

**KENYA'S LEGAL AND INSTITUTIONAL FRAMEWORK ON BENEFIT SHARING  
FROM OIL EXPLOITATION: THE CASE STUDY OF TURKANA COUNTY**

**BY**

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**G62/75046/2014**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTERS OF LAWS  
(LL.M.) OF THE UNIVERSITY OF NAIROBI**

**PREPARED UNDER THE SUPERVISION OF**

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**AT THE**

**UNIVERSITY OF NAIROBI**

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**2015**

## **Declaration**

I, CHELAGAT JEPTUI GRACE, 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:.....**

**CHELAGAT JEPTUI GRACE**

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

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## **Acknowledgments**

I greatly acknowledge my supervisor Professor Albert Mumma for your time, guidance, patience and wealth of invaluable input.

I also acknowledge the knowledgeable insight of other Lectures in the Environmental Law program from whom I have been able to glean ideas from which I have expounded in this authorship.

I acknowledge the University of Nairobi LLM class of 2015.

I thank my family, Rodgers and friends for your patience and encouragement without which this achievement would not have been possible.

Lastly, and most importantly I thank God for His faithfulness.

## **Dedication**

I would like to dedicate this authorship to my parents, thanks for being more than I could ever ask for.

## **List of Abbreviations**

CEDAW- Convention on Elimination of All Forms of Discrimination against Women

CSR- Corporate Social Responsibility

EIA- Environmental Impact Assessment

ICCESC -The Covenant on Economic Social and Cultural Rights

ICCPR- Covenant on Civil and Political Rights

ILC- Indigenous Local Community

IMS- Indigenous Management Structures

LC óLocal Community

MEIC- Multinational Extractive Industry Companies

MNC-Multinational Corporations

NRBSB- Natural Resource Benefit Sharing Bill 2014



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## 1.0 Introduction

Oil exploitation is relatively a new phenomenon in the Kenyan legal system. The current energy laws, fail to identify and establish a relevant institutional and legislative framework for a natural resource benefits sharing regime. Indigenous Local Communities inhabiting oil rich areas disproportionately forgo their enjoyment of their land, livelihoods, endure environmental degradation, increase pollution and relatively poorer health as compared to the rest of the national population. For the above they ought to be compensated and accorded a percentage benefit over and above other Kenyans.

## 1.1 Background to The Problem

Energy is the engine for economic development. The level and intensity of commercial energy use in a country is a key indicator of economic growth and development.<sup>1</sup> Energy has been identified in the socio-economic pillar as an infrastructural enabler in Kenya's Vision 2030. Vision 2030's objective is to transform Kenya into a newly industrialized middle income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment.<sup>2</sup>

The Minister of Planning and Devolution on the 2<sup>nd</sup> of October 2014 released a press statement included oil and other mineral resources as a new priority sector under the economic pillar, in Vision 2030's second Medium Term (2013 to 2017).<sup>3</sup> Vision 2030 initially identified six priority sectors whose growth and employment creation potential were key in driving the country's economy now oil and other natural resources becomes the seventh sector. This inclusion affirms the vital position oil is expected to play in the realization of Kenya vision 2030.

Amidst the general jubilation of Kenya entering the prestigious club of the world's oil producing nations, the interests of the marginalized communities where these oil and gas deposits are situated are often overlooked. Those expected to champion the Indigenous Local Communities

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<sup>1</sup> Government of Kenya Session paper No.4 of 2004 on Energy (The Government Printer Nairobi 2004)

<sup>2</sup> Government of Kenya, Kenya Vision 2030: A Competitive and Prosperous Kenya (Government Printer, Nairobi 2007)

<sup>3</sup> Macharia Kamau, Kenya Sees fortune in Oil, Gas Discoveries to Realize Vision 2030 *The Standard* (3<sup>rd</sup> October 2014) 7

interests often fail, resulting in their uprising against multinational oil corporations licensed to carry out operations in their ancestral land.

These perceived injustice towards the Indigenous Local Communities fuels conflicts within the oil production blocks inhibiting law and order and smooth business operations. The relationship between the oil companies and oil producing communities is often characterized by suspicion, lack of trust hostilities and violence.<sup>4</sup> This was witnessed in October 2013 in Turkana County. Tullow Oil has been forced to suspend operations in Turkana after locals stormed facilities...demanding for jobs for the local and supply contracts for the community.<sup>5</sup> Secondly the lack of a revenue sharing legislative framework may result in turmoil in the oil rich regions of Kenya. Stakeholders have expressed concern that failure to have a framework outlining revenue sharing model might result in the resource rich areas being thrown into conflict.<sup>6</sup>

Oil producing companies give back to the community through their corporate social responsibility programs. Tullow Oil and its partners have invested over Kshs 30 million in the provision of education health and water in Northern Kenya.<sup>7</sup> Leaving it to the discretion to oil producing companies corporate social responsibility whims, to aid the Indigenous Local Communities is unsustainable. The oil producing companies are after the bottom line hence would not be expected to devote a colossal sum of their income to benefit the local communities. Corporate social responsibility is about managing perceptions and making people outside and inside the feel good about themselves.<sup>8</sup>

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<sup>4</sup>Babatunde Abosede , "Oil Exploitation and Conflict in the Nigeria Niger Delta-A study of ilje ,Ondo State Nigeria " *Journal of Sustainable Development Africa* (2009)Volume 11 No.4 ,

<sup>5</sup> Peter Kiragu, "Locals storm Tullow Oil Fields in Turkana" *The Star* (28 October 2013) 3

<sup>6</sup> Supra n. 4 p.64

<sup>7</sup>Tullow Oil Invests in Modern schools in Turkana County <<http://www.tulloil.com/index.asp>> accessed on 1st October 2014

<sup>8</sup>Fryans George Jedrzej, "The False Developmental Promise of Corporate Social Responsibility: Evidence From Multinational Oil Companies" *Journal of international Relations and Development* Volume 81 no.3 (2005 )

## 1.2 Statement of the Problem

There currently exists in Kenya no established benefit sharing institutional or legal framework in the oil sector. The Constitution of Kenya dictates under article 66(2) that parliament shall enact legislation ensuring that investment in property benefit local communities and their economies. Article 71 of the Constitution obligates parliament to enact legislation to govern the exploitation of natural resources. Thirdly Article 69(1) places an obligation on the State to ensure sustainable exploitation of the environment and natural resources and the equitable sharing of the accruing benefits. The above statutes which should ideally actualize this constitutional threshold all have common lacuna for they lack a stipulated framework for natural resources benefits sharing with specific emphasis on the local communities. The Draft National Energy and Petroleum Policy acknowledges the lack of a framework for the sharing of petroleum benefits to the local communities.<sup>9</sup>

Indigenous Local Communities disproportionately have to forgo the enjoyment of their land, livelihoods, endure environmental degradation, increased pollution and relatively poorer health as compared to the rest of the national population. Therefore, they ought to be compensated and accorded a percentage benefit over and above other Kenyans not within oil-producing locales. The local oil-producing communities lack a legal and institutional basis for demanding a portion of the revenue the national government collects from oil exploitation.

Compensation of land taken by the state by eminent domain is not sufficient benefit to Indigenous Local Communities. They require continuous in flow of benefits that would be best fashioned in a natural resource benefit sharing scheme because of their loss of livelihood is not a one off event. Oil production has a negative impact on local social life and threatens the ecology of human livelihoods to oil producing communities.<sup>10</sup> Most of Turkana is arid or semi- arid

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<sup>9</sup> The Ministry of Energy *The Draft National Energy and Petroleum Policy 2015* p.118 ÷ Article 62 (3) of the Constitution provides that all natural resources are vested in the national government in trust for the people of Kenya, while Article 202 (1) states that revenue raised nationally shall be shared equitably among various levels of government. 2. Some of the benefits accruing from the exploitation of energy and petroleum resources include profits, training, employment, technology transfer and CSR programmes. Article 66(2) of the Constitution requires that investments in property shall benefit the local communities and their economies. Challenges Lack of a clear framework for sharing of benefits from exploitation of energy and petroleum resources with the local communities.

<sup>10</sup>Akinola R. Shittu "Social Deprivation through Self-Governing Institutions in Oil Communities of Nigeria" *Africa Today*, Vol. 55, No. 1 (Fall, 2008), pp. 89-107 Indiana University Press p. 1

hence they cannot engage in agriculture which is Kenya's main economic activity which also militates against their food security. The Turkana community is highly dependent on pastoralism for their livelihoods.

### 1.3 Turkana County in Context

Turkana County is one of the least developed counties in Kenya. The Commission on Revenue allocated in 2011 ranked Turkana as the least developed county. The rate of poverty was 94.3% higher than the national rate of 45.9% and was ranked 47/47 CRA 2011.<sup>11</sup> The Turkana community falls within the definitional parameters of marginalized community as per Article 260 (d) of the Constitution which defines pastoral persons and communities, whether they are (i) nomadic; or (ii) 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. The Turkana's community has been historically marginalized.

Professor Akuja contends nowhere else are historical injustices as glaring as in Turkana County. Right from as late as 1954, the Swynerton Plan, through to 2011, things have remained the same in Turkana County. The likes of the Northern Frontier District where Turkana is located were declared no go zones for any semblance of development. Reliable records show that, in the mid-1960s, there were only two primary schools in Turkana and there was no secondary school. Today, there about 300 primary schools, 10 secondary schools and no tertiary institution in Turkana County. Pupils who complete their education from these primary schools go to waste because of the few secondary schools and lack of school fees to transit to higher levels.<sup>12</sup> The ratio of Teacher to Pupil in primary school is 1:51 and 1:27 in secondary schools CRA 2011. The Majority of the population 71.0% have primary education, 9.5% Secondary education .Only 18.1% of the county's population can read and write and 39.0% children of 15-18 years attend school.<sup>13</sup>

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<sup>11</sup> Kenya Inter-Agency Rapid Assessment *Turkana Secondary Data Review As At March 2014* <[http://www.humanitarianresponse.info/system/files/documents/files/Turkana%20Secondary%20Data%20Review\\_20141112.pdf](http://www.humanitarianresponse.info/system/files/documents/files/Turkana%20Secondary%20Data%20Review_20141112.pdf)> accessed on 10<sup>th</sup> July 2015

<sup>12</sup> Akuja Thomas Why Turkana remains poorest county in Kenya *Business Daily* <<http://www.businessdailyafrica.com/Opinion-and-Analysis/Why-Turkana-/539548>> accessed on 8<sup>th</sup> July 2015

<sup>13</sup> Supra n.11

These historical injustices increased with the passing of time making the Turkana community further cast in the periphery of social, political and economic development. The Turkana have insufficient to basic education let alone higher education hence they are unable to compete with other communities in the job market.ø The National Cohesion and Integration Commission revealed that residents of Turkana are less than 0.1 per cent of the workforce in the Civil Service. In sum, all that comes out clearly is that historical injustices have formed the backbone of the seemingly inherent poverty. Thus, Turkana tops the poverty ranking.ø<sup>14</sup> In 2012 15% children in Turkana County were underweight and 30% were stunted in height. There are only 16 nurses, one doctor, three clinical officers in Turkana County.ø<sup>15</sup> The Turkana community is marginalized in the health sector hence they have few days of productive labour due to illness. Access to water in Turkana County is unsatisfactory at best. -Turkana has a water poverty index of 43.5 with less than 20% of the population having access to 20 litres per person per day ...The average price of water is 3-5 KES per 20 litre jerician, households access water from a distance of 1.3-3.5Kms one way and the water waiting time is 30 minutes.ø<sup>16</sup>

The access to electricity in Turkana county is below the national average. Only 2% of residents in -Turkana County use electricity as their main source of lighting. A further 8% use lanterns, and 9% use tin lamps. 76% use fuel wood.ø<sup>17</sup> Turkana County suffer from poor housing. øIn Turkana County, 7% of residents have homes with cement floors, while 91% have earthen floors. 1% has wood and less than 1% has tile floors. A small minority of the residents have homes with concrete roofs, while 12% have corrugated iron roofs. Grass and makuti roofs constitute 72% of homes, and less than 1% has mud/dung roofs and 4% of homes have either brick or stone walls. 27% of homes have mud/wood or mud/cement walls. 31% has wood walls. 1% has corrugated iron walls. 28% have grass/thatched walls. 9% have tin or otherø<sup>18</sup> All the aforementioned statistics evidence the marginalization of the Turkana Community.

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<sup>14</sup> Ibid

<sup>15</sup> Ministry of Health *Turkana County at a Glance*

<[http://www.healthpolicyproject.com/pubs/291/County%20poster-factsheet\\_\\_Turkana\\_Fpdf](http://www.healthpolicyproject.com/pubs/291/County%20poster-factsheet__Turkana_Fpdf)> accessed on 8<sup>th</sup> July 2015

<sup>16</sup> Supra n.11

<sup>17</sup> Kenya National Bureau of Statistics *Exploring Kenya's Inequality: Pulling apart to Pull Together ? Turkana County* p.13

<sup>18</sup> Ibid p.14

## 1.4 Hypothesis

Kenyan laws are wanting in regards to any framework for natural resources benefits sharing. This dissertation is premised on the hypothesis that, Kenya lacks legislation, institutional framework and policy to enable the Indigenous local community members from areas rich in oil benefit from the exploitation of natural resources.

## 1.5 Theoretical Framework

The Social Contract theory has been found most suitable theory for this study. The social contract is made between the government and its citizens where they surrender certain freedoms to the state in exchange for protection. The theory was espoused by many proponents including Thomas Hobbes, John Locke and Jean Jacques Rousseau. Thomas Hobbs perceived the state of nature as one of constant strife human life was reduced to being solitary, nasty, poor, brutish and short.<sup>19</sup> Law and government were set up to move from this unsatisfactory state to induce law, order and ensure personal security of the citizens. The citizens confer their rights to a sovereign who then obtains unlimited power to rule them. -Once the citizens sign away their rights to the sovereign acquires unfettered powers to preside over governmental powers and authority over citizens.<sup>20</sup> Thomas Hobbs viewed the function of law as assisting the citizens to decipher right from wrong.

John Locke propounded that man was born in the state of nature free and equal to one to another. The state of nature suffered the constant menace of insecurity with inhibited man from enjoying total freedom. In order for man to enter society he had to surrender his absolute freedom for their common good and security. However man did not surrender his rights under natural law relating to integrity of the personal and ownership of private property. -Such surrender of rights coupled with the obligation of the sovereign to ensure security and common good of the citizens to ensure security and the common good of the citizens is akin Rhodesian social contract .Locke termed fundamental prerogatives retained by the individual as the natural rights.<sup>21</sup> The Kenyan government being the Sovereign has not ensured the common good of the Turkana community

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<sup>19</sup> Freeman MDA *Lloyds' Introduction to Jurisprudence* 8<sup>th</sup> Sweet & Maxwell 2002 p. 106

<sup>20</sup> Bix Brian *Jurisprudence Theory and Context* 6<sup>th</sup> ed Sweet & Maxwell 2012 p.

<sup>21</sup> *Ibid* p.

members because their community has continued to lag behind in development from the pre-colonial days to present day.

Rousseau propounds that the social contract must be subject to the general will of the people.<sup>22</sup> He advances a theory that man has some natural inalienable rights which no one can devolve from him. He agitates that the general will of the people is equated to the social contract. The people's natural rights cannot be abrogated from by legislation. Since the Indigenous Local Communities land ownership rights predate the Constitution and other legislation. Their rights do not flow from the Constitution. The Turkana's rights flow from their historical occupation of their ancestral land.

The Constitution in Article 62(1) (f) defines public land to include land upon which minerals and oil is found. The Turkana people have natural rights over their oil rich ancestral land which may not be taken away by the Constitution declaring land upon oil if found public land. The right of the Turkana people to higher percentage in the benefit sharing formulae is an expression of their natural rights over their ancestral property. Failure of the government to ensure they enjoy higher percentage of the benefits would give Turkana's right to revolt against the government for abrogating their natural rights over property which are inalienable.

