The Impact of Government Decentralisation on the Development and Implementation of Benefit-Sharing Laws in Kenya's Extractive Sector

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DECLARATION

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To the all wise and infinitely loving God do I reserve my highest appreciation.

DEDICATION

To the memory of my compatriot, Advocate Elijah Marima ole Sempeta, murdered 15 years ago while seeking redress for the wrongful expropriation of the land and resource rights of the Maasai of Magadi.

ABSTRACT

Intra-state distribution of monetary and non-monetary benefits from resource extraction among multiple entities is a subject of considerable interest in natural resource law. Drawing mainly but not exclusively from international human rights and environmental law, this study explores the nature, core content and models of benefit sharing in the extractive sector in Kenya. The study establishes that central to the push for benefit sharing is the desire to realise justice – commutative, distributive or compensatory – for resource-host communities and regions.

Kenya is an ideal case study related to benefit sharing because of its recent adoption of multi-level governance known as devolution. From this lense of multi-level governance, the thesis assesses whether such a system aids or impedes the effective distribution of resource benefits to host regions and communities, a factor critical to mitigating resource conflict.

The thesis examines Kenya's legal regime governing benefit sharing from the colonial period to the present. This historical review demonstrates the significant impact that Kenya's Constitution adopted in 2010 has produced in entrenching benefit sharing in the norms and institutions of the state. It attributes the enhanced legal and policy recognition of benefit sharing not merely to the text of the Constitution but to the role played by semi-autonomous territorial units, known as counties, in shaping emerging norms and standards on benefit-sharing through a wide range of strategies including legislation, litigation and information dissemination. Where counties take a proactive role in shaping the manner in which resource costs and benefits are distributed in law, responsive legislative outcomes can be realised. Conversely, where counties fail to seize their institutional position to aid resource impacted communities' engagement with policy opportunity structures, national institutions and resource operators are likely to default to historically exclusionary and paternalistic approaches to benefit sharing. The legal and institutional gaps evident in Kenya's mineral and petroleum legislative regime are largely a function of this dynamic.

In examining the response of two resource-host counties in Kenya-Turkana and Kwale-the study demonstrates the need for counties to make pro-community policy choices in ensuring that constitutionally mandated monetary and non-monetary benefits are accessed at the local level. The study validates the utility of benefit sharing as an enabler of stable resource development environment especially when its impact is experienced through local economic development within host regions and communities.

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TABLE OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
CA	County Assembly
CBD	Convention on Biological Diversity
CEC	County Executive Committee
CDA	Community Development Agreement
CIDP	County Integrated Development Plan
COG	Council of Governors
CRA	Commission on Revenue Allocation
CSR	Corporate Social Responsibility
FPIC	Free, Prior and Informed Consent (Consultation)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
LAPSSET	Lamu Port South Sudan-Ethiopia Transport Corridor
MCDC	Mining Community Development Committee
MNC	Multinational Corporation
MRB	Mining Rights Board
NLC	National Land Commission
Nagoya Protocol	The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
OAG	Office of Auditor General
OMC	Online Mining Cadastre
PSNR	Permanent Sovereignty over Natural Resources

CHAPTER 1: INTRODUCTION

1.1 Introduction

The decision to vertically distribute governmental functions between two or more levels of a state and horizontally among a stipulated number of territorial units is informed by the elusive search for inclusive, democratic, and effective governments, particularly in Africa.[1] This is the essence of devolution. States that have devolved their governance system have either constitutionalised or legislated it.[2] The entrenchment of a devolution in a country's Constitution signals a deep commitment to preserve both the levels and territorial units of the state and ensure their long-term involvement in policy decisions taken at the centre.[3] To be effective, such a multi-sphered devolved state will require intergovernmental cooperation and coordination,[4] rationalised through intergovernmental relations institutions.[5]

A similar objective underpins the aspiration to allocate the costs and benefits of non-renewable natural resources in a manner that dissociates extractive development from the inevitability of producing the resource curse trap common in the African continent.[6] Where the assignment of monetary and nonmonetary advantages and burdens is severely unequal, resource induced conflict is likely.[7] Seen from this lens, the concept of benefit sharing is the corrective legal device that seeks a more equitable distribution of burdens and benefits of resource development.[8]

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[1] John Mutakha Kangu *Constitutional Law of Kenya on Devolution* (2015) 10; Anne M Larson & Jesse C Ribot 'Democratic decentralization through a natural resource lens: An introduction' (2004) 16 *European Journal of Development Research* 1-25.

