by Norway. According to the US Energy Information Administration, Norway is Europe's largest oil producer, the world's third-largest natural gas exporter, and an important supplier of both oil and natural gas to other European countries. The organisation further states that Norway was the 3rd largest exporter of natural gas in the world after Russia and Qatar, and the 12th largest net exporter of oil in 2013.¹²⁴ The above information clearly outlines Norway as a major oil player and the amount of revenue from the oil is immense.

In Norway, the petroleum policy in place states that the petroleum resources are for the benefit of the Norwegian society as a whole.¹²⁵ Therefore, the Norwegian government decided to invest the revenue from the oil in a sovereign fund which is meant to make sovereign investment from the oil revenue with the aim of preserving the revenue for future Government use as well as for the benefit of future generations. It appears that the Norwegian citizens benefit as a whole from the use of the dividends from the oil fund when the Government uses the proceeds to fund the budget deficits and therefore limit raising taxes on

¹²⁴The US Energy Information Administration, Norway (April 28, 2014)

<<http://www.eia.gov/countries/analysisbriefs/Norway/norway.pdf> > accessed 7 October 2014.

¹²⁵The Norwegian Model: Evolution, Performance and Benefits. Speech at "The Norwegian Experience in the Oil and Gas Sector" Seminar in Mexico, 8 May 2013 found at [the Norwegian experience](#) accessed 7 October 2014.

the citizens. There is collective benefit and the resource income is not attributed to residency in a state or administrative region like in Alaskan example.

The Norway Government decided to use the income from the oil resources in improving the traditional fishing industry. This was informed by the fact that oil resources are non-renewable and hence are exhaustible and a time may come when they the reserves will be exhausted. So the country decided to use this income to improve on what they have had for centuries and what they will continue having. This thinking should also inform the County development project to support and develop what the local communities already know instead of abandoning the economic activities that the community already knows for the allure of joining the oil industry and abandoning altogether their traditional economic activities.¹²⁶

4.6 The concept of a local community development plan

While there are provisions under the Benefit Sharing Bill 2014 that are meant to ensure that the County Governments as trustees of the local communities put the funds received both for the County and the local community into the intended use, there still may be pitfalls similar to the ones witnessed under the Constituency Development Fund (CDF). The Constituencies Development Fund was created by the Constituencies Development Fund Act, 2003 (Amended in 2013 to align it with the Constitution) with the primary objective of addressing poverty at grassroots level by dedicating a minimum of 2.5% of the Government ordinary revenue to grassroots development and the reduction of poverty. The fund is managed by the Constituencies Development Fund Board (CDFB).¹²⁷

¹²⁶ Steinar Holden, 'Avoiding the Resource Curse: The Case Norway', Department of Economics, University of Oslo (August 2013)

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CCIQFjAA&url=http%3A%2F%2Ffolk.uio.no%2Fsholden%2Fwp%2Fresource-curse-norway-13.pdf&ei=igFSVNmYCKf17AaKt4GIBQ&usq=AFQjCNGhLbbgZT3Vkwghmu_pnCsTuR9tsg&sig2=89mWP9r5PreC8YkTHzIEQ&bvm=bv.78597519.d.ZGU> accessed 30 October 2014.

¹²⁷ Constituencies Development Fund Board, <<http://www.cdf.go.ke/about-cdf>> accessed 5 November 2014.

In 2009, the Institute for Social Accountability (TISA) issued a report in which they identified duplication and non-completion of CDF projects as one of the problems that bedevilled the development fund.¹²⁸ To ensure that the same fate does not befall on the projects that are meant to benefit the local community and therefore ensure that benefits are being felt by the local communities, this study is recommending that every constituency should be required by law to develop beforehand a comprehensive County Development Plan (CDP) with the help of all the County stakeholders such as the local community and all the responsible policy makers which plan should then be made available to all the organizations that are involved in the exploiting of natural resources and benefit sharing to ensure that development within the County is co-ordinated and that all the stakeholders are pulling towards a common direction.

The CDP will cure the issues of duplication of efforts and the issue of an organization involved in benefit sharing commissioning a development project that is not a priority to a particular community or a project that is not required by such a community in the first place. Secondly, the fact that there will be a plan which every stakeholder is required to put common effort at achieving will mean that development in counties will be thought through and resources will only be allocated to those projects that the community really requires. Similarly, it will be easier to track the progress being made by the stakeholders in benefit sharing arrangements since it will be clear to all parties on what is required to be done from the word go.