## **1.6 Literature Review**

Various scholars have elucidated on the importance of members of Indigenous Local Communities to benefit from oil and gas exploitation in their environs. Abundant literature abounds in the area of natural resource curse. That gainsaid, few have tackled the question of the natural resource benefit sharing and fewer still expositing the right of the Indigenous Local Communities to greater benefits to oil revenue over and above the general population in a resource rich state. This literature review first analyses scholarly works written by international authors then narrows down to African scholars and lastly Kenyan authorities in the arena of natural resource benefit sharing.

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<sup>22</sup> Ibid

Lisa Calvano in her article *Multinational Corporations and Local Communities: A Critical Analysis of Conflict*<sup>23</sup> describes the dark side of Corporate Social Responsibility (CSR) that it can be used as a tool of manipulation of the Indigenous Local Communities to induce them into silence and -In addition, companies may use CSR as a form of green washing to divert attention from or cover up misdeeds:-<sup>24</sup> She describes the asymmetry of power relations and communication techniques between the Multinational Corporation (MNC) and the local communities. Calvano emphatically notes that -CSR proclaims that business has a broader set of obligations to society, the dominant view of most of the researches is that CSR's primary function is to enhance firm profitability. -<sup>25</sup> Lastly she recommends the adoption of strategies of management and operation of Multinational Corporations (MNC) that value the culture of the Indigenous Local Communities to avoid conflicts. Calvano secondly espouses the adoption of the least confrontational approaches are those that create mechanisms for stakeholder engagement such as community-driven regulation and multi stakeholder learning dialogues. -<sup>26</sup>

The above article was found to be help in conceptualizing the conflicts between the MNC with local communities. Calvano describes the various different forms of communication adopted by the Indigenous Local Communities to vent their dissatisfaction with the MNC such as protests as was witnessed in Turkana in October 2013. The Turkana being a pastoralist community have lost land in oil blocks which was previously used as grazing land occasioning them loss of livelihood this was also captured in her article hence her work is relevant in the Kenyan context generally and Turkana specifically.

Fisher in her article *International Experience with Benefit-sharing Instruments for Extractive Resources* decries the need for developing countries to have good governance; transparent, corruption free and sound policy framework for sharing oil benefits.<sup>27</sup> She fails to clearly bring out the need for the Indigenous Local Communities to benefit over and above the general

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<sup>23</sup>Calvano Lisa ‘ Multinational Corporations and Local Communities: A Critical Analysis of Conflict’ *Journal of Business Ethics* (2008) 82: p.795

<sup>24</sup> Ibid p. 796

<sup>25</sup> Ibid

<sup>26</sup> Ibid p. 801

<sup>27</sup>Fisher Carolyn *International Experience with Benefit-sharing Instruments for Extractive Resources*<<http://www.environmentalportal.in.RFF-Rpt>> accessed on 20<sup>th</sup> January 2015



population. Oil revenue wealth does not automatically ensure astronomical economic growth for developing countries many a times causes the opposite effect this has been termed as the resource curse.

Fiona Mackenzie and Simon Dalby in their work *Reconceptualising Local Community: Environment, Identity and Threat* argue for the evolution of the definition of Indigenous Local Communities from the territory or geographical area that they occupy to a more holistic and humanistic approach.<sup>28</sup> The humanistic geographers focus on the sense of place that Indigenous Local Communities construct and those local cultures they celebrate.<sup>29</sup> They further contend that a local community can be identified using non geographical indicators such as class, gender, ethnicity, sexuality etc. Self assertion and the search for some forms of authentic selfhood in the face of indifference, rapid global economic and social change or deliberate persecution permeate many of these accounts.<sup>30</sup> They then proceed to enumerate symbols of community identity which they contend is an asset when a community perceives danger. These symbols are perceived to be sufficiently imprecise or ambiguous<sup>31</sup> in demarcating one community from the next.

This, they conclude is important when ILC agitate for economic development projects which are initiated within the area they occupy, to be implemented in a more sustainable manner in view of the Indigenous Local Communities ways. Most of this literature was found irrelevant to the study for it focused on geography save the importance of the identification of the Indigenous Local Communities which the authors brought out succinctly.

Professor Collier Aul asserts in his article titled *Managing Resource Revenues in Developing Economies*<sup>32</sup> that revenues from the extractive industry are unique because they are finite and exhaustible and secondly and because commodity prices are highly volatile they are

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<sup>28</sup>Dalby Simon et al *Reconceptualising Local Community: Environment, Identity and Threat* Vol. 29, *The Royal Geographical Society (with the Institute of British Geographers)* No. 2 (June 1997), p. 99

<sup>29</sup>Ibid p. 100

<sup>30</sup>Ibid

<sup>31</sup>Ibid p. 102

<sup>32</sup>Collier Aul et al *Managing Resource Revenues in Developing Economies* Palgrave Macmillan Journals IMF Staff Papers, Vol. 57, No. 1 (2010)

unreliable.<sup>33</sup> They argue that often after the discovery of such resources there is a boom in the economy which often leads to the natural resources curse. To counter this they espouse the creation fund by government. Government should largely save the boom in foreign financial assets, whether through an explicit fund, or simply by the accumulation of reserves. The new information that the boom is over reinforces the wisdom of having saved the boom revenues. This insight must have informed the creation of the sovereign wealth fund under section 26 in the Natural Resources Benefit sharing Bill.<sup>34</sup> This literature was found helpful in conceptualizing from an economic background the necessity of the sovereign wealth fund but unhelpful in advancing the rights of the Indigenous Local Communities.

Jedrzej George Fryna commences his article with a profound statement that The oil sector has been among the leading industries in championing Corporate Social Responsibility (CSR).<sup>35</sup> Oil companies attach greater importance to their social and environmental impact of their activities and they presently engage more with Indigenous Local Communities than they used to in the past. This he argues is demonstrated by the growth in corporate codes of conduct and social reporting.<sup>36</sup> Oil companies now uphold notable CRS initiatives such as the Kofi Annan's Global Compact and Global Reporting initiatives.<sup>37</sup> He then proceeds to question the effectiveness of CSR and posits that there is a gap between what the multi-national oil companies promises and what is felt on the ground by Indigenous Local Communities.

Fryna argues that CSR brings the oil company managers closer to political leaders and the obvious bonuses that would ensue there from. Fryna continues to argue that CRS often is about managing external expectations and is often an attempt by the oil companies to save face after getting bad publicity because of their exploitative nature. This article is relevant to Kenyan context especially were oil companies seek media millage by over illuminating their CSR activities which often blind the Indigenous Local Communities who don't step back and evaluate

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<sup>33</sup> Ibid p. 86

<sup>34</sup> The Natural Resources Benefit Sharing Bill section 26(1)(a) twenty per cent of the revenue collected shall be set aside subject to sub section (2) be paid into the sovereign wealth fund established by the national government.

<sup>35</sup> Fryna Jedrzej The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies *International Affairs (Royal Institute of International Affairs 1944-), Vol. 81, No. 3, Critical Perspectives on Corporate Social Responsibility* (May, 2005)

<sup>36</sup> Ibid p. 581

<sup>37</sup> Ibid

the actual benefit of the CSR, against the backdrop of the profits MNC make at their expense and hardship.

Herbst Jeffrey in his article *The Politics of Revenue Sharing in Resource -Dependant States* elucidates that a significant number of developing countries have few natural resources which accounts for a vast majority of government revenue.<sup>38</sup> Tension over the division of natural resources exports have been repeatedly cited as central contributor to conflicts. In contrast with countries that have managed to develop fair and equitable mechanisms for distributing natural resources revenue which has the potential to solidify national ties. Herbst arguments are legitimate in the Kenyan circumstance that without an equitable framework for natural resource benefit the county could fall victim to civil unrest and cession politics.

Karen E. Makuch and Richardo Pereira argue that there is a clear correlation between natural resources exploitation and social welfare. They contend that energy is an important factor of production which should assist in industrial and national growth.<sup>39</sup> The above authors failed to identify a framework for allocation of benefits accruing from oil exploitation to the Indigenous Local Communities though acknowledging its importance in improving social welfare. Professor Ton Dietz in his book *Entitlements to Natural Resources*<sup>40</sup> proponent the importance of Indigenous Local Communities participating in decision making and benefiting natural resources within their locales. This view accords well indigenous management structures of natural resource revenue.

Uwafiokun Idemudia contends in his article *The Quest for the Effective Use of Natural Resource Revenue in Africa: Beyond Transparency and the Need for Compatible Cultural Democracy in Nigeria*<sup>41</sup> that the oil curse could be transformed into a blessing if African oil rich states embraced if oil-revenue management systems based on transparency, accountability, and

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<sup>38</sup>Herbst, Jeffrey ÷ *The Politics Of Revenue Sharing In Resource-Dependent States* World institute for Development Economics (UNU-WIDER) no.43 OF 2001

<sup>39</sup> Karen Makuch and Richardo Pereira *Environmental and Energy Law* ( Blackwell Publishing 2012) p.120

<sup>40</sup> Ton Diets *Entitlements to Natural Resources : Contours of Environmental Geography (International Books 1996 )* 23

<sup>41</sup>Idemudia Uwafiokun ÷*The Quest for the Effective Use of Natural Resource Revenue in Africa: Beyond Transparency and the Need for Compatible Cultural Democracy in Nigeria*ø*Africa Today*, Vol. 56, No. 2 (Winter 2009), pp. 2-24 Indiana University Press

fairness.<sup>42</sup> To ensure accountability Uwafiokun advocates for the adoption of a compatible cultural democracy in Africa this entails a consocietal arrangement that is, the use of ethnic groups, nationalities, and communities as the constituencies for representation. It would be both centralized and decentralized.....with emphasis on communal rights.<sup>43</sup>

Ukafiokun emphasizes the importance of the Ubuntu philosophy in creating the ideal environment for public participation, accountability and transparency in the natural resource management in resource-rich African states. This literature was found helpful for it firstly ingrained the Ubuntu philosophy in the call for transparency, citizen participation and accountability in oil revenue allocation and management. Secondly by placing the Indigenous Local Communities at the heart of the compatible culture democracy approach their right to higher percentage of benefits than larger citizenry can be advanced.

Akinola in his article *Coping with Social Deprivation through Self-Governing Institutions in Oil Communities of Nigeria*<sup>44</sup> contends that communities living within area where crude oil is extracted suffer poverty, neglect, environmental degradation and denial of fundamental rights.<sup>45</sup> The paper is grounded theoretically in the public choice theory, which is skeptical of the centralist type of government's ability to meet the aspirations of the governed. He asserts that the Nigeria's federal government continues to pilferage the oil revenue to the detriment of Indigenous Local Communities living near oil rich blocks. Akinola seeks to remedy this dire state by proposing the adoption of self-governing institution otherwise known as community based institutions to cater for the developmental needs of such local communities. He hails the success by oil producing communities self government for providing social services, distributing social goods and he agitates the same would be replicated in the division of oil revenue. This literature was found helpful bearing in mind the proposed establishment of Local Community Benefit Sharing Forum in section 31 of the Natural Resource (Benefit Sharing) Bill 2014.<sup>46</sup> The article

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<sup>42</sup> Ibid p. 2

<sup>43</sup> Ibid p. 23

<sup>44</sup> Akinola R. Shittu "Social Deprivation through Self-Governing Institutions in Oil Communities of Nigeria" Africa Today, Vol. 55, No. 1 (Fall, 2008), pp. 89-107 Indiana University Press

<sup>45</sup> Ibid. p.1

<sup>46</sup> Natural Resource (Benefit Sharing) Bill 2014 s. 31 "There shall be established by each affect local community a Local Community Benefit Sharing Forum comprising of five persons elected by the resident of the local community" 31(3) The function of the Local Community Benefit Sharing Forum shall be to (a) negotiate with the

underscores the importance of Indigenous management structures and decision making over oil revenue devolved at the county and local levels.

Professor Aponte Miranda before the American Society of international Law 2012 annual meeting presented a paper titled *The Role of International Law in Intrastate Natural Resource Allocation*<sup>47</sup> she advocated for a departure from the state's permanent sovereignty over natural resources in favor of marginalized communities. At the core of intrastate struggles for land and natural resources is a distributional concern regarding the potentially legitimate interests of multiple marginalized communities vis-a-vis each other, the broader national polity, and the state.<sup>48</sup>

She advances three approaches founded in international law for ensuring that Indigenous Local Communities acquire higher distribution of benefit over natural resources found within their locality. First, a human rights perspective upon which she contends that it acknowledges the procedural and substantive land and resource rights of identity of indigenous peoples, who can demonstrate a cultural attachment to the land and resources. The second approach is founded on the tenants of good governance and seeks to regulate the disclosure of state profit margins in natural resource extraction projects.<sup>49</sup> This approach advocates for transparency and accountability in natural resource revenue management. Lastly the final approach is grounded on theory of sovereignty over national resources and more so appreciates the difference between the state and people. This approach draws a distinction between the state and the peoples of a state. It interprets the doctrine of permanent sovereignty over natural resources as properly imbuing the peoples of a state with sovereignty to freely dispose of natural resource.<sup>50</sup>

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county benefit sharing committee for purposes of entering into a local community benefit sharing agreement on behalf of the community (b) identify local community projects to be supported by money allocated to the local community by the county benefit sharing committee (c) oversee the implementation of projects undertaken by the local community using money devolved under this Act.

<sup>47</sup> Miranda A. Lillian "The Role of International Law in Intrastate Natural Resource Allocation" *American Society of International Law* Vol. 106 (March 2012) p.3

<sup>48</sup> Ibid p.77

<sup>49</sup> Ibid p.78

<sup>50</sup> Ibid p.76

The paper was found helpful, especially the human rights and the good governance approaches which can be utilized via public interest litigation. Public interest litigation which would seek a declaration and order of court compelling the Kenyan Government to disclose the contents of the oil concession contracts between it and the numerous multinational oil companies. The Constitution under Article 35(1) gives every Kenyan the right of information held by the state. The same Article in 35 (3) obligates to publish and publicize any important information affecting the nation. The human rights and good governance approach is a profound mechanism upon which the rights of the Indigenous Local Communities in areas oil rich can be enforced to secure greater benefits to them and their progeny.

Jeremiah Dibua in *Citizenship and Resource Control in Nigeria: The Case of Minority Communities in the Niger Delta*<sup>51</sup> contends that "The marginalization of the citizenship rights of the minority oil producing communities, helped to fuel the resort to ethnic citizenship rights agitation as the basis for resource control." He brings out the history of the Ogoni people who have been marginalized economically despite their occupation of the land upon which the bulk of Nigeria's oil revenue has been derived through out the years. Dibua argues that the principle of derivation is seen as the primary vehicle through which the people from whose resources wealth is generated would exercise control over a significant portion of that wealth.<sup>53</sup>

Jeremiah Dibua contends that ethnic citizenship was crafted by the colonial governments formed the basis of a person's participation in the colonial society helped to create and sustain the phenomenon of ethnic citizenship.<sup>54</sup> This literature was found to be relevant in propagating this study in view of the chaos that was experienced by Tuilow oil in October 2013 in Turkana County. The Turkana took up arms after feeling disenfranchised by Tuilow's operations which they perceived as adding no value to their community. The importance of ethnic or local communities as a vehicle of engaging the National and County Government for higher percentage of benefits was well explored by the Dibua's article and is useful in the Turkana people's context.

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<sup>51</sup>Dibua Jeremiah *Citizenship and Resource Control in Nigeria: The Case of Minority Communities in the Niger Delta* Africa Spectrum, Vol. 40, No. 1 (2005), pp. 5-28

<sup>52</sup>Ibid p.7

<sup>53</sup>Ibid p.9

<sup>54</sup>Ibid p.8

John Boye Ejobowa in *Who Owns the Oil? The Politics of Ethnicity in the Niger Delta of Nigeria*<sup>55</sup> adopts a pluralist citizenship view, that an individual can have more than one membership in the modern state which is multinational and that sub national membership should be the building block for political membership in the wider state arena. This view recognizes individuals as being born into sub national communities that provide a secure sense of belonging and identity. Life lived in these communities provides a context within which individuals make and revise their choices in the wider society. He concludes that the benefits from oil should almost equally be divided between the Nigeria's federal governments and the sub national states (ethnic states). Ejobowa's article is relevant and useful in fortifying the rights of the communities near the oil producing blocks. His article gives them a platform to argue for a larger share of the benefits from oil and gas greater than the wider Kenyan population.