[2] Charles M Fombad 'Constitutional entrenchment of decentralization in Africa: An overview of trends and tendencies' (2018) 62:2 *Journal of African Law* 175-199.

[3] Peter W Hogg *Constitutional Law of Canada* (1992) 115. Fombad ibid at 177.

[4] The principle of cooperative government was spelt out by the South African Constitutional Court in *Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill, No. 83 of 1995* (CCT46/95) (1996) ZACC 3 at para 34 (where the court asserted: 'Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through cooperation').

[5] Nathalie Behnke & Sean Mueller 'The purpose of Intergovernmental Councils: A framework for analysis and comparison' (2017) 27:5 *Regional & Federal Studies* 507-527.

[6] Barry Barton & Lee Godden et al 'Introduction' in Lila Barrera-Hernández (ed) *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) 1-22, at 1.

[7] Ibid at 11; Anthony Bebbington et al 'Contention and ambiguity: Mining and the possibilities of development' (2008) 39:6 *Development and Change* 887-914 at 906.

[8] Elisa Morgera 'The EU and environmental multilateralism: The case of access and benefit-sharing and the need for a good-faith test' (2014) 16 *Cambridge Yearbook of European Legal Studies* 109-142 at 110.

Benefit sharing and devolution in the Kenyan context share several attributes. By design, devolution seeks to enhance equity and fairness through greater sociopolitical and economic participation of citizens and communities in governance.[9] Similarly, benefit sharing is a mechanism that pursues the realisation of equity by distributing extractive wealth and other advantages among different stakeholders.[10] Combined, devolution of decisions over natural resource benefits and the involvement of resource operators and host communities in those decisions counters the adverse effects of the control of resource rents (revenue) by the central government.[11] In theory, therefore, both devolution and benefit sharing can be instrumental in advancing democratic governance, shared prosperity, and the mitigation of economic inequality.

This thesis examines whether Kenya's extensive decentralisation process, known as '*devolution*', has impacted the development and implementation of laws on benefit sharing in the extractive sector. Kenya's devolution process began with the promulgation of the 2010 Constitution.[12] The Constitution creates two tiers of government, national and county, and 47 co-equal county governments.[13] Further, the Constitution establishes a bicameral legislature[14] and other devolution-safeguarding institutions.[15] Therefore, Kenya provides an opportunity to compare the legal framework for benefit sharing pre- and post-devolution. Furthermore, Kenya's extractive sector is rapidly expanding, creating conditions for ongoing legal development, as described in this chapter's background.

In the context of this study, the term '*extractives*' refers to non-renewable natural resources, including minerals, oil, and natural gas, whose exploitation generates rents and other economic benefits.[16] The extractive sector has a significant impact on African economies. The World Bank notes that oil and gas alone have accounted for close to 50 per cent of total African

[9] Kangu op cit note 1 at 109-120; See also, Chapter 6.2.1.
[10] A Clark 'Government decentralisation and resource revenue sharing' in Elizabeth Bastida, Thomas Waelde & Janeth Warden (eds) *International Comparative Mineral Law and Policy: Trends and Prospects* (2005) 549-566.
[11] Javier Arellano-Yanguas 'Aggravating the resource curse: Decentralisation, mining and conflict in Peru' (2011) 47:4 *Journal of Development Studies* 617-638 at 618.
[12] The Constitution of Kenya (27 August 2010); Fombad op cit note 2 at 183.
[13] Constitution of Kenya ibid arts 1(4), 6 & First Schedule.
[14] The National Assembly and Senate are the two chambers of Parliament, with the Senate dedicated to the protection of the interests of county governments. Constitution of Kenya ibid art 96. See Chapter 6.4 for detailed treatment of legislative interplay between the two chambers relevant to benefit sharing.
[15] Constitution of Kenya ibid art 216 establishes one of the critical intergovernmental relations institutions dealing with the coordination of revenue management issues, the Commission on Revenue Allocation. See Chapter 6.
[16] Andy Whitmore *Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries* (2012) 6.