4.7 Conclusion

In this chapter, I have outlined the challenges that are likely to be faced when trying to determine who the local community is for the purpose of benefit sharing. The chapter has

¹²⁸ The CDF Status Report, Alarm over illegalities in CDF operations, December 2009, Prepared by The Institute for Social Accountability (TISA). < [CDF Status Report 2009 by TISA](#)> Accessed 5 November 2014.

defined the local community after having established the best criteria to avoid the pitfalls identified at the start of the chapter. The chapter ends by defining the role of the County Governments in the arrangement for benefit sharing as well as what may be put in place to ensure that the County Governments as trustees can be reigned into carrying out what the community expects them to do as trustees. The issue of a trust for the local community with the objective of managing the benefits that will accrue from natural resources as well as the issue of a County Development Plan (CDP) has also been discussed as an alternative to ensure that communities truly benefit from the natural resources that they are endowed with.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

This Chapter discusses the conclusions and recommendations from this study. The chapter starts with conclusions of the study and then proceeds to provide the recommendations.

5.1 Conclusions

First, the study has established that the Turkana people are categorised as indigenous peoples under International Human Rights law. This has come out clearly based on the definition of marginalized people as provided by the Kenyan Constitution and ultimately from the definition of indigenous peoples as provided by the Commission under the African Charter on Human and Peoples Rights (ACHPR). The Kenyan Government is bound by the above legal documents and therefore it needs to respect the status of this community as determined above.

Secondly, as indigenous peoples, the Turkana's lands that they have occupied in the country belong to them as espoused by the international legal frameworks such as the UNDRIP and the ACHPR. They therefore have unregistered land rights to the area that they occupy and this right is constitutionally protected in Kenya.

Thirdly, the study has established that although the Kenyan State owns the natural resources in the country, local communities where the resources are found have other rights which are not necessarily ownership rights and that during the extraction of the natural resources these rights are infringed upon. Therefore, the communities should not only be compensated but also participate in the sharing of the other incidental benefits that accompany the exploitation of natural resource as discussed in this study. This is especially the case when the community involved is under a protected category of indigenous peoples. It is on this premise that the

study argues that the Turkana people ought to be compensated and thereafter participate in the benefits accruing from the oil extraction on their lands as a means of mitigating the effect of the property rights that they would have lost through the simple act of converting their community land to public land.

5.2 Recommendations

The recommendations of this study are as follows:

1. The National Assembly to enact the Natural Resources (Benefit Sharing) Bill 2014 into law as required under Article 71 of the Constitution in order to operationalise Article 69 of the Constitution. The Bill should however take into consideration the proposals in this study to make it serve its objective. This will include a mechanism to integrate Local Communities into the sharing of the accruing benefits from the natural resources in a manner that takes into consideration the community needs as identified by the members of the community themselves.
2. The Ministry of Interior and Coordination of National Government should direct the Directorate of Immigration and Registration of Persons to register all the residents in all administrative units such as Counties in the country to enable the identification of local communities when the process of sharing benefits from natural resource commences.
3. The National Government should ensure that all the County Governments in the country develop a County Development Plan (CDP) to provide for a blue print of the development projects that will be initiated and their order of priority per County. This will prevent the various developers involved in extraction of natural resources from engaging in random acts of community development in the name of benefit sharing and in the long run duplicate unnecessary development projects which could be less

costly to the organizations to implement but in reality they could be lacking in utility for the local communities. This will include socio-economic projects such as Hospitals and schools.

4. The County Governments to help the local communities set up legal Trusts which will receive and manage all the monies payable to the communities under benefit sharing agreements.
5. The County Governments to come up with regulations to expressly govern the procedure of calling Community Forum meetings and the procedure of choosing the project that is of importance to the community. This will do away with political discretion which often leads to negative outcomes.
6. The Government through the Ministry of Land, Housing and Urban Development should come up with clear regulations that will help in the determination of the radius of the area that will be considered for benefit sharing, this study proposes a radius of 10 Kilometres.
7. The Government through the Ministry of Environment, Water and Natural Resource to come up with regulations that will ensure that the immediate environment where exploitation of natural resources takes place is restored to its original position.

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