Newenham-Kahindi in her article titled *Global Mining Corporation and Indigenous Local Communities in the Lake Victoria Zone: The Case of Barrick Gold Multinational in Tanzania*<sup>56</sup> emphatically emphasizes the failure to effectively use mining-generated taxation revenues to improve the local communities lives.<sup>57</sup> The paper agitates for the inclusion of the Indigenous Local Communities in decisions made by the government concerning the establishment and continued operation of MNC in their ancestral lands. For local communities, legal papers are nothing. The company finds the people here very unpredictable. The answer is so simple: it is all about deep understanding, integration, and building a trusting relationship.<sup>58</sup> She identified three types of engagement namely transactional, transitional and transformational. Newnham-Kahindi favors the adoption of the transformational engagement which entails the development of a social, embedded engagement strategy which ensures a two-way communication. The transformational engagement paradigm necessitates meaningful consultation and collaboration with the ILC.

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<sup>55</sup>Ejobowa John -Who Owns the Oil? The Politics of Ethnicity in the Niger Delta of Nigeria Africa Today, Vol. 47, No. 1 (2000), pp. 29-47 *Indiana University Press*

<sup>56</sup>Newenham-Kahindi M. Aloysius -Global Mining Corporation and Indigenous local communities in the Lake Victoria Zone: The Case of Barrick Gold Multinational in Tanzania *Journal of Business Ethics*, Vol. 99, No. 2 (March 2011)

<sup>57</sup>Ibid p. 255

<sup>58</sup>Ibid p. 269

Newenham-Kahindi proponents the adoption of a business practices which utilize those local community-cantered values in rejection of the "standardized and homogenous western "style based on logical and rational choice paradigms business practices "59 The MNC should craft business practices which are alive to the host Indigenous Local Communities values. This article was found helpful despite the fact that is centered on a case study of a gold mining company for it identified strategy of transformational engagement with the LC.

Christabel Nyamwaya is one of the few authors to write on natural resource benefit sharing in the Kenyan context in her article *Benefits Sharing On Extractive Natural Resources With Society In Kenya*<sup>60</sup>. She underscores the importance of Indigenous Local Communities acquiring benefits above the rest of the population due to the negative impacts they endure the extraction activities. Nyamwaya conceptualizes benefit sharing as a social license for the MNC to continue their extractive activities. She dichotomizes benefits into two branches first, monetary benefits which include; "revenue sharing, equity sharing, preferential rates, property tax and development funds"61 Secondly non-monetary benefit sharing "such as integrating project benefits into local development strategies, livelihood restoration and enhancement, community development and catchment development."62 This article was found very helpful though it was written within the back drop mining industry for it discusses the varied methods of benefit sharing that could be adopted within the Kenyan context.

Dr. Kariuki in his article "Utilizing Africa's Resources to Fight Poverty"<sup>63</sup> adopts a human rights approach, which is similar to Prof. Miranda human rights and good governance approaches. He contends natural resources and the benefits that would ensue from their proper management can be a source of subsistence and venue of breaking the cycle of poverty. By breaking the cycle of poverty, Indigenous Local Communities will be able to enjoy greater fundamental freedoms and their innate human dignity will be upheld. He buttressed his arguments in international law,

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<sup>59</sup>Ibid p. 275

<sup>60</sup>Nyamwaya Christabel *Benefits Sharing On Extractive Natural Resources With Society In Kenya*<<http://www.fes-kenya.org/media/publications/Benefits%20Sharing%20on%20Extractive%20Natural%20Resources%20with%20Society%20in%20Kenya%202013.pdf>>accessed on 30<sup>th</sup> September 2014

<sup>61</sup> Ibid p.25

<sup>62</sup> Ibid

<sup>63</sup>Muigua Kariuki *Utilizing Africa's Resources to Fight Poverty*<<http://www.kmco.co.ke/index.php/publications>> 10 January 2015



specifically the role of the state to Indigenous Local Communities who rely on land for their livelihoods who then should be able to enjoy natural resource benefits to sustain themselves. This article was found insightful in this study for because the Turkana communities, who are the focus of this study heavy, rely on land for pastoralism which has now been converted into government land upon which the MNC have set up their oil extraction activities. For this reason the Turkana Community ought to enjoy benefits to enable them break the cycle of poverty, enjoy greater human rights and dignity. The reviewed literature has a gap for they do not adequately capture the unique circumstances of Kenya in general and Turkana County in particular.

## **1.7 Objectives of The Study**

These are dichotomized into two items namely the main and specific research objectives.

### **1.7.1 Main Objective**

The broad objective of this study is to assess the energy policy and statutes with a view to determining whether or not Indigenous Local Communities are benefiting from oil and gas exploitation within their ancestral land.

### **1.7.2 Specific Objectives**

The specific objectives of this study are to

- (a) To review the Constitution, national legislation and policy for gaps in affording benefits to Indigenous Local Communities near oil producing areas.
- (b) To find out the limitations in the Energy Act and the Kenyan Energy policy in the provision of benefits to Indigenous Local Communities near oil rich areas.
- (c) To find out the efficacy of the proposed natural resource benefits sharing strategy formulated in the Draft National Energy and Petroleum Policy 2015, Petroleum (Exploration, development and Production) Bill 2015 and to review the National Resources (Benefit Sharing) Bill 2014.

## 1.8 Issues

This project proposes to address the following issues:

- a) The need to define the indigenous Local Communities within the law.
- b) The legal basis for indigenous local community entitlement to Benefit Sharing.
- c) Legal Benefit Sharing Mechanism and structures.

## 1.9 Research Questions

This dissertation revolves around seeking answers to the following questions,

- (a) What are limitations in the present legislative and policy provisions in the Energy Act, Petroleum (Exploration and Production) Act and Sessional paper no.4 in setting up a legislative and institutional framework for in natural resource benefit sharing?
- (b) Which strategies institutions, mechanisms and frameworks plausible for natural resource benefits sharing?
- (c) What are the types of benefits available to the local indigenous communities?
- (d) Who are indigenous local communities?

## 1.10 Definition of Terms

The term benefit sharing is more developed in medical ethics field. Presently in legal parlance it is problematic to define. At present the term benefit sharing is used in many different ways , making it difficult to identify what the key issues and the best approaches to solving them. It is not clear the benefits to be shared and how these balance with costs.<sup>64</sup> Benefit sharing is a terminology that came to use in the past two decades in international legal discourse. The concept of benefit sharing came to prominence during the drafting of the Convention on Biological Diversity at the Earth Summit in Rio De Janeiro. Benefit sharing refers to a commitment to channel some kind of return whether monetary or non-monetary back to the affected communities<sup>65</sup> An ideal natural resources benefit sharing model would be in the Kenyan context be triad in nature consisting of a national, county and indigenous local community levels. Benefit sharing refers to in this study to the distribution of revenue emanating

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<sup>64</sup> Supra n. 60 p.25

<sup>65</sup> Hayden Cori *Benefit-Sharing Experiments in Governance* < [http://www. programs.ssrc.org/ccitese/publications](http://www.programs.ssrc.org/ccitese/publications)> accessed on 26<sup>th</sup> October 2015

from oil exploitation to the national and county levels with special attention to those enjoyed by the indigenous local communities.

### **1.11 Research Methodology**

These are the methods utilized by the researcher in acquiring data in this study. This dissertation relied on secondary sources of data. This study relied on secondary sources including library research at the University of Nairobi, Ministry of Energy, High Court and United Nations Environment Program (UNEP). Online resources such subscription law journals were useful especially in the literature review. Publications by relevant organizations were found helpful by the researcher in formulating her arguments. Primary data was obtained through the review of the Constitution various statues and Bills. Comparative analysis of statutes and policies of other countries legal systems that have appreciated and devised formulas for natural resource benefits sharing were most informative.

After obtaining the data the author evaluated the data to ensure its relevance and appropriateness to the research topic. This ensured congruency between the data collected and the research questions. Upon the relevant data the author carried out content and qualitative analysis which was interpreted through the chapters. This study is inquisitive, analytical, prescriptive as it delves into the oil revenue benefit sharing.

### **1.12 Limitation of the Study**

This study is limited in subject coverage to the analysis of specific area of oil exploitation to the exclusion of other natural resources such as geothermal, gas, coal or wind energies. The study has chosen concentrate on the oil sector. The study will concentrate in the oil exploitation phase and will disregard any benefits accrued to the local community members within the oil exploration phase if any. The study geographical coverage concentrated on Turkana County which is the only county in the county where oil soon to be exploited.

## 2.0: Approaches to Defining Indigenous Local Communities

### 2.1 Introduction

The demarcation of who is and who is not considered a constituent of the Indigenous Local Communities determines whether or not one is entitled to enjoy the benefits of oil exploitation. This portion examines four methods of definition of Indigenous Local Communities which include geographical anthropological, political and dependence types of definitions of Indigenous Local Communities. The study also seeks the definition of the Indigenous Local Communities under international law and precedents. The study adopts the anthropological definition as best delimiting the membership to the Turkana Community because it has lower chances of infiltration by opportunistic settler communities seeking to usurp benefits rightly belonging to members of Turkana community.

The Senate Natural Resource Benefit Sharing Bill 2014<sup>66</sup> apportions a portion of the proceeds of oil exploitation to the local communities. The Draft National Energy and Petroleum 2015 similarly recognises the challenge posed by a lack of a clear framework for sharing of benefits from exploitation of energy and petroleum resources with the local communities.<sup>67</sup> Where the natural-resources debate is particularly sharp is not only in the context of divided societies, but in those cases where the uneven geographic distribution of natural resources corresponds with ethnic, religious or linguistic divides. While these issues are especially important in decentralised nations and are particularly salient in a federal context, they can arise in any state confronted with demands for increased autonomy over local resources from individual communities.<sup>68</sup>

Presently, Kenya has no specific law governing community rights to natural resources.<sup>69</sup> The Constitution gives cognisance of the importance of Indigenous Local Communities benefiting

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<sup>66</sup> S.26(3) 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

<sup>67</sup> Supra n.9

<sup>68</sup> Haysom Nicholas & Kane Sean *Briefing Paper Negotiating Natural Resource for Peace: Ownership, Control and Wealth-sharing* October 2009 Centre for Humanitarian Dialogue p.5

<sup>69</sup> The author is aware of the Community Land Bill 2014 this Bill addresses the management of community land as identified by the Constitution but has no provisions on management of natural resources within those community lands. *Further see* The Constitution of Kenya Article 63. (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.(2) Community land consists of (a) land lawfully registered in the name of group representatives under the provisions of any law;(b) land lawfully transferred to a specific community by any process of law;(c) any other land declared to be community

from any development on land.<sup>70</sup> Secondly, Article 69(1) places an obligation on the State to ensure sustainable exploitation of the environment and natural resources and the equitable sharing of the accruing benefits. In some developing countries, natural resources are the only or predominant source of wealth. As a result, these resources are very often seen as a national heritage to be shared equitably. However, they often generate strong feelings of Indigenous local community ownership over their development and the resulting revenues. The challenge is to balance these local interests against the overall importance of natural resources to national development.<sup>71</sup>

## **2.2 Justification for The Definition of Indigenous Local Communities**

Law is a very specific discipline, often persons are included or precluded from benefiting from the proceeds derived from statute, based solely on whether or not they are statutory defined as beneficiaries from the provisions of a said Act or even the Constitution. The role of clear and unambiguous legislative drafting is at this juncture emphasized especially in the realm of natural resource benefit sharing. The result of enacting a loose definition of Indigenous Local Communities is that the intended beneficiaries under Statute or the Constitution will be overlooked and disenfranchised by opportunistic immigrant settler community members who can better articulate Indigenous Local Communities issues and fortify their own interests at the expense of the Indigenous Local Communities who have suffered economic, social and political marginalization. The Constitution under article 260(d) defines marginalized communities as pastoral persons and communities, whether they are (i) nomadic; or (ii) 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.

The main justification for the need to define Indigenous Local Communities is that it ensures that only those people who have been historically marginalized, their livelihood interrupted and

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land by an Act of Parliament; and(d) land that is (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or(iii) lawfully held as trust land by the county governments... (5) Parliament shall enact legislation to give effect to this Article

<sup>70</sup> The Constitution of Kenya art. 66(2) Parliament shall enact legislation ensuring that investments in property benefit Indigenous Local Communities and their economies.

<sup>71</sup> Supra n.66 p. 28

who bear the brunt of disadvantages from oil exploitation benefit extra from oil revenue, in terms of their present (and future) health and environment degradation hence should be compensated for the hardship they have to endure over and above other Kenyans. It is also worthwhile to note that the consultative processes ...should involve engagement the Indigenous Local Communities and tribes. This is true for all issues concerning natural resources given the strong proprietary feelings of Indigenous Local Communities over local resources and the likely significant local environmental and social impacts from their exploitation.<sup>72</sup>

Secondly a precise definition inhibits opportunistic immigrant settler communities from usurping the benefits statutory and constitutionally directed to the Indigenous Local Communities who are often as in the case of the Turkana community, less articulate, sophisticated and learned hence often unable to articulate their issues to the government and non-governmental organization. The opportunist alien communities often are able to disguise themselves as Indigenous Local Communities and beguile non governmental organization especially those championing for indigenous rights and are able to benefit from natural benefit sharing schemes set up by statute.

Opportunistic settler communities often seek favors in international fora especially concerned with indigenous rights and guise themselves as members of the Indigenous Local Communities and hence able to fortify their interests at the expense of the lowly and marginalized authentic members of the Indigenous Local Communities .These international bodies are seldom able to verify their membership or lack of it to the Turkana Community. These egotistic settler commutes often articulate the Indigenous Local Communities issues better than the Indigenous Local Communities themselves, because of their higher education and general exposure than the marginalized Turkana community. ILC's hardships continue to triple because their land which sustained Turkana's ancestral pastoralism livelihood is deemed government land as per the Constitution.<sup>73</sup> The Turkana do not have other sources of income or alternate livelihoods because of their marginalized community status, lacking many of the opportunities enjoyed by other communities in Kenya. The cost of living in Turkana will increase due to the higher purchasing

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<sup>72</sup> Ibid

<sup>73</sup> The Constitution of Kenya art. 62(1)(f) Public land Indigenous Local Communities land includes all minerals and mineral oils as defined by law

power of the alien communities and expatriates who may live within their county making Turkana feel further marginalized in their ancestral lands.

Thirdly a proper definition of who constitutes the Indigenous Local Communities is a conflict prevention tool. The Indigenous Local Communities, feeling more marginalised within their ancestral land may opt to take up arms turning against the opportunistic settler communities this would lead to ethnic clashes. The Indigenous Local Communities could unfortunately channel their feelings of disenfranchisement to violence. The Turkana are known as war prone community and proliferation of small arms is prevalent in North Rift region. Hence a proper definition of who constitutes the Indigenous Local Communities entitled to benefit from oil exploitation can be cast as tool of conflict prevention. Natural-resource revenues are particularly problematic, as they are prone to capture by ruling groups or communities, exacerbating social divisions and even leading to direct conflict over the resource itself. Indeed, research by the World Bank points to resource dependence as one of the most important causes of civil wars.<sup>74</sup>

## **2.3 Approaches to Membership Identification to an Indigenous Local Community**

### **2.3.1 Geographical Approach**

This could be perceived as the most simplistic or rudimentary approach to the definition of local indigenous community premised on their physical location in reference to the occurrence of the natural resource. This definition is utilized in the Natural Resource Benefit Sharing Bill in where it defines the Indigenous Local Communities as a people living in a ward within which a natural resource is situated and are affected by the exploitation of that natural resource.<sup>75</sup> The definition does not distinguish between the Indigenous Local Communities and the opportunistic settler communities. This lack of distinction could cause the opportunist immigrant settler communities to usurp the benefits due to the Indigenous Local Communities yet they have not suffered the loss of livelihood and suffered historical and present marginalization as them.