exports over the last decade.[17] This contribution to exports has been on the rise in recent years.[18] Mining equally makes a substantial contribution to the economies of sub-Saharan Africa.[19]

The continent's fiscal dependence on its extractive economy is, however, problematic.[20] The false security triggered by resource rents – actual or anticipated – may have the effect of increasing government's appetite for borrowing.[21] This in turn dramatically increases public debt to unsustainable levels based on unrealistic and volatile revenue projections.[22] Consequently, vast natural resource wealth can trigger runaway inflation, render non-resource sectors less competitive, and worsen inequality.[23] On the political side, resource-endowed countries are often less democratic and accountable.[24] Their societies are prone to conflicts[25] and they are frequently reliant on external support to underwrite social development.[26] Economic and political theorists have canvassed these adverse effects of extractive processes on economic and sociopolitical life under the concept of the resource curse.[27]

[17] Punam Chuhan-Pole, Andrew L Dabalen & Bryan Christopher Land *Mining in Africa: Are Local Communities Better Off?* (2017) 1.
[18] International Monetary Fund 'Regional economic outlook: sub-Saharan Africa-sustaining growth amid global uncertainty' *World Economic and Financial Surveys* 2012, available at *http://www.imf.org*>, accessed on.
[19] Magnus Ericsson & Olof Löf 'Mining's contribution to national economies between 1996 and 2016' (2019) 32 Mineral Economics 223-250 at 226.
[20] Chuhan-Pole, Dabalen & Land op cit note 17 at 1.
[21] Frederick van der Ploeg 'Natural resources: Curse or blessing?' (2011) 49:2 *Journal of Economic Literature* 366-420 at 392.
[22] JG Frynas, G Wood & T Hinks 'The resource curse without natural resources: Expectations of resource booms and their impact' (2017) 116:463 *African Affairs* 233-260 at 238; Terry Lynn Karl & Ian Gary 'The global record' in *Foreign Policy in Focus* (2004) 35-42 at 36; Gisa Weszkalnys 'Hope & Oil: Expectations in SãO Tomé E Príncipe' (2008) 35:117 *Review of African Political Economy* 473-482 at 474.
[23] Jeffrey D Sachs & Andrew Warner 'The curse of natural resources' (2001) *European Economic Review* 827-831 (demonstrating the missing link between resource wealth and economic growth).
[24] Argentino Pessoa 'Natural resources and institutions: the "natural resources curse" revisited' (2008) MPRA Paper No. 8640 4; AA Faruque 'Transparency in extractive revenues in developing economies in transition: A review of emerging best practices' (2006) 14:1 *Journal of Energy and Natural Resources* 66-67.
[25] Paul Collier & Anke Hoeffler 'Resource rents, governance, and conflict' (2005) 49:4 *Journal of Conflict Resolution* 625; International Institute for Environment and Development and World Business Council for Sustainable Development *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) xix.
[26] Nathan Jensen & Leonard Wantchekon 'Resource wealth and political regimes in Africa' (2004) 37:7 *Comparative Political Studies* 821-822; Weszkalnys op cit note 22.
[27] Phrase coined in Richard M Auty *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993) 1.

However, the resource curse is not inevitable as resource wealth has produced both poor[28] and well-performing countries.[29] The difference in performance appears to lie in the design and quality of domestic institutions, and their ability to manage resource endowments transparently and apply it towards social-economic transformation of the country.[30] In an effort to mitigate the destabilising impact of resource wealth in Africa's ethnically diverse nations, institutions that facilitate equity – such as devolution – have been established. In theory, these institutions should ensure that extractive-host communities and localities participate in decision-making processes and benefit from resource exploitation.[31] Where subnational entities and communities are excluded from resource benefits, risks are created across the entire extractive value chain.[32]

Several terms that will frequently appear in this thesis need to be clarified upfront. *Benefit sharing* is a generic term used to explain the demand by citizens, communities, and subnational units to participate in monetary or nonmonetary benefits of extractive activities.[33]

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[28] Nigeria, Democratic Republic of Congo, and Angola have been cited as poor performers due to dependency on the extractive sector. See, Xavier Sala-i-Martin & Arvind Subramanian 'Addressing the natural resource curse: An illustration from Nigeria' (2013) 22:4 *Journal of African Economies* 570-615; Olsson Ola & Heather Congdon Fors 'Congo: The prize of predation' (2004) 41:3 *Journal of Peace Research* 321-36; Inge Amundsen 'Drowning in oil: Angola's institutions and the "resource curse"'(2014) 46:2 *Comparative Politics* 169-189.

[29] Botswana and Norway are the poster children of extractive resource management successes. See, Kafayat Amusa 'The effectiveness of government expenditure on economic growth in Botswana' (2019) 10:3 *African Journal of Economic and Management Studies* 368-384 at 369; Ellen Hillbom 'Diamonds or development? A structural assessment of Botswana's forty years of success' (2008) 46:2 *The Journal of Modern African Studies* 191-214 at 200-2; Mark C Thurbera et al 'Exporting the "Norwegian Model": The effect of administrative design on oil sector performance' (2011) 39:9 *Energy Policy* 5366-5378.

[30] Larsen Erling Roed 'Escaping the resource curse and the Dutch disease: When and why Norway caught up with and forged ahead of its neighbors' (2006) 65:3 *American Journal of Economics and Sociology* 605-640; Frederick van der Ploeg 'Natural resources: Curse or blessing?' (2011) 49:2 *Journal of Economic Literature* 366-420; Douglass C North *Institutions, Institutional Change and Economic Performance* (1990); Terry Lynn Karl 'Ensuring fairness: The case for a transparent fiscal contract' in Macartan Humphreys, Jaffrey D Sachs & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) 256-285.

[31] Michael Watts 'Resource curse? Governmentality, oil and power in the Niger Delta, Nigeria' (2004) 9:1 *Geopolitics* 50-80 at 62-66 (for a case study of incoherent mechanisms of inclusion of communities in resource benefits in the Niger delta of Nigeria).

[32] L Ngasike & M Kamau 'Move to cut share of royalties now threatens Early Oil' *East African Standard* 25 Feb 2018 online at *https://www.standardmedia.co.ke/news/article/* (accessed on 1 Nov 2019); L Mugerwa 'Hoima leaders dispute oil benefits' *Uganda Monitor* 20 April 2017 online at *https://allafrica.com/stories/* (accessed 1 Nov 2019); C Ejimofor 'Nigeria Delta communities demand stake in ex-Shell oil block' *Bloomberg Online* 8 July 2017 online at *https://www.bloomberg.com/news* (accessed 1 Nov 2019). See also, *Katangese Peoples' Congress v Zaire* Comm. No. 75/92 of 1995 (African Commission on Human and Peoples' Rights); *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Comm. No. 155/96 of 2001 (African Commission on Human and Peoples' Rights); SG Akpan 'Host community hostility to mineral development: A new generation of risk' in Bastida, Waelde & Warden op cit note 10 at 311-330; Rachel Davis & Daniel Franks *Costs of Company-Community Conflict in the Extractive Sector* (2014).

[33] E Morgera 'The need for an international legal concept of fair and equitable benefit-sharing' (2016) 27 *European Journal of International Law* 353-83 at 354.