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<sup>74</sup> Supra n.66 p. 20

<sup>75</sup> The Natural Resource Benefit Sharing Bill 2014 s.2

The Bill acknowledges that the Indigenous Local Communities will be affected by the exploitation of the natural resource. The Indigenous Local Communities suffer the loss of ancestral land, loss of livelihood, environmental degradation over and above the opportunistic settler communities. The opportunistic immigrant settler communities have the freedom of movement and freedom to settle<sup>76</sup> in any part of Kenya but this freedom should not be extended to the share of benefits resulting from natural resource exploitation.<sup>77</sup> The adoption of a geographical definition is undesirable because the fluidity of membership to the Indigenous Local Communities determined solely on geographical criteria to the exclusion of other pertinent factors chief of which being the marginalization of the Indigenous Local Communities. The second pitfall of this definition is that it exempts members of Indigenous Local Communities living outside their ancestral home in Turkana County.

Fiona Mackenzie and Simon Dalby in their work *Reconceptualizing Local Community: Environment, Identity and Threat*<sup>78</sup> argue for the evolution of the definition of Indigenous Local Communities from the territory or geographical area that they occupy to a more holistic and humanistic approach. These humanistic geographers focus on the sense of place the local communities construct and that local cultures they celebrate.<sup>79</sup> They further contend that a local community can be identified using non geographical indicators such as class, gender, ethnicity, sexuality etc.

### **2.3.2 Anthropological Approach**

Anthropology is the study of humans. Cultural anthropology is the most relevant branch the definition of Indigenous Local Communities. Indigenous Local Communities can be defined by the observation of the similar culture they uphold, observe and celebrate. This definition is advocated for by Fiona Mackenzie and Simon Dalby in their article. The people who should benefit from the natural resource can be identified by their common culture and traditions. This would mean in the present case all persons who celebrate the Turkana customs should be

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<sup>76</sup> The Constitution of Kenya Art.40(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property<sup>óó(a)</sup> of any description; and<sup>(b)</sup> in any part of Kenya.

<sup>77</sup> Ibid Art. 39(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.

<sup>78</sup> Supra n.28 p.100

<sup>79</sup> Ibid



permitted to benefit from oil exploitation. Culture is dynamic and immigrant settler communities could easily adopt the culture of the Turkana for the sole reason of accessing the benefits of oil exploitation.

The Turkana have a vibrant culture which they have continued to uphold against of the pull of modernity. Indeed the right to culture and language is secured under Article 44 of the Constitution.<sup>80</sup> A key component in Turkana culture is that the male rite of passage from childhood to adulthood is the lack of circumcision which is prevalent in the majority of cultures in Kenya. The minority communities living within the Niger Delta have often advocated for an anthropological definition of Indigenous Local Communities as one best suited to secure their interests in natural resource benefit sharing. This mode of definition has one prime advantage over the others, because the local content of the particular Indigenous Local Communities is easily determined by reference to their common culture, traditions and heritage.

### **2.3.3 Political Approach**

This definition utilizes the established political boundaries set by the state in the identification of those who should benefit from natural resource exploitation. The Natural Resource Benefit Sharing Bill adopts this definition by prescribing those who should benefit should living within the ward where the natural resource is exploited. The ward is political unit where ward representatives are elected to the county assembly. This definition is subject to the abuse of gerrymandering to include opportunistic immigrant communities who have not suffered marginalization and loss of livelihood as the Indigenous Local Communities. This definition pits the County Government against the ward representatives of the relevant wards upon which the natural resources abound as the proper representatives of the Indigenous Local Communities.

Another disadvantage of the political definition is the political leaders overarching concern to acquire and retain high voter confidence and numbers. Whenever any decision or contest concerning the division of revenue accruing from oil exploitation arises the political leader will quickly make reference to the number of voters for or against it to make his decision. If the

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<sup>80</sup>Constitution of Kenya art. 44(2) Every person has the right to use the language, and to participate in the cultural life, of the person's choice(a) to enjoy the person's culture and use the person's language.

number of the settler immigrant communities becomes progressively larger than the Indigenous Local Communities then the political leader will side with them to the detriment of the Indigenous Local Communities interests.

Thirdly voters in Kenya often register as voters in their home counties yet reside in cities and towns. The urban members of the Indigenous Local Communities would not fully appreciate the hardship of the Indigenous Local Communities members who live within Turkana County. Including them in the definition of the Indigenous Local Communities would militate against the Indigenous Local Community members who face daily hardship as distinguished from the diaspora indigenous Local Community who have gotten better opportunities in other geographical areas who should then not be included in the benefits that would ensue from oil exploitation.

### **2.3.4 Dependence on the Economic Resource Approach**

Those entitled to benefit from the exploitation of oil and other natural resources are identified by the virtue of their dependence of the economic resource. This is a wider definition which encapsulates all those affected by the exploitation of the natural resource who may live within or without the set geographical occurrence of the natural resource. Those included as falling within the Indigenous Local Communities may not celebrate the same cultural activities and tradition as the Turkana but are nevertheless affected by the disproportionate adverse impacts of oil exploration.

This is a wider definition that takes into account the ripple effects the exploitation of oil in Turkana may have for neighboring communities who may similarly lose their livelihoods, suffer environmental degradation, and endure increased pollution and relatively poorer health as compared to the rest of the national population. The exploration of oil at times causes the dislocation of a whole community which may consequently cause them to forgo their economic activities situate in their ancestral lands. A good example being the Ogoni fisherman in the Niger Delta who were forced abstain from their livelihood as a consequence of water pollution.<sup>81</sup>

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<sup>81</sup> *Infra* n. 120

In view of the Turkana's communities unique circumstances the anthropological definition is best suited for identifying membership into the Indigenous Local Communities. The anthropological approach best identifies who should be entitled benefit in benefit sharing regime. The definition captures their unique culture and ancestry which would preclude opportunistic immigrant settler community from its definitional ambit. The anthropological definition exhibits a sure advantage over the geographical, political and dependence methods of definitions which have the common defect of infiltration by opportunistic immigrant settler communities. The geographical definition accords membership into the Indigenous Local Community by the mere habitation within the ward upon which the oil is present. The political definition basically pegs membership into the Indigenous Local Communities based on whether or not the opportunistic immigrant settler communities have registered as voters within the ward upon which the oil is exploited and yet they have not suffered the marginalization and hardship as the Turkana. The dependence on an economic resource cast the net of beneficiaries too wide including those minimally affected by the exploitation of oil.

## **2.4 The Definition of Indigenous Local Communities under International Law**

### **2.4.1 Precedents**

The definition of Indigenous Local Communities is not set in international law. Several decisions have been laid down by international human rights commissions created by various treaties, defining the parameters for the definition of persons considered to be indigenous or local communities. This section of the study examines such case law with a view to establishing the criterion or criteria used by the court to determine whether a specific person or local community qualifies to be regarded as so in international law and domestic statutes. In the *Endorois Case*<sup>82</sup> the African Commission on Human and People's Rights, in expounding the provisions of the African Charter on Human and People's Rights laid down such a criteria. The plaintiff's allegations included violations of the African Charter by Kenya against the Endorois community's right to property<sup>83</sup>, right to development,<sup>84</sup> right to practice their religion<sup>85</sup> and rightly to freely dispose the wealth and natural resources among others.<sup>86</sup>

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<sup>82</sup>Centre for Minority Rights Development and Minority Rights Group international on Behalf of Endorois Welfare Council V Kenya no. 27 of 2003 ( February 2010)

<sup>83</sup> African Charter on Human and People's Rights art.14

At the heart of the decision was the determination of whether the Endorois were a people. The Commission noted that the term people and indigenous people/ communities are contested terms and recalled the drafting difficulties of the African Charter of Human Rights ... The Commission noted that the word indigenous did not intend to create a special class of citizens but rather address historical and present day injustices and inequalities.<sup>87</sup> The past distributive injustices of marginalized communities who coincidentally mostly reside in oil blocks have a right to affirmative action which in one way may be achieved through obtaining a greater share of natural resource benefit sharing scheme because of the past injustices that set such communities at the periphery of society. In addition to the hardship they suffer because of the detrimental effects of the oil pollutants on the various environmental media causing detriment to their health livelihood and environmental degradation.

In spite of their potential positive economic impacts, extractive activities tend to leave a strong environmental footprint that must be addressed. The environmental impacts take place along the entire value chain, and have potential negative effects depending on the type and size of the extractive activity, the location and surrounding areas, and the technology used. The larger the oil field or mine, the greater the impacts, and these are more complex when the extractive activity occurs near ecologically or socially sensitive areas. In the case of oil and gas, improperly planned seismic tests and drilling activities, flaring of excess gas, deforestation from on-site operations, oil leakages spill through all the supply chain, and accidents can be highly pollutant, affecting the natural life of the area, the land and water, and the performance of other economic activities like fishing or tourism during a long period.<sup>88</sup>

In *Mayagna (Sumo) Awas Tingni Community V Nicaragua*<sup>89</sup> the Inter-American Commission on Human Rights commented in paragraph 149 held that indigenous groups by the very fact of their existence, have the right to live freely in their own territory, the close ties of indigenous people

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<sup>84</sup> Ibid art. 22

<sup>85</sup> Ibid art. 8

<sup>86</sup> Ibid art. 21

<sup>87</sup> Supra n.66 p.53

<sup>88</sup> Sigam Claudine & Garcia Leonardo *Extractive Industries: Optimizing Value Retention In Host Countries* UNCTAD, Geneva UNCTAD/SUC/2012/1

<sup>89</sup> No. 79 ( Aug 31 2001)

with land must be recognized and understood as the fundamental basis of their culture, their spiritual life their integrity and their economical survival. The definition of indigenous people is closely linked with their connection and relationship with their lands. While other Kenyan communities have placed high premium on higher education, business , formal employment , business , stock exchange the Indigenous Local Communities obtain their sole livelihood from their lands where they sustain which survival and that of their livestock such as the Turkana.

## 2.4.2 International Conventions and instruments

### **United Nations Declaration on the Right on Indigenous People**

The Turkana are indigenous people. During the colonial period, indigenous people were for the most part ideologically construed as irrational and uncivilized.<sup>90</sup> The term indigenous was previously thought to be discriminatory and distasteful due to our colonial legacy. We also recognize the concern of those who feel that the term indigenous people has negative connotations in Africa as it has been used in derogatory ways during the European colonialism and has also been used in chauvinistic ways by some post-colonial African governments....however ,notwithstanding the word itself has today become a much wider internationally recognized term by which to understand and analyze certain terms of inequalities and suppression such as ones suffered by many pastoralists<sup>91</sup>

The African Commission's Working Group of Experts on Indigenous Populations/Communities elucidated 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.<sup>92</sup> The United Nation has approved of a similar method of identification indigenous communities. Importantly, under contemporary jurisprudence strict definitional parameters have given way to fluid concepts of identity significantly driven by self-identification. Self identification has been set forth by the United Nation and the ILO Convention 169 as the best mode of definition of indigenous people. Special attachment to and use of their traditional land is the other approach and lastly, experience

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<sup>90</sup>Ibid. p.40

<sup>91</sup> Supra n.66 p. 86

<sup>92</sup> Ibid p.87

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.<sup>93</sup>

The United Nations Working Group on Indigenous Populations under the chairmanship of Erica-Irene Daes laid down a four point criteria of identifying indigenous peoples:<sup>94</sup>

- a. The occupation and use of a specific territory;
- b. 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;
- c. Self-identification, as well as recognition by other groups, as a distinct collectively;
- d. An experience of subjugation, marginalization, dispossession, exclusion or discrimination

The four points do not necessary have to occur in concurrence for a community to considered indigenous it suffices that one character is met by the community. This loose definition was favored by the United Nations Sub-commission because it does not preclude genuinely indigenous communities from such characterization due to the multifarious requirements. International law has not utilized geographical anthropological, political and dependence types of definitions of Indigenous Local Communities. The definition of Indigenous Local Communities in international law is fluid and indefinite in nature. The international instruments and precedents have not set down directive method of determining Indigenous Local Community membership.

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<sup>93</sup>Supra n.74 p.47 See Kamari-Mbote *Ours By Right : Law, Politics and Realities of Communal Property in Kenya* p.108 The ILO Convention no.169 ...The Convention does not define indigenous or tribal people. Self-Identification is an important criterion in identifying indigenous people and tribal people. Other criterion include traditional lifestyle; culture (ways of making a living, language custom) own social organization and traditional customs and laws.

<sup>94</sup>Ibid p. 94 UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982

## **2.6 Conclusion**

This chapter was dedicated to the definition of the Indigenous Local Communities. The first limb of the study specifically described the political, geographical, anthropological and dependency definition of Indigenous Local Communities and the various advantage and disadvantage of each. The second limb of the study sought to define Indigenous Local Communities under international law and court precedents. The anthropological definition was found most suitable for purposes of this study for it captures the right composition of members of the Indigenous Local Communities affected by the exploitation of the oil in Turkana because the cultural parameters for inclusion thereupon preclude opportunistic settler communities within its definitional ambit.

## **3.0 Chapter 3: The Entitlement to Benefit**

### **3.1 Introduction**

The Indigenous Local Communities have rights to benefit from natural resources beneath their ancestral lands under international law, the Constitution, indigenous entitlement and owing to their marginalized status. The Turkana are entitled to a greater share of revenue from oil exploitation than the rest of the Country buttressed on the aforementioned modes of entitlement. This portion of the study examines the foregoing with a view to establishing where upon Indigenous Local Communities right to higher percentages of revenue allocation from oil exploitation is premised than those percentages proposed in the Draft Petroleum Exploration, Development and Production) Bill 2015<sup>95</sup> and The Natural Resource Benefit Sharing Bill 2014.<sup>96</sup>

### **3.2 The Basis for Entitlement**

There exist several justifications for the Indigenous Local Communities right to higher percentage of benefits from oil exploitation. This section of the study has narrowed their entitlement into four heading which include the Indigenous Local Communities; pervasive marginalization, their unique attachment to land, due to the disproportionate adverse impact upon their environment and livelihoods finally their entitlement under international law.

#### **3.2.1 Entitlement due to Marginalization**

The Constitution defines marginalized communities in Kenya as Art. 260(d) pastoral persons and communities, whether they are (i) nomadic; or (ii) 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.øThis definition precisely captures Turkana people way

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<sup>95</sup> the Draft Petroleum Exploration, Development and Production) Bill, 2015 s.94(4) The Government's share shall be apportioned between the National Government , the local County Government and the local community. (4) The local community's share shall be equivalent to five percent of the Government's share and shall be payable to a trust fund managed by a board of trustees established by the County Government in consultation with the local community.

<sup>96</sup> The Natural Resource Benefit Sharing Bill s.26(1)(b) 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. 26 (3) 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.



of life. The Turkana are the second largest pastoral tribe in Kenya. They are nomadic and they live in the Northern part of Kenya around Lake Turkana.<sup>97</sup> Art 56(b) of the Constitution establishes the need for affirmative action for marginalized communities who should be provided special opportunities in educational and economic fields. This constitutional provision establishes the entitlement of the marginalized communities to special opportunities in the economic fields which should include a greater share of benefits of natural resources within their ancestral lands over and above the general Kenyan population as a form of affirmative action. This would in one way remedy the injustice suffered by the Turkana Community caused by historically unjust distribution of social and economical goods and service.

The Turkana community has been set at the periphery of social and economical development. Many indigenous communities lack the political and economic clout of dominant societies.<sup>98</sup> First this may be attributed to the remoteness of the Turkana County from the major cities in Kenya. Unlike other populations indigenous people have a tendency to be located in the vulnerable locations throughout the world.<sup>99</sup> Secondly, the Turkana have a strong adherence to their traditional way of life with little desire to embrace modernization. The Turkana have not fully appreciated the general exposure and eradication of ignorance that education grants. The Turkana nomadic lifestyle militates against the stability needed by the Turkana children in order to acquire a proper education. Turkana County is the least literate county in Kenya According the Kenya National Bureau of Statistics, has Turkana County has 82% percent illiteracy in 2013.<sup>100</sup> The Turkana's lack of basic and advanced education which inhibits them from competing for employment and other opportunities with the rest of the Kenya's who have embraced modernity and education. This therefore entitles them to a larger share of the proceeds from oil exploitation within their ancestral lands as a mode of affirmative action.