Laws in this study include positive law as contained in constitutions, treaties, declarations, and statutes at international, regional, national, or subnational levels. *Decentralisation* is a system by which powers are formally ceded to actors and institutions at lower levels in a political-administrative and territorial hierarchy.[34] In Kenya, the process of government decentralisation is known as *devolution*. It connotes the sharing of power between national and 47 territorially based county governments tasked with implementing specific governmental functions.[35] A *resource curse* situation exists when resource-producing states or regions are left worse off by resource development processes.[36]

This study contributes to knowledge in three ways. First, there is limited research on how devolved units in Kenya facilitate or impede extractive sector benefit sharing.[37] Secondly, scholarship examining the relationship between devolution and legal implementation generally remains scant.[38] Thirdly, studies that review the different criteria followed by countries in decentralising resource benefits have focused little on the impact of subnational entities in shaping the nature of implementation mechanisms.[39] According to these studies, decentralisation alone neither increases the share of resource benefits allocated to the subnational level nor does it ensure the effective use of these resources in furtherance of community interests. Instead, existing research lends credence to the view that political relations between the different levels of the state impact the bargaining power of subnational units to influence revenue allocation policies and practices.[40] This study's major contribution

[34] DA Rondinelli (ed) *Decentralisation and Development: Polity Implementation in Developing Countries* (1983) 19; Kangu op cit note 1.
[35] Kenya's devolution model is borrowed in large part from South Africa's 1996 Constitution. See N Steytler & Yash Ghai (eds) *Kenyan-South Africa Dialogue on Devolution* (2016). The South African model has been described as 'quasi federal', 'protofederal', or 'multi-sphere'. R Simeon & C Murray 'Multi-sphere governance in South Africa: An interim assessment' (2001) 31 *Journal on Federalism* 65-92.
[36] Michael L Ross 'The political economy of the resource curse' (1999) 51 *World Politics* 297-322; R Hodler 'The curse of natural resources in fractionalized countries' (2006) 50:6 *European Economic Review* 1367-1386.
[37] A Kayumba *Challenges and Prospects of Equitable Benefit-sharing in Mining Sector: A Case Study of Titanium Mining in Kwale County, Kenya* (unpublished MA thesis, University of Nairobi, 2014) 5. Kayumba's study on titanium mining in Kwale examines the legal regime in Kenya as at 2014 and the extent to which it responds to the overwhelming communal expectation of benefits from the extractive activities.
[38] MF Montoya 'Participation of territorial authorities in mining activities in Colombia' in Barrera-Harnandez op cit note 6 at 355-447.
[39] Javier Arellano-Yanguas & Andrés Mejía Acoste 'Distributing the wealth from the earth' (2014) 45:5 *IDS Bulletin* 58-68 at 66; Giorgio Brosio 'Oil revenue and fiscal federalism' in JM Davis et al (eds) *Fiscal Policy Formulation and Implementation in Oil-Producing Countries* (2003) 243-69; Michael L Ross 'How mineral-rich States can reduce inequality' in Humphreys, Sachs & Stiglitz op cit note 30, 237-255 at 248-50.
[40] Tulia G Falleti *Decentralization and Subnational Politics in Latin America* (2010) 18; Anne Larson 'Natural resources and decentralization in Nicaragua: Are local governments up to the job?' (2002) 30:1 *World Development* 17-31; Tim Bartley, Krister Andersson & Pamela Jagger et al 'The contribution of institutional theories to explaining decentralization of natural resource governance' (2008) 21:2 *Society and Natural Resources* 160-174 at 160.

is, therefore, to apply the design principles developed by common property scholars to assess the viability of devolved resource governance institutions to mitigate the resource curse.[41]

As such, this study aspires to narrow the knowledge gap by spotlighting the agency of Kenya's new devolved units in influencing the shape of resource-benefit frameworks and their implementation. Moreover, many other countries in Africa find themselves in a situation similar to Kenya's, where decentralised government units are playing, or should be playing, an essential role in natural resource governance.[42] Developing an understanding of devolution's impact on benefit-sharing laws in Kenya's extractive sector may help inform other contexts. The Africa Mining Vision acknowledges that one of the sector's challenges is how resource benefits allocated to communities are managed and utilised.[43] Apportioning resource benefits to subnational units and granting them a role in managing resource benefits allocated to communities could address this challenge.[44]

1.2 Background

The contested nature of the extractive sector's ability to contribute sustainably to development of African nations is highlighted in the literature.[45] Where it is successful is in part dependent on the management of resource revenues and other benefits.[46] Therefore, states and resource developers can no longer ignore the risk of excluding host regions, localities and communities

[41] Chapter 4.
[42] Larson & Ribot op cit note 1 at 1.
[43] African Union 'Africa Mining Vision' (2009) available at *https://au.int/sites/* accessed on 1 Nov 2019. The Economic Commission of West African States Mining Directive also obligates member states to 'ensure the equitable and effective distribution and transfer of portion of mining incomes, provided for in the guidelines or legislation of member states, for the benefit of local communities and encourage the strengthening of their capacities.' See, ECOWAS *Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector* (2009) art 8.5. See also, art 11.2 & 11.3 which oblige corporate social responsibility and alternative livelihood programmes to constitute conditions precedent to the grant of mining licensing and non-adherence constituting ground for revocation of such a license.
[44] The African Charter on Decentralization obligates states to adopt legislation and other mechanisms enabling local government and populations to benefit from natural resources development in their territory. Additionally, central governments must ensure natural resource benefits acquired from resource exploitation in given localities and communities are equitably redistributed to all subnational governments and local communities. See, African Charter on the Values and Principles of Decentralisation (2015) *Local Governance and Local Development* art 16(4)*(b)(c)*.
[45] Tracy-Lynn Field *State Governance of Mining, Development and Sustainability* (2019) ch 3; Bebbington et al op cit note 7 at 907; E Reed & M Miranda 'Assessment of the mining sector and infrastructure development in the Congo Basin region' (2007) *Washington DC, USA: World Wildlife Fund, Macroeconomics for Sustainable Development Program Office*.
[46] *Africa Mining Vision* supra note 43; Gavin Hilson 'The Africa Mining Vision: a manifesto for more inclusive extractive industry-led development?'(2020) 41:3 *Canadian Journal of Development Studies* 417-431 at 419.

from access to benefits.[47] The consequences of disregarding this risk are adverse to resource operators and states alike as political instability, violence, and increased expenditures on security can undermine the viability of resource development activities.[48]

In most countries, including Kenya, positive law governs benefit-sharing processes and modes of distribution.[49] However, these laws may or may not align with the core basis of host-community demands. First, host communities stake their claim for benefits on the grounds of economic self-determination, which they argue entitles them to participation in the benefits of exploitation of subsurface resources.[50] Secondly, they assert that their ownership of land on which extraction happens, through customary title or as beneficiaries of a trust, permits them to gain from the fruit of these lands.[51] Thirdly, communities bear disproportionate adverse environmental and social impacts of extractives,[52] and benefit sharing offers partial redress. From the perspective of host communities, benefit sharing is thus a question of justice and inclusive governance.[53]

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[47] Ernst & Young 'Business Risks Facing Mining and Metals 2013-2014' available at *http://www.ey.com*>, accessed on 24 January 2021. See also, Kristi Disney Bruckner 'Community development agreements in mining projects' (2016) 44:3 *Denver Journal of International Law and Policy* 413-428 at 416.

[48] George S Akpan 'Host community hostility to mining projects: A new generation of risk?' in Bastida, Waelde & Warden op cit note 10, 311-330 at 320 (documenting Shell's losses due to community hostility to petroleum development in Niger Delta at US$164 million). A major mining corporation is estimated to have lost as much as US$6.5 billion value erosion over two years due to community-induced disruption. See, Davis & Franks op cit note 32. The price of stocks of Tullow Oil Corporation, involved in oil development in Kenya, dropped 13 per cent at the London Stock Exchange during the month-long impasse with the local community. See, N Fletcher 'Tullow Oil slides as it halts drilling in Kenya' *The Guardian* 28 October 2013 online at *https://www.theguardian.com/* accessed 12 Oct 2020. See also, RA Hodge 'Mining company performance and community conflict: Moving beyond a seeming paradox' (2014) 84 *Journal of Cleaner Production* 27-33 at 27; Willice O Abuya 'Resource conflict in Kenya's titanium mining industry: Ethnoecology and the redefinition of ownership, control, and compensation' (2017) 34:4 