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<sup>97</sup> Omo Valley in Ethiopia, Ancient African Tribes, <<http://www.omovalley.com/The-Turkana-tribe-live-around-the-Turkana-lake-in-Kenya.php>> accessed on 3 October 2014.

<sup>98</sup> *Infra* p.4

<sup>99</sup> Abate & Kronk Elizabeth (eds) *Climate Change and Indigenous People : A Search for Legal Remedies* Edward Elgar Lmt 2013 Commonality Among Unique Indigenous Communities : An Introduction To Climate Change And Its Impacts On p.5

<sup>100</sup> Kapchanga Mark *Turkana and Wajir Counties Have Highest Levels of Illiteracy* <<http://www.standardmedia.co.ke> > accessed on 18<sup>th</sup> May 2014

The Constitution gives cognizance of the importance of local communities benefiting from any development on land.<sup>101</sup> Secondly article 69(1) of the Constitution places an obligation on the State to ensure sustainable exploitation of the environment and natural resources and the equitable sharing of the accruing benefits. The Constitution accords the local communities such as the Turkana entitlement to benefit from development in land which would include oil exploitation. That gainsaid, Indigenous Local Communities land including that which upon oil is found is vested upon the national government in trust for the people of Kenya and is administered on their behalf by the National Land Commission. This provision establishes the entitlement to benefit upon all Kenyans as a whole with no special provision for the Indigenous Local Communities. One of the two key tenants of constitutional interpretation is that it first should be construed as a whole. Secondly, in constitutional interpretation harmony should be achieved among its provisions. The Constitution provides that it should be interpreted in a manner that advances the development of law and human rights. By fortifying the Indigenous Local Communities rights both objectives will be met.<sup>102</sup>

### **3.2.2 Unique Attachment to Land**

The Turkana are a pastoralist community and are highly dependent of their lands for sustenance of their livelihoods. Indigenous and tribal peoples have unique ways of life, and their worldview is based on their close relationship with land. The lands they traditionally use and occupy are critical to their physical, cultural and spiritual vitality.<sup>103</sup> Their traditional pastoralist mainstay necessitates them to have constant access with land for grazing livestock. Turkana land is semi arid hence the Turkana need large grazing lands to sustain their livelihoods. The livestock have a social dimension to it for it is used for payment of bride price further tying the Turkana to land.

A key characteristic for most of them [indigenous communities] is that their survival and their particular way of life depends on access and rights to their traditional lands. They suffer discrimination as they are being regarded as less developed and less advanced than other more

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<sup>101</sup>The Constitution of Kenya art. 66(2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

<sup>102</sup>Ibid. Art 259(1) This Constitution shall be interpreted in a manner that (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law;

<sup>103</sup>Inter-American Commission on Human Rights 'Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources: Norms And Jurisprudence Of The Inter-American Human Rights System' *American Indian Law Review*, Vol. 35, No. 2 (2010) p.263

dominant sectors of society. They often live in areas inaccessible regions often geographically isolated and suffer from various forms of marginalization, both politically and socially. They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalization violates their human rights as communities threatens the continuation of their cultural ways of life and prevents them genuinely participate in deciding on their own future and forms of development.<sup>104</sup>

Higher benefits from oil exploration, bestowed upon the Indigenous Local Communities especially the Turkana who are a marginalized community will aid in achieving the objectives set out by the equalization fund. The Equalization fund is created under Art.204 of the Constitution which is used by parliament to enable marginalized areas to be brought to par with the rest of the country in basic services including water, roads, health facilities and electricity. Under the Natural Resource Benefit Sharing Bill 2014 the Local Natural Resource Benefit Sharing Forum determines the development priorities of their area.

### **3.2.3 Entitlement due to Disproportionate Adverse Impact upon the Turkana's Environment and Livelihoods**

The Turkana have will endure environmental degradation, loss of livelihoods and endure poorer health over and above the rest of the Kenyan population. In spite of their potential positive economic impacts, extractive activities tend to leave strong environmental footprint that must be addressed. The environmental impacts take place along the entire value chain, and have potential negative effects depending on the type and size of the extractive activity, the location and surrounding areas, and the technology used.<sup>105</sup> Indigenous Local Communities should have higher benefits that should attach to them over and above Kenyan citizens. Sharing benefits and compensating for damages generated by mining operations within communities is widely recognized as a necessity.<sup>106</sup> Indigenous Local Communities have to discordantly forgo the

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<sup>104</sup> African Commission on Human and People's Rights Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) 48. <[http://www.iwgia.org/iwgia\\_files\\_publications](http://www.iwgia.org/iwgia_files_publications)> Accessed 10<sup>th</sup> May 2015.p. 89

<sup>105</sup> Supra n.86 p. 14

<sup>106</sup> Wall Elizabeth et al *Sharing Mining Benefits in Developing Countries: The Experience with Foundations, Trusts, and Funds* <<http://www.worldbank.org/ogmc>> 13<sup>th</sup> May 2015 p. 6

enjoyment of their ancestral land and livelihoods due to exploitation of oil which causes environmental degradation and public Indigenous Local Communities health concerns both present and future generations.

The Indigenous Local communities will bear the brunt of negative ecological and economic front to ensure that Kenya as a whole reaps the mammoth benefit of entering into the prestigious club of oil producing countries. Legal provisions to impose redistribution at the local level are often not implemented hence limited benefits accrue to the host communities that bear most of the negative impact of mining operations. However, in practice, royalties payable to the central government rarely revert back to the affected region, even when the legislation specifies that this should not be the case.<sup>107</sup> Such a scenario should be prevented in Kenya by ensuring that the Indigenous Local Community benefit.

### **3.2.4 Entitlement under International Law**

International secured the right of local communities and indigenous people. International law forms part of Kenyan law by dint of article 2(6)<sup>108</sup> of the Constitution. There are several international law instruments establishing the rights of Indigenous Local Communities to natural resources within their ancestral lands or territories. The international system has undergone significant changes during the past 50 years with respect of the status and rights of indigenous people. Indigenous people have emerged as subjects on international law capable of contributing to international lawmaking process aimed at defining indigenous identity and rights.<sup>109</sup>

Conventions Concerning Indigenous and Tribal Peoples in Independent Countries and Convention on the Elimination of All forms of Racial Discrimination are cognizant of communal rights of indigenous people over their territories and subsurface resources. Convention Concerning Indigenous and Tribal Peoples in Independent Countries.<sup>110</sup> The ILO Convention

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<sup>107</sup> Ibid p. 9

<sup>108</sup> The Constitution of Kenya 2010 art 2(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

<sup>109</sup> Supra n.97 p.39

<sup>110</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries C 169 ,72 Official Bull 59 ( June 27 1989)

169 presents the only acceptable binding treaty that delineates the rights of indigenous people.<sup>111</sup> Part II of the Convention addresses issues of the indigenous people right concerning natural resources within their territories. This Convention unfortunately has not been ratified by Kenya hence precluding Kenya's Indigenous Local Communities from the benefits and protection within the Convention's ambit.

Convention on the Elimination of All forms of Racial Discrimination entered into force in January 4<sup>th</sup> 1969.<sup>112</sup> The Convention obliges state parties to refrain from engaging in act of racial discrimination in Article 2 of the Convention. The Convention secures individual rights to own property and also cognizant of group or communal ownership of property. The protected rights include ... the right to own property alone as well as in association with others<sup>113</sup> This position is reminiscent of the current state of Turkana County where the marginalized. The Turkana often do not have individual titles therefore compensation payable to them would be minimal this discriminates against them as opposed to other communities with title to land.

The Convention On The Elimination Of All Forms Of Racial Discrimination lays the groundwork for the recognition of collective right of indigenous people... activities that force people to deprive indigenous groups of access to resources ,force such groups to leave their territory...implicate their social, economic and property rights...This is particularly evident as a form of discrimination ,since such activities rarely benefit the indigenous groups themselves. <sup>114</sup> These two Conventions thus establish the entitlement of Indigenous Local Communities such as the Turkana to natural resources within their ancestral lands.

The Covenant on Economic Social and Cultural Rights (ICESC) and Covenant on Civil and Political Right (ICCPR) both secure the rights cultural integrity indigenous local communities. The ICESC of came into force on January 3<sup>rd</sup> 1976 was ratified by Kenya on the first of May 1972. Article 1 of the Convention acknowledges the right of self-determination. Article 15 supports the right to cultural integrity. Article 11 of the Convention recognizes the right of

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<sup>111</sup>Supra n. 8 p.50

<sup>112</sup>Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S ( Dec 21 1965)

<sup>113</sup> Centre for International Environmental Law *UNEP Compendium on Human Rights and the Environment* (2004 UNEP ) p. 11

<sup>114</sup>Ibid

everyone to an adequate standard of living for himself and his family including of the right of food and water clothing and housing to the continuous improvement of living conditions. This article is replicated in article 27 of the Convention of the Child. This Convention was ratified in Kenya on the on the 31 July 1990.<sup>115</sup>

Natural resource benefit sharing is an avenue for the elevation of the standard of living for the marginalized Turkana community. This establishes the entitlement of Indigenous Local Communities to greater benefits than the general Kenyan population as a means for the elevation of their standards of living in view of their historical marginalization, and environmental degradation and loss of livelihood they will endure disproportionately to the rest of the population.

Article 27 of the Covenant on the Civil and Political Rights protects the right to cultural integrity. Community rights can also be viewed as a right of indigenous people article 27 of the ICCPR on cultural rights is seen as the most prominent protection provides by international law to land rights of the indigenous people since it has been directly linked with indigenous peoples since it has been established a clear link between indigenous people lands and culture... This link has been elucidated by the General Comment 23<sup>116</sup> on Article 27 by the Human Rights Committee which observed that

With regard to exercise of cultural rights protected under Article 27 the Committee observes that culture manifests itself in many forms, including a particular way of life associated with use of land resources, especially in the case of indigenous people. That right may include traditional activities such as fishing or hunting.<sup>117</sup>

This Comment can be extrapolated to include the Turkana's pastoralist livelihood hence the need for a greater share of benefits arising from oil exploitation for the loss of their cultural rights. The cordoning off of oil blocks and conversion to public land, indigenous land previously

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<sup>115</sup> 1755 U.N.T.S 3(Nov. 20 1989)

<sup>116</sup>Mbote- Kameri Patricia et al *Ours By Right : Law, Politics and Realities of Commuality Property in Kenya* Strathmore University Press 2013 p. 106

<sup>117</sup>United Nations Human Rights Committee , General Comments 23, para 7(1994a)

the Indigenous Local Communities' ancestral land used for grazing livestock which sustains their livelihood which has been disrupted. Therefore their entitlement arises by that very fact; benefit sharing is thus a viable remedy for the loss of the Indigenous Local Communities' cultural rights fortified under the ICCPR. A suitable benefit sharing formulae should accord the Turkana a greater percentage of benefits over and above other Kenyans who have not lost their particular way of life associated with the use of land resources.<sup>118</sup>

Gender mainstreaming has been addressed by Convention on Elimination of All Forms of Discrimination Against Women. The Convention was adopted for signature by the General Assembly on December 1979<sup>119</sup> This Convention was ratified by Kenya on 9<sup>th</sup> March 1984 it seeks to eradicate gender based discrimination against women in both the private and public spheres of life. CEDAW obligates parties to eliminate discrimination against women especially those in the rural areas. Ensure that they enjoy adequate living conditions, particularly in relation to housing and sanitation, electricity, water supply and communications ....given that many forms of environmental degradation disproportionately affect women. The Convention agitates for rural Turkana and other women to be included in the natural resource benefit sharing decision making process from the national, county and local committee level in the three levels of benefit sharing paradigm created in the National Resource Benefit Sharing Bill.

Section 28(2) (b) of the Bill establishes the composition of the County Benefit Sharing Committee there should be five persons elected by the local community where the resource bestrides representing the diversity of the local community. Gender should be one of the diversities considered as per the Constitution which under article 10 lays down the national values which include inclusiveness and equality in the interpretation of any law including the National Resource Benefit Sharing Bill should it become law.<sup>120</sup> The Article safeguards the interests of the marginalized which include Turkana women who are undermined in such strong

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<sup>118</sup> Ibid

<sup>119</sup> 1249 U.N.T.S 13 ( December 18<sup>th</sup> 1979)

<sup>120</sup> Ibid art.10(2)(b) 10.(1) The national values and principles of governance in this Article bind all State organs, State officers, indigenous Local Communities officers and all persons whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements indigenous Local Communities policy decisions. (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

patriarchal communities without the benefit of enlightenment brought about by education which often positively changes the perception of a woman in the society. Sadly, Turkana rural women twice marginalized first by the mere fact of being female and secondly by the historical injustices in the distribution of social goods.

In the region the African Charter on Human and People Rights was signed in Banjul on June 26<sup>th</sup> 1981. The African Charter has tasked the African Commission's Working Group of Experts on Indigenous Populations/Communities with defining the indigenous communities and elucidating on their rights under law. The African Commission on Human and People's Rights has also laid down progressive jurisprudence on the rights of indigenous communities as in the *Endorois case*<sup>121</sup> and the *Ogoni case*.<sup>122</sup>

### 3.3 Scope of the Entitlement

United Nations Declaration on the Right on Indigenous People was adopted by the United Nations General Assembly in Sept 2007. This Declaration is not binding in Kenya. Kenya is among the 11 Countries that refrained from signing it.<sup>123</sup> Article 26 and 28 of the Declaration<sup>124</sup> recognizes the right of indigenous people to lands, right to ownership, use, enjoyment control and development of such lands irrespective of formal title.<sup>125</sup> The strongest argument for recognition of substantive rights over sub-surface resources may be grounded in the use of such resources for their survival and development.<sup>125</sup> The Indigenous Local Communities have entitlement to the oil which is a subsurface resource and indeed should receive a higher percentage of benefit emanating from the same for their survival and development. The law in Kenya provides that land upon which oil is found is declared public land under the Constitution<sup>126</sup> this provision is replicated in the s. 3 of the Petroleum Act Cap 308.<sup>127</sup>

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<sup>121</sup>Supra n.80

<sup>122</sup>*Social and Economic Rights Action Center and Center for Economic and Social Rights V Nigeria* no.155/1996( May 27 2002)

<sup>123</sup> Supra n. 97 p.107

<sup>124</sup> UN Declaration on the Rights on the Indigenous People G.A Res 61/295

<sup>125</sup> Supra n.8 p.57

<sup>126</sup> Constitution of Kenya s.62 (f) Public land is all minerals and mineral oils as defined by law

<sup>127</sup> Petroleum (Exploration and Production) Act Cap 308 s. 3



The International Law Association Interim Report: *The Rights of Indigenous people at the Hague Conference 2010*<sup>128</sup> noted that international law is increasingly supporting either directly or indirectly the recognition the indigenous people possess resources they are unable to access but reside within the their lands and territories despite State assertions of ownership of the minerals. In Kenya land upon which minerals are found is classified as public land.<sup>129</sup> The Constitution defines Community land which is held by communities identified on the basis of ethnicity, culture or similar community of interest under Article 63 the Community Land Bill 2014 seek to implement this constitutional provision. Upon the discovery of minerals in community land automatically becomes public land.

Benefit sharing can be understood as a compromise term which acknowledges the indigenous entitlement of the Indigenous Local Communities to the sub-surface mineral under their ancestral lands and the State's assertion of ownership of oil, for this reason the Indigenous Local Communities should enjoy higher percentage of benefit than the general population. The State must recognize the legal personality of indigenous and tribal people and their titles to lands and territories traditionally owned or used by them. In the lands and territories, the government owes a duty to consult regarding the development and investment in projects the State must comply with certain safeguards including consultation and benefit-sharing arrangements.<sup>130</sup> Yohan Dinstein contends that the right over natural resources by indigenous people is simply a right closer to self determination.<sup>131</sup>

The scope of entitlement of entitlement to the Turkana is closer to the principle of aboriginal title in other jurisdiction such as Canada and Australia. Their aboriginal title over their lands and sub surface resources have been recognized in their Constitution and Statutes. Section 35(1) of the Constitution Act, 1982, provides recognition of Aboriginal rights and affirms Aboriginal peoples' interests in traditional lands. The constitutional recognition of Aboriginal rights secures their supremacy over any inconsistency in common law, federal legislation, or provincial legislation

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<sup>128</sup> International Law Association *The Hague Conference Rights of Indigenous People* (2010) <http://www.ila-hq.org/download.cfm/docid/9> 15<sup>th</sup> May 2015 p.23

<sup>129</sup> The Constitution of Kenya art.66(2)

<sup>130</sup> Supra n. 97 p. 6

<sup>131</sup> Dinstein Yoram 'Collective Rights of Peoples and Minorities' *International and Comparative Law Quarterly* 25,102 (1976) p.110

(barring any limits established by the courts). However, while the Constitution Act (1982) secures Aboriginal rights, it does not create them; Aboriginal rights are inherent, collective rights based on their original occupancy of the land.<sup>132</sup>

The Canadian Constitution acknowledges that the rights of the aboriginal title does not originate from the Constitution or any other statute and is deemed superior to any law or judicial decision attempting to trump them. In Kenya rights to land are thought to flow from the Constitution there is no recognition of the indigenous local communities inherent collective rights to their ancestral lands based on their original occupancy of land.

The court had occasion to elucidate on tenants of Aboriginal title in *Calder v. British Columbia (1973)*<sup>133</sup> confirmed that Aboriginal title is a legal right derived from traditional occupation and use of tribal lands. Moreover, Aboriginal title to land cannot be understood under traditional property laws. It is not like fee simple, but is instead a sui generis interest in land. The scope of entitlement of Indigenous Local Communities over their lands and the resources therein is a special right which cannot be liken or understood in the lens of traditional land rights. Aboriginal title is also an underlying burden on the provincial proprietary interest in lands and resources under section 109 of the Canadian Constitution Act.... Aboriginal rights to oil and gas on reserve lands have been legislated and regulated.<sup>134</sup> In recognition of the special rights of the aboriginal people's rights over oil and gas within their lands the Canadian government has enacted a special legislation to govern it. The federal government has passed specific legislation and regulations regarding oil and gas development on Aboriginal lands namely The Indian Oil and Gas Act (IOG Act, 1985).<sup>135</sup>

Aboriginal title rights in Canada is a best practice of how the right of Indigenous Local Communities such as Turkana over oil within their ancestral land should be given legal recognition and supremacy over all laws including the Constitution. In recognition of their

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<sup>132</sup>Wright Laura & White Perry "Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements" *The International Indigenous Policy Journal* Volume 3 Issue 2 2012 p.2

<sup>133</sup>(1973) D.L.R (3d) 145

<sup>134</sup>Supra n.130 p.3

<sup>135</sup> Ibid p.5

superior title to their ancestral land, any benefit sharing formulae that does not accord them higher percentages of benefits over and above the general population should be deemed defunct and incompatible at their superior rights to their lands hence null and void.

In the *Saramaka People V Suriname*<sup>136</sup> case the Inter-American Court recognized the ownership of the Saramaka people to sub-surface resources within their indigenous land and their rights to benefit sharing upon extraction of the same. The court stated that the State has a duty to share the benefits derived from the development plans within indigenous people territory. This precedent establishes the right of Indigenous Local Communities to benefit from revenues of derived from natural resources.ø The Court found there was need for benefit-sharing... The case is also important because it elucidates a State's obligation when it exploits natural resources owned by the State found within or beneath an indigenous or tribal people's territory.ø<sup>137</sup>

The court expressed recognized the right of indigenous to benefit from development plans within their ancestral lands. This position is replicated in Kenya's Supreme law under Article 66(2) Parliament shall enact legislation ensuring that investments in property benefit Indigenous Local Communities and their economies. This clear constitutional dictate requiring the Indigenous Local Communities to benefit from development plans including oil exploration echoes in international law courts and resounds in our Constitution.

### **3.4 Conclusion**

This chapter dedicated to elucidating the various forms entitlements Indigenous Local Communities have to higher percentages of benefits from oil exploitation over and above the rest of other Kenyans. The Turkana are entitled to a higher percentage of benefit by virtue of the Constitution dictates, their marginalization and indigenous entitlement under international law. The indigenous local communities' rights over sub-surface natural resource was expounded on in reference to international best practice.

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<sup>136</sup> No.172 ( Nov.28 2007)

<sup>137</sup> Supra n. 66 p. 116

## **4.0 Chapter 4: Institutional Structures and Mechanism for Sharing Benefits**

### **4.1 Introduction**

The revenue that is accorded to the Indigenous Local Communities should be proficiently managed for it to make the greatest impact towards improving the quality of their lives. There are several statutory, joint management voluntary organizations and community based indigenous management structures that will be explored in this section of the study with view to recommending one which is best suited to the peculiar circumstances of the people of Turkana. This portion of the study also demystifies the types of benefits available to the Turkana people. The last portion of the chapter examines how the Turkana can actualize their rights to benefit from oil exploitation within their ancestral lands.

### **4.2 Existing Legislative and Institutional Framework for Benefit sharing in Kenya**

The Kenyan legislation governing the legal, institutional and policy frameworks in the energy sector are the Constitution, the Energy Act 2012, the Petroleum (Exploration and Production) Act Cap 308, Petroleum Development Fund Act<sup>138</sup> and the Energy Policy. The Constitution of Kenya dictates under Article 66(2) that provides parliament shall enact legislation ensuring that investment in property Indigenous Local Communities and their economies. Article 71 of the Constitution of obligates parliament to enact legislation to govern the exploitation of natural resources. Thirdly Article 69(1) places an obligation on the State to ensure sustainable exploitation of the environment and natural resources and the equitable sharing of the accruing benefits. The above statutes which should ideally actualize this constitutional threshold all have common lacuna for they lack a stipulated framework for natural resources benefits sharing with specific emphasis on the local communities.

The Minister of Planning and Devolution has recognized this void and stated in her press statement that the government will develop the policy, legal and institutional framework for the exploitation and management of Kenya's natural resources for the maximum economic benefits

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<sup>138</sup> Laws of Kenya no.4 of 1991 revised 2012

of the country and the local communities.<sup>139</sup> The Draft National Energy and Petroleum Policy 2015 acknowledge the need to devise a benefit sharing framework for the local communities.<sup>140</sup> The policy fails to give any policy parameters on the establishment of a benefit sharing framework.

The Energy Act and the Petroleum (Exploration and Production) Act which are the principal legislations governing oil in Kenya are notably silent in on matter of natural resource benefit sharing. At this juncture it may be instructional to note that both statutes came in force before the discovery of oil and gas in Kenya but legislation should be futuristic in nature.

The Environmental Management and Co-ordination Act 1999 requires that an Environmental Impact Assessment (EIA) is carried out in project s listed in the second schedule of the Act.<sup>141</sup> The EIA report must delineate the expected benefits of the proposed projects to the local communities. Often the project proponents undertakes better the life of those affected by for example building wells to provide clean drinking water in water scarce areas. These projects are at the discretion of the project proponent and they are not legally bound to undertake though they to increase their chances of obtaining an EIA license from the National Environmental Management Authority.

### **4.3 Nature of the Benefits**

The types of benefits that would accrue to the Indigenous Local Communities are diverse in nature all aimed at improving their standard of living. The Bill defines benefits as any gains, proceeds or profits from the exploitation of natural resources.<sup>142</sup> The Natural Resource Benefit Sharing Bill provides for both monetary and non monetary benefits accruing to the Indigenous

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<sup>139</sup> Supra n. 3

<sup>140</sup> Supra n. 9

<sup>141</sup> Act no.8 of 1999 s.58(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

<sup>142</sup> The Natural Resource Benefit Sharing Bill 2014 s.2

Local Communities.<sup>143</sup> Monetary benefits include sharing part of the monetary flows generated by the operation of the infrastructure project with the affected communities, through: revenue sharing, preferential rates, property taxes, equity sharing / full ownership and development funds. Non-monetary benefits are integrating project benefits into local development strategies including : Livelihood restoration and enhancement, Community development and Catchment development<sup>144</sup> 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.<sup>145</sup> Other mechanisms include livelihood restoration and enhancement as well as community development. This paper focused on the specific monetary benefit sharing formulae.

### 4.3.1 Sovereign Wealth Fund

Due to the finite nature of oil revenue mechanisms to ensure long term benefit to the future generation has been capsulated through the establishment of the Sovereign Wealth Fund<sup>146</sup>. The establishment of the Fund is in line with the tenants of sustainable development. Twenty percent of all tax revenue received by the national government being proceeds of the exploitation of natural resources will constitute the Sovereign Wealth Fund .The Sovereign Wealth Fund is composed of two funds namely the natural resources fund and the futures funds.<sup>147</sup> Sustainable

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<sup>143</sup>Ibid. s.27 (2) The county benefit sharing agreement shall include non-monetary benefits that may accrue to the county and the contribution of the affected organization in realizing the same.

<sup>144</sup>Supra n.60 p.26

<sup>145</sup>Ibid. p.28

<sup>146</sup> s. 26.(1) The revenue collected shall be shared as follows- (a) 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

<sup>147</sup> S.26(2) 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 (a) sixty percent of the monies shall be paid futures fund; and(b) forty per cent of the monies shall be paid natural resources fund. *Also see* the Petroleum (Exploration, Development and Production) Bill, 2015 s.95

(1) There is established a Sovereign Wealth Fund at The National Treasury into which shall be paid a percentage of Government's share of revenue as shall be received from proceeds of petroleum and managed by the Government.

(2) The purpose of the fund shall be to

(a) provide an endowment to support development in future generations when petroleum reserves may have been depleted;

(b) to cushion the impact on or sustain public expenditure capacity during periods of unanticipated petroleum revenue shortfalls;

(c) build a savings base for the Kenyan people;

development houses the sub theory of intergenerational equity which provides that the current generation in their consumptive activities should ensure that the finite earth stock is not depleted to the detriment of the future generations. The principle was defined by Aguis in his book *Future Generations and International Law* as "the principle of ordering of mankind which will make it possible for every generation to, by virtue of its own effort and responsibility to secure a proportionate share in the common good of the human species."<sup>148</sup>

The Sovereign Wealth Fund ensures sustainability of the funds from the finite oil resource. This ensures the future generations enjoy the positive impact of oil revenue long after the oil wells have run dry. The best practice of ensuring the sustainability of oil revenue is Norway.<sup>149</sup> The oil revenue has been utilized by the Norwegian government to establish to purchase prime real estate in other jurisdictions as a measure of ensuring sustainability of the finite oil revenue.

#### **4.3.2 Corporate Social Responsibility Benefits as of means of Securing Benefits to Indigenous Local Communities**

The Draft National Energy and Petroleum Policy lists Corporate Social Responsibility programs as a benefit from petroleum exploitation.<sup>150</sup> That gainsaid, it is often argued rather erroneously as this paper contends, that CSR accords great benefits to members of Indigenous Local Communities. Corporate Social Responsibility has been an avenue used by Multinational Extractive Industry Companies (MEIC) to hoodwink the Indigenous Local Communities to complacency. Lisa Calvano argues that Corporate Social Responsibility has been used as a manipulation tool towards local communities.<sup>151</sup> The Multinational Extractive Industry Companies use a meager percent of their profits to appease the Indigenous Local Communities

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- (d) enhance the development of Kenyan infrastructure; and
  - (e) provide stabilization support in times of economic stress;
  - (3) The Cabinet Secretary of The National Treasury, shall determine, with the approval of parliament the
  - (a) amounts payable into the Fund;

<sup>148</sup> Agius Emmanuel *Future Generations and International Law* London Earthscan Publications 1998 p.10

<sup>149</sup> Columbia River Treaty Local Governments Committee *An Overview: Sharing Benefits From Natural Resources with Local Stakeholders in British Columbia* p.17

<sup>150</sup> Supra n.9 p.118 "Some of the benefits accruing from the exploitation of energy and petroleum resources include profits, training, employment, technology transfer and CSR programmes."

<sup>151</sup> Supra n.27 p. Tullow also committed to double its Corporate Social Responsibility allocation from Ksh 89 million to Ksh. 178 million per year (US\$2,024,320)

choosing to invest on projects of their preference with the least cost implication to their bottom line and foreign shareholder profitability. Dr. Duncan Ojwang in his article *Converging Ubuntu Principles with Corporate Social Responsibility to Extend Corporate Benefits to Communities*<sup>152</sup> elucidates that "The basic principle of Corporate Social Responsibility as currently defined as a mere non-binding corporate 'charity' is a voluntary definition and non-binding venture hence it does not address the exploitative practices as a result of today globalized market. "The MEIC are not legally bound to provide benefits to the Indigenous Local Communities they are persuaded to do so as to acquire and retain a social license to continue their operations in their ancestral lands.

Corporate Social Responsibility is charity which cannot be legislated upon. The Multinational Extractive Industry Companies determine unilaterally the amount of money and the projects they deem fit to invest upon with little or no input from the Local Indigenous Communities on their developmental needs. "Many corporate social initiatives do not go beyond narrowly philanthropic gestures; for example donating objects such as schoolbooks, mosquito nets or lifejackets to local communities, without any attempt to consult either the community itself or development specialist."<sup>153</sup> The little the Multinational Extractive Industry Companies do is often mere public relation exercises aimed at making the Indigenous Local Communities complacent. "If PR priorities take precedence over development priorities, this is likely to affect the planning and the implementation of Corporate Social Responsibility initiatives. PR needs may, for instance, prioritize media- friendly projects such as donating medical equipment or helping to construct a new hospital, rather than slow local capacity-building or the training of village nurse."<sup>154</sup>

This corporate charity cannot be compared to what the Indigenous Local Communities forfeit in terms of their loss of livelihood and polluted environment they have to endure living in. Corporate Social Responsibility is thus insufficient securing the Indigenous Local Communities share to the benefits from oil exploitation. Corporate Social Responsibility is quite an unsustainable mode of distributing benefits to the Indigenous Local Communities because it

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<sup>152</sup>Ojwang Duncan International Conference On Indigenous Knowledge Systems And Environmental Ethics: Implications For Peace-Building And Sustainable Development 28-30<sup>th</sup> April 2015 University of KwaZulu South Africa p. 1

<sup>153</sup>Supra n.8 p. 586

<sup>154</sup>Ibid p. 585



overly depends on the discretion of the shareholders capricious feelings of philanthropy. CRS can be undertaken beside an established revenue sharing regime but should not be cast as the sole benefit sharing mechanism.

#### **4.4 Types of Benefit Sharing Structures**

This portion of study examines four structures that may be used to distribute benefits from oil exploration to members of the indigenous local communities which include; indigenous management institutions, voluntary organizations, joint management structures and statutory established structures. The advantages and the disadvantages of the aforementioned will be discussed with a view to suggesting one which is best suited to the peculiar circumstances of the Turkana community.

##### **4.4.1 Indigenous Management Structures**

Indigenous Management Structures refers to local and collective resource governance arrangements and practices. It thus covers a wide range of resource use practices, given the great diversity of both human communities and resources.<sup>155</sup> It has been defined as a term to describe the management of resources... by collective, local institutions for local benefit. Indigenous Management Structures take many different forms in different locations and different socio-political and bio-physical contexts.<sup>156</sup> This paper adopts a working definition of the same as the collective management of benefit sharing revenue by members of the Indigenous Local Communities for the common benefit of all or a majority its members which is outgrows from traditional structures therein.

Indigenous Management Structures in Africa predated colonialism Local communities did actively manage natural resources in East Africa prior to these formal processes. There is a long tradition across all countries in the region, as elsewhere in Africa, for customary or traditional approaches to the management of natural resources. Local groups of people across the region

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<sup>155</sup>Roe Dilys et al (eds) *Community Management Of Natural Resources In Africa Impacts, Experiences And Future Directions* International Institute for Environment and Development (IIED) p. 5 In the last few decades, there has been a growing awareness of the importance of collective natural resource management practices and institutions, and a recognition of the ways that historic forces have disrupted local people's ability to manage the lands and resources they depend upon.

<sup>156</sup>Ibid p. 24

possessed a wide array of indigenous resource management systems, most of which were never documented or recorded.<sup>157</sup>

Indigenous Management Structures are not a foreign concept in the Kenyan context; It enjoys wide legitimacy especially in the Indigenous Local Communities who hold fast to their traditional way of life and traditional leadership. Local groups of people have managed the land on which they live and the natural resources with which they are surrounded for millennia. Indigenous African communities often developed elaborate resource management systems ... East Africa is characterized by the persistence of long-term community-based resource management systems used by resident communities, such as pastoralists in the Rift Valley<sup>158</sup>

Indigenous management of natural resources is derivative of the Indigenous Local Communities community right of self-determination. This position is echoed in Art. 22 of the Rio Declaration secure the right of indigenous and local communities to manage the environment and development in accordance with their traditional practices.<sup>159</sup> This has also been buttressed in Art 20 of the Rio Declaration.<sup>160</sup>

In natural resource management across African countries, there is a great need for ensuring quality participation of the people in the use and management of natural resources ... Regarding this it has been argued that in order to increase environmental management efficiently and improve equity and justice to local people there is need to explore participatory and Indigenous Management Structures. Such decentralization requires both power transfers and accountable representation.<sup>161</sup>

Indigenous Management Structures empower the Indigenous Local Communities to effectively participate in the disbursement of the funds that accrue to them by virtue their loss of livelihood and endurance of environmental degradation. Dr. Kariuki Muigua conceptualizes the foregoing

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<sup>157</sup> Ibid p.31

<sup>158</sup> Ibid p.5 & p.27

<sup>159</sup> The Rio Declaration on Environment and Development

<<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78>> 24<sup>th</sup> May 2015

<sup>160</sup> Ibid Art. 10 Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level shall have appropriate right to information held by public authorities...and activities in their communities and the opportunity to participate in the decision making process.

<sup>161</sup> Supra n.66 p.26

as Democratic Environmental Governance which he defines as local Communities participation in decision making especially the views and values on environmental management held by communities likely to be affected by the decisions affecting the environmental resources that are close to them.<sup>162</sup> This concept has been further expounded upon in concept of democratic decentralization which is contradistinguished from mere deconcentration which does not grant Indigenous Local Communities decision-making power.

Democratic decentralization is fundamentally a reformist undertaking premised on changing institutional arrangements governing lands and natural resources. Shifting rights and tenure over resources from the hands of central state bureaucratic agencies to local communities involves decentralization of resource governance in one form or another.... democratic decentralization involves the transfer of powers to locally elected authorities that are by definition downwardly accountable. According to this governance typology, it effectively requires democratic decentralization rather than deconcentration where local resource users are not granted authority over resource management decisions and uses.<sup>163</sup>

Democratic decentralization has evolved and is now somewhat capsulated in the Principle of Subsidiary in the Management of Environment and Natural Resources as propounded by Robert Vischer. The Principle agitates for the reallocation of social functions from government to nongovernment entities which include indigenous management bodies.<sup>164</sup>

Indigenous Management Structures are gaining more prominence in Africa in general and Kenya in particular as evidenced in Forest Act 2005 which created Joint Forest Management through the registration of Community Forest Associations.<sup>165</sup> In the last few decades, there has been a growing awareness of the importance of collective natural resource management practices and institutions, and a recognition of the ways that historic forces have disrupted local people's ability to manage the lands and resources they depend upon. A wide range of Indigenous Local

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<sup>162</sup> Muigua Kariuki *Enhancing Environmental Democracy in Kenya*  
<<http://www.kmco.co.ke/index.php/publications> > accessed on 22<sup>nd</sup> May 2014 p. 9

<sup>163</sup> *Supra* n.153 p.10

<sup>164</sup> Vischer Robert "Subsidiary as a Principle of Governance Beyond Devolution" *Indiana Law Review* Vol. 35 2001  
<<http://www.mckinneylaw.iu.edu/pdf/vol35>> accessed on 14<sup>th</sup> July 2015 p.103

<sup>165</sup> The Forest Act no. 7 of 2005 Laws of Kenya s. 46(2) provides for a community based forest association to apply to the Director for permission to participate in the conservation and management of a state forest or local authority forest.

Communities policy makers and development and conservation practitioners have supported efforts to revive or bolster local natural resource management institutions in response to various economic, social, environmental and political pressures. Increasingly debates over local communities' ability to manage their lands and natural resources.<sup>166</sup>

Indigenous Management Structures carry out operations by relying on customary laws and traditions of the Indigenous Local Communities most of which are unwritten and have been passed on from one generation to the next through word of mouth. Indigenous Management Institutions occurring in Africa is not new but rather based on existent customary rules and governance institutions, including local norms, cultures and beliefs.<sup>167</sup> The customary law of the Indigenous Local Communities should ideally determine the decisions of the Community Based Natural Resource Management enjoy much greater legitimacy from the Indigenous Local Communities as juxtaposed against statutory based decision on oil benefit sharing revenue. Community based law derive their validity from the cultures of the local communities who subscribe to them... The laws of the community tend, typically to be unwritten and are underwritten largely by the support and respect that they command from community members.<sup>168</sup>

Kenya laws are pluralist in nature this is because of the concurrent operation of customary, and statute law in the governance of Kenya's natural resources. Customary natural resource governance laws are practiced alongside the contemporarily statutes albeit unrecognized, their operation is manifest nonetheless.

Hegemony of state based legal systems over the community based legal system is manifest in a number of ways : historical rights derived from community based systems have been revoked ... The effect has been to alienate local communities from their environment and natural resources to reduce the community based legal systems to a peripheral management

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<sup>166</sup>Supra n.153 p. 5

<sup>167</sup>Ibid p.123

<sup>168</sup>Mumma Albert "Local Communities in Environment and Natural Resource Management" *Compliance and Enforcement of Environmental law in Towards More Effective Implementation* Leroy Paddock et al eds Cheltenham: Elgar Publishing 2011 p. 620 Further See Supra. n 153p.17 Real community management can be greatly restricted by a lack of supporting national policy, regardless of the amount of donor involvement and potential for community projects in the region. Attempts to set up community projects against the backdrop of legislation that does not allow for community management can cause conflicts between government organizations and project management.

system often ineffective and secondary status.... States have taken steps whose effects has been to eliminate community based legal systems ...Consequently the state based legal system have tended to override and the local based community laws that predate them<sup>169</sup>

There are several advantages that would flow to the Indigenous Local Communities in choosing to adopt an Indigenous Management Structure to manage the funds that would accrue to them by virtue of an established benefit sharing regime. First it secures the Indigenous Local Communities right to self-determination and decision-making over the use of the oil which is found within their locales this is concurrent with the principle of democratic decentralization, Principle of Subsidiary in the Management of Environment and Natural Resources and international law namely the UN Convention of Biodiversity<sup>170</sup>, Article 10 and 22 of the Rio Declaration ad Chapter 23 of Agenda 21.

Secondly Indigenous Management Institutions reduce administrative costs and salaries which would be the case of in a statutory body. They takes place on an informal, traditional basis, the costs involved in administering management regimes are likely to be relatively minimal, and to be met entirely by local people.<sup>171</sup> This position is similarly advanced by Prof. Mumma who asserts This system [western environmental management and enforcement structures] tends to be resource intensive and depends for its success on the support of a sophisticated infrastructure of administration, information technology and human and financial resources.<sup>172</sup>

Thirdly Indigenous Management Institutions fosters accountability to the members of the Indigenous Local Communities has contradistinguished from statutory benefit sharing bodies. One of the most outstanding aspects of the current trend in natural resource management around the world is the element of Indigenous Local Communities participation in the people-centered or community- centered natural resource management which is evidently absent in the Top-down or command and control approach. It has been observed that there has been a paradigm shift in natural resource management away from state-centered control which is deemed costly to an

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<sup>169</sup> Ibid p. 620-621

<sup>170</sup> The United Nations Convention on Biodiversity <<http://www.unep.org/Documents.Multilingual/Default.asp> > accessed on 24th May 2014

<sup>171</sup> Supra n.153 p.75

<sup>172</sup> Supra n.166 p.619

approach in which the local people play active role.<sup>173</sup> The allocation of funds decisions and developmental plans for the use of benefit sharing revenue made by the IMS enjoys more legitimacy from the Indigenous Local Communities.

Finally they are tailored to suit the specific condition and realities of the Indigenous Local Communities as juxtaposed against a uniform statutory benefit sharing authority. Experience with over the last twenty years, has demonstrated a wide range of development pathways and opportunities tailored to local needs and conditions... can improve cash flows to local communities giving them more autonomous development options<sup>174</sup> This has been found to be more effective model of the distribution to revenue to the Indigenous Local Communities because their own leaders identify the developmental priority needs specific to their geographical areas and challenges. It is argued that the lack of sound management system is ascribable to the displacement of community based environmental and natural resource management systems, process and institutions and the adoption instead of supposedly...environmental management systems, processes and institutions ,derived from external (largely western ) cultures.<sup>175</sup>

Before examine the weakness of indigenous management institutions it is first prudent to establish the parameters upon which the bodies effectiveness, weaknesses or strengths are measured against, which are namely empowerment, economics and environment which are often referred to as the 3Es . Murphree identifies three pillars by which the viability of community based natural resource management programs can be evaluated: conservation, benefits and empowerment. There are, however, potential tensions between these pillars. The generation of economic benefits, for example, is often an essential incentive for conservation, but increasing resource-based revenues can also stimulate increased local competition and potentially concentration of benefits (so-called elite capture).<sup>176</sup> When benefits become concentrated in local elites in a way that violates local social norms and undermines collective action, it can work against the basic tenets of distributive justice. The IMS should takes steps to conserve the

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<sup>173</sup> Kariuki Muigwa *Towards Meaningful Public Participation in Natural Resource Management in Kenya* <<http://www.kmco.co.ke/index.php/publications> >accessed on 23<sup>rd</sup> May 2014 p.1

<sup>174</sup> Supra n.153 p.xii

<sup>175</sup> Supra n.166 p.619

<sup>176</sup> Supra n.153 p. 55

environment in view of the deleterious effects of oil exploitation. The benefits will then empower the Turkana who are a marginalized community economically.

The most prominent shortcoming of the is their incapacity to manage the colossal amount of money channeled to the Indigenous Local Communities from benefit sharing regime due to lack of education and accounting and auditing skills. Secondly issues of corruption abound in money matters especially in Kenya which is the fourth most bribery prone country internationally as per Transparency international's bribery index<sup>177</sup>. Professor A. Mumma asserts that the experience in Kenya has been of poor accountability by the leaders of community groups.<sup>178</sup>

Decentralizing mineral revenues faces serious criticisms in being able to catalyze local economic development in communities. It is a system that puts into the hands of traditional authorities and district assemblies, which have lengthy histories of embezzling funds, a share of mine royalties earmarked for local economic development. It is a setup, however that is undermined by a tendency of elite capture and may contribute to political corruption at the community level.<sup>179</sup>

Third, if the division of the benefit sharing revenue or the placement of a project may favor one of the clans within the Indigenous Local Communities leading to factionalism and discord. The outcome of this situation is disappointing economic and social development, and also factionalism and distrust between communities members.<sup>180</sup>

#### **4.4.2 Voluntary Organizations**

Indigenous Management structures been translated from the realm of operation within indigenous law to statute law dint of registration of voluntary organizations. Professor Mumma asserts The prevailing practice in Kenya is that members of a community wishing to acquire a legal status register an organization which can be vested with legal rights and responsibilities.

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<sup>177</sup>Transparency International Kenya *The East African Bribery Index 2011*

<<http://www.tikenya.org/index.php/kenya-bribery-index>>accessed on 24th May 2015

<sup>178</sup> Supra n.166 p.634

<sup>179</sup> Standing André Ghana's Extractive Industries And Community Benefit Sharing: The Case For Cash Transfers *The International Journal For Policy Minerals And Economy* vol. 20 2014 p. 78

<sup>180</sup> Supra n.166 p.634

The law provides a diverse range of forms of registration for non-governmental organizations which communities can adopt.<sup>181</sup>

The Indigenous Management Structures can acquire legal status by adopting the various outfits available in statute. First they may register as a community organization in the County Commissioner's Office of the Ministry in Charge of Community Development. Secondly under the Cooperative Societies Act<sup>182</sup> which provides for the registration of Cooperate Societies with the aim of promoting the economic interest of the members. Third the Non-Governmental Organization Act<sup>183</sup> enables organizations whose substratum is the advancement of economic development to register under its provisions. Lastly the Non-Governmental organization, trusts and companies limited by shares are other forms of registration that communities may adopt.<sup>184</sup>

It is thought that the registration of Indigenous Management Institutions into voluntary organizations militates against authenticity of it making it as it were seeking legitimacy and validly from statute law which is not as esteemed in the eyes of the members of the Indigenous Local Communities. Despite the lack of legal or corporate personality most communities projects operate by such self-help groups work quite well. This is so particularly among the rural communities in which concepts such as legal personality and corporate identity in term of statute la have little relevance.<sup>185</sup> Lastly the myriad of registration legislations are voluntary in nature making it deficient because not all members of the community will be members of the organization.<sup>186</sup>

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<sup>181</sup> Ibid p.633

<sup>182</sup> The Cooperate Societies Act CAP.490

<sup>183</sup> Non-Governmental Organization Act of 1990 *Note* : the Public-Organization Act No 18 of 2013 had not yet commenced operation at the time of writing this dissertation.

<sup>184</sup> Supra n.166 p. 634

<sup>185</sup> Ibid p. 635

<sup>186</sup> Ibid p.634



#### **4.4.3 Joint Management of Local Indigenous Communities' Benefit Sharing Revenue**

Joint management of natural resource is more favored by developing countries governments as opposed to indigenous management structures, for they allow the State some level of control and power over the decisions made by the institutions in collaboration with the identified state agencies.øThe potential to generate economic benefits for local people has been a key driver of efforts to revive or stimulate IMS, because such benefits contribute to local economic development and poverty reduction. Paradoxically... state authorities have a strong incentive not to devolve authority.ø<sup>187</sup> They are two typologies of Joint Management institutions those which are established according to the principles of deconcentration and those established under the principles of decentralization.

The advantages of Joint Management include lesser administrative costs in its operations. The decisions of the Joint Management institute will enjoy greater legitimacy and authenticity therefore more acceptance by the Indigenous Local Communities for they have higher local content, when juxtaposed against statutory bodies whose decisions are views as foreign impositions which are not alive to the peculiarities of the traditions, customary law and circumstances of the Indigenous Local Communities. Lastly joint management may be viewed as a progressive step towards the attainment of complete indigenous management of benefit sharing revenue.

The disadvantages include the elite capture and political interference because joint management ostensibly includes the government officers who may be overbearing, manipulative and who may undermine and intimidate the members of the Indigenous Local Communities who form part of the Committee because of their superior education levels, articulation and exposure. This may cause members of the Indigenous Local Communities to be relegated to the periphery of the decision-making process hence their decision will lack the requisite local content, legitimacy and authenticity. The members of the Indigenous Local Communities will be then alienated from the governance of the Indigenous Local Communities benefit sharing revenue accrued to them this

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<sup>187</sup> Supra n.153 p.64

would consequently negate the tenants of democratic decentralization, democratic environmental governance and the principle of subsidiary in the management of natural resources.

#### **4.4.4 Statutory Enacted Local Indigenous Local Communities' Benefit Sharing Revenue Structures**

These are natural resource management institutes which are wholly controlled by the government agencies. These institutions accord the Indigenous Local Communities no decision making power even though they bear the brunt of environmental degradation and long-term effects of their health. Statutory based benefit sharing bodies affront the tenants of democratic decentralization, democratic environmental governance and the principle of subsidiary in the management of natural resources. The decisions of such body have no local content hence consequently have no legitimacy and authenticity. The main advantage of the statutory based benefit sharing structures members have the capacity to account and audit the allocated benefit sharing revenue unlike the members of the indigenous management institutions. Nevertheless knowledge in bookkeeping and auditing does not ensure the transparency and accountability in the management of resources directed to the Indigenous Local Communities.

The Natural Resource Benefit Sharing Bill 2014 established a statutory management body by the name Local Natural Resource Benefit Sharing Forum under section 32 whose mandate is to enter local community benefit sharing agreement with the respective County Benefit Sharing Committee.<sup>188</sup> The Forum is composed of five members of the elected members of the Indigenous Local Communities who should not be state officers. Using election to determine membership to the Forum is criticized because of the rampant voter bribery in Kenya. It would be more advisable for members of Indigenous Management Institutions to propose suitable members among themselves who have integrity and aptitude to understand the magnitude of the allocation of funds to the various developmental projects.

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<sup>188</sup>The Natural Resource Benefit Sharing Bill s.32 (1) Every affected local community shall enter into a local community benefit sharing agreement with the respective county benefit sharing committee. (2) The local community benefit sharing agreements shall include non-monetary benefits that may accrue to the local community and the contribution of the affected organization in realizing the same.

Secondly the decision only to have five members of the local communities in the Local Natural Resource Benefit Sharing Forum is problematic at best because due to numerous sub clans within the Turkana community who live within the ward upon which the natural resource is found. The unrepresented sub clans may not trust the five members of other sub clans to protect their interests by comparative experience.

Lastly remuneration of the of the members of the Local Benefit Sharing Forum is determined by the County Benefit Sharing Committee under section 31(4) which readsø ÷ The members of a Local Community Benefit Sharing forum shall be paid such allowances as shall be determined by the County Service Board in consultation with the Salaries and Remuneration Commission .øThe abovementioned provisions could easily lead to intimidation of the members of the Forum by members of the Committee because of the imbalance of power favoring the County Benefit Sharing Committee to the detriment of the members of the Local Benefit Sharing Forums. The members of the Forum will not be able to freely and independently represent the best interest of the Indigenous Local Communities they hail from in the county.

The County Governments Act s.87 promotes the participation of the local community members in the management of fiscal resources within a statutory set up. [The County Government Act] is to the effect that citizen participation in county governments shall be based on participation on inter alia..Timely access to information data and documents and other relevant information related to local communities...Reasonable access to the process of formulating and implementing laws and regulations ,protection and promotion of the interest of minorities marginalized groups and communities.ø<sup>189</sup>

Dr. Muigua argues that the above section ensures Local Communities participation in natural resource management hence devolved governments must not purport to make unilateral decisions especially with regards with the management of natural resources.ø<sup>190</sup> The County Benefit

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<sup>189</sup> County Governments Act Cap.no.17 of 2012 Laws of Kenya

<sup>190</sup> Muigua Kariuki *Towards Environmental Justice In Kenya* <<http://www.kmco.co.ke/index.php/publications>>accessed on 22<sup>nd</sup> May 2015 p. 25

Sharing Committee<sup>191</sup> (from hence forth referred to as the Committee) is established under s. 28 of the Natural Resource Benefit Sharing Bill. The Committee should ensure in its choice of allocation of funds to the Local Benefit Sharing Forum (from hence forth referred to as the Forum) their input is incorporated especially in the allocation of funds to the respective Forums. The Committee should not be tempted to superimpose their decisions upon the Forum for this would be a blatant disregard of s.87 of the County Governments Act which is their establishing legislation.

#### **4.5 Enforcement of the Indigenous Local Communities' Entitlement to Benefit Sharing**

The Indigenous Local Communities have constitutionally accorded entitlement to a share of revenue arising from oil exploitation.<sup>192</sup> The Constitution under Article 258 provides for the enforcement of the Constitution.<sup>193</sup> The Indigenous Local Communities could argue that the State by issuing licenses for oil exploitation without ensuring first establishing an equitable benefit sharing regime is operational and secondly not ensuring that the local communities have benefitted from the development in land has contravened the Constitution.

The enforcement of article 66(2) and 69(1) of the Constitution are intrinsically intertwined with the right to information by the State.<sup>194</sup> The State is duty bound to publish and publicize any important information affecting the nation.<sup>195</sup> The contents of the concession agreements signed between the Multination Extractive Industry Companies and the Government of Kenya forms the basis of the benefit sharing regime. Without knowledge of the contents of concession agreements the Indigenous Local Communities cannot effectively enforce their entitlement to benefit sharing.

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<sup>191</sup> The Natural Resources Benefit Sharing Bill s. 28 (1) There shall be established in each county that has a natural resource to which this Act applies, a County Benefit Sharing Committee.(2) A County Benefit Sharing Committee shall consist of(a) the County Executive Committee Member responsible for finance;(b) the chairperson of the committee of the respective County Assembly responsible for matters relating to natural resources; and five persons elected by the local community where the resource bestrides representing the diversity of the local community.

<sup>192</sup> Article 69(1)and 66(2) of the Constitution

<sup>193</sup> Ibid Article 258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by(a) a person acting on behalf of another person who cannot acting their own name;(b) a person acting as a member of, or in the interest of, a group or class of persons;(c) a person acting in the public interest;

<sup>194</sup> Article 35(1) of the Constitution

<sup>195</sup> Ibid 35(3)

The information contained in such agreement is paramount to the economic development and transparency for the Kenyan nation in general and the Indigenous Local Communities in particular hence should not be shrouded in the secrecy as is the present case.

The right to information is a procedural right in environmental democracy. The Indigenous Local Communities may enforce their right to information under Article 22<sup>196</sup> of the Constitution to compel the government to release the contents of the concession agreements. In the *Friends of Lake Turkana Trust v Attorney General & 2 others*<sup>197</sup> the court was of the view that access to environmental information was a prerequisite to effective public participation in decision making. The State would be expected to argue that such agreements fell within the ambit of The Official Secrets Act<sup>198</sup> but a mere Act of Parliament cannot trounce a constitutional dictate upon the state by dint of constitutional supremacy.

In Kenya PSCs signed with oil companies have confidentiality clauses that prevent the disclosure of contracts to local stakeholders. Governments and companies argue that contracts include commercially sensitive information that cannot be disclosed publicly. In doing so, they refer to the financial and technical data of the project as confidential, and exclude these from contracts which they are obliged to disclose, but include them in other documents which they are not obliged to disclose. Contract transparency is very important for the Indigenous Local Communities in that citizens can hold governments accountable for protecting the Indigenous Local Communities interest. They can also hold governments and companies accountable to the terms of the agreements they sign. The disclosure allows citizens to ensure that payments agreed are made, that the environment is protected and that obligations to the local community are met.<sup>199</sup>

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<sup>196</sup> Ibid Art.22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

<sup>197</sup> Environment Land Court Suit no. 825 of 2012

<sup>198</sup> The Official Secrets Act Cap.187 Laws of Kenya

<sup>199</sup> Africa Center for Open Governance *Mixed Blessing? Promoting Good Governance in Kenya's Extractive Industries* <[http://www.africog/reports/extractive\\_industries](http://www.africog/reports/extractive_industries)> accessed on 4<sup>th</sup> May 2015 p.20

## **4.6 Conclusion**

This chapter was dedicated to defining the various types of benefit available to the people of Turkana. Secondly this portion of the study interrogating the various institutions that may be tasked with managing the revenue directed to the Indigenous Local Communities in a benefit sharing regime. The paper has explored three institutions namely, Indigenous Management Structures, Joint Management bodies and statutory bodies. This paper comes to the conclusion that Indigenous Management Institutions would be best suited to the particularities of the Turkana. This gainsaid, the indigenous management institutions inefficiencies identified herein should be addressed to ensure optimum benefits accrue the Indigenous Local Communities. Lastly the paper explored methods of enforcing the Turkana's their right of benefit sharing.

## **5.0 Chapter Five: Conclusion & Recommendation**

### **5.1 Introduction**

This study has examined the right of Turkana as an Indigenous Local Communities to a higher share of benefits from oil exploitation above the general Kenyan populous. This chapter is a summary of the preceding chapters it captures the main arguments discussed in the chapters. The preceding chapters having identified lacunas in the policy, legislative, and institutional framework for according the ILC greater benefit from oil exploitation. The second limb seeks to remedy the identified lacunas though the recommendation should address.

### **5.2 Conclusion**

Chapter one outlined the hypothesis, theoretical framework and objectives of this research paper. It sheds light on the importance of the study, the methodology adopted and the issues this dissertation sought to address. This introductory chapter was dedicated to laying a general guideline upon which the whole of dissertation oscillates. The chapter two of the study delimits membership to the indigenous local communities by the adoption of the anthropological definition of an indigenous local community. This definition accords membership into the indigenous local communities on the basis of cultural anthropology the virtue of community members upholding observing and celebrating similar culture. This definition was found to preclude opportunistic settler communities from benefiting at the expense of genuine indigenous local community members. This chapter answered the fourth research question.

Chapter three explored the basis of the indigenous local communities' entitlement to higher share of benefits. The paper laid down four justifications first by virtue of the Turkana's marginalization. Turkana County is the poorest county in Kenya. The Turkana have been set at the periphery of social and economic development from Kenya's independence. Secondly the Turkana have a unique attachment to land because they are a pastoralist community and are highly dependent on their lands for sustenance of their livelihoods. Thirdly the Turkana will have to endure disproportionate adverse impact upon their environment and livelihoods. The last basis for entitlement arises from the provisions of international law to which Kenya is signatory. The last portion of the chapter elucidated on the scope of entitlement of the indigenous local

communities rights to subsurface resources such as petroleum within their ancestral lands regardless of their ability to access it. The third chapter responded to the second research issue.

Chapter four examined four types of structures that may be used to distribute benefits from oil exploitation to the indigenous local communities. These structures include the indigenous management structures, voluntary organizations, joint management of local indigenous communities benefit sharing revenue, voluntary organization and statutory enacted local indigenous local communities benefit sharing structures. This study espoused the adoption of the indigenous management structures because it affords members of the ILC most decision making power which befits the concept of democratic decentralization and the principle of subsidiary in the management of natural resources. The chapter future expounds on the nature of benefits which are envisioned for the ILC. The last limb of the study dwelt on the enforcement of the indigenous local communities entitlement to benefit sharing. The fourth chapter answered the first, second and third research questions as laid down in chapter one.

## **5.2 Recommendations**

This study has indentified a lacuna in the law from constitutional provisions directing the enactment of a natural resource benefit sharing framework and its actualization in legislation. Senate has tabled the Natural Resources Benefit Sharing Bill 2014 to fill this lacuna though the Bill requires some amendments before promulgation to better secure the interests of Indigenous Local Communities in the oil exploitation revenue and its management. The Bill is insufficient and should not be enacted as it presently reads. Natural Resources Benefit Sharing Bill 2014 though progressive, has some shortcoming chiefly first, its definition of the local community. Secondly, the unsatisfactory representation and limited decision making power of the indigenous local communities in its benefit sharing structures. Lastly the meager percentage of benefits accorded to the local communities.

1. The anthological approach to the definition of an indigenous local community should be adopted. The Kenyan Constitution, statutes and Natural Resources Benefit Sharing Bill 2014 have overlooked the importance of such an anthropological definition. Section 2 of



the Natural Resource Benefit Sharing Bill defined a local community as a people living in a ward within which a natural resource is situated and are affected by the exploitation of that natural resource. Law is a very specific and precise discipline. The lack of a comprehensive definition enables opportunistic settler communities to usurp the benefits intended for the ILC who have suffered historical distributive injustices in the allocation of societal goods. The Natural Resource Benefit Sharing Bill adopts a pluralist geographical, political and dependence on the economical resource definition. The aforesaid definition is found wanting in securing the best interests of the ILC for it include outsiders, the ILC's management of benefit sharing revenue using indigenous management institutions is thus compromised. The Natural Resource Benefit Sharing Bill should thus be amended to reflect the anthropological definition of a local community.

2. The Natural Resource Benefit Sharing Bill establishes statutory benefit sharing revenue structures, which are wholly controlled by government agencies. The structure consist of a Benefit sharing Authority whose function as per section 6 of the Bill to review, and where appropriate, determine the royalties payable by an affected organization engaged in natural resource exploitation .The Bill further creates a County Benefit Sharing Committee under section 29 which is mandated determine the amount of money to be allocated to each local community from sums devolved under the Act .Section 31 creates the Local Natural Resource Benefit Sharing Forum whose principle function is to nnegotiate with the county benefit sharing committee for the purpose of entering into a local community benefit sharing agreement on behalf of the community.

The power of the ILC to make decisions is limited which militates against the concept of democratic decentralization. The decision only to have five members of the local communities in the Local Natural Resource Benefit Sharing Forum is problematic due to numerous sub clans within the Turkana community who live within the ward where the natural resource is found. The unrepresented sub clans may not trust the five members of other sub clans to protect their interests by comparative experience. Secondly using

election to determine membership to the Forum is criticized because of the rampant voter bribery in Kenya.

The Bill should allocate more decision making power to the local indigenous community by embracing Indigenous Management Institutions as opposed to the proposed statutory borne institutions. This can be achieved amendment of the NRBSB abolishing the County Benefit Sharing Committees and according its functions to the Indigenous Management Institutions. Indigenous Management Institutions presently have not been accorded legal recognition therefore requisite enabling provisions within the Bill should be drafted to sanction its operations and give effect to its decisions. This will thus accord the IMS legal basis to apportion the oil benefit sharing funds to the indigenous local community's developmental needs.

3. The percentage of revenue from oil exploitation proposed to be accorded to the local communities is insufficient. Section 26 The Natural Resources Benefit Sharing Bill proposes 12.8% percent of the oil exploitation revenue to be directed to the local communities. The Petroleum (Exploration, Development and Production) Bill 2015 under section 94(4) apportions to the local community five percent of the governments share. These percentage proposals are unsatisfactory the indigenous local communities should at least enjoy over thirty percent of the government revenue generated from oil exploitation. This is due to their pervasive marginalization, their unique attachment to land, due to the disproportionate adverse impact upon their environment and livelihoods finally their entitlement under international law. All of the above entitlements cannot be computed to a figure below thirty percent. The Natural Resources Benefit Sharing Bill and Petroleum (Exploration, Development and Production) Bill 2015 should both be amended to insure a minimum of thirty percent of oil exploitation revenue is enjoyed by the indigenous local communities such as the Turkana.
4. This study proposes a model benefit sharing structure where twenty percentage of all royalties from oil exploitation should be set aside into and paid into sovereignty wealth fund. This will guarantee intergenerational equity despite oil being a finite natural

resource. Fifty percent of all the royalties should be directed to the central government. This revenue should be utilized for the benefit of all Kenyans under the management of the proposed Benefit Sharing Authority. The remaining thirty percent of the royalties should be directed to the indigenous local communities under the administration of indigenous management institutions. This study proposes royalty ratio of per twenty to the sovereign wealth fund, fifty percent to the national government and thirty percent to the indigenous local communities.

5. Kenya should reconceptualize and amend its policy and legislation on ownership of oil and other minerals by indigenous local communities. Article 66 of the Constitution and section 3 of the Petroleum (Exploration and Production) Act dictate the ownership of petroleum by the state. Kenya should acknowledge the indigenous local communities rights over sub surface natural resources does not flow from the constitution, but are inherent collective rights over their ancestral lands based on their original occupancy. This would accord well with the tenants of the social contract theory, natural rights to property which are inalienable. Kenya should borrow a leaf from the best practice of aboriginal title in Canada where their Constitution and legislation recognise and affirm the Aboriginals right to sub surface resources. The Canadian Constitution further recognises that aboriginal title does not originate from the constitution and or any other legislation and acknowledges its supremacy above the aforementioned. Kenya by adopting the above would better appreciate the necessity of benefit sharing of oil revenue to the indigenous local communities and increase the percentage proposals accorded to them.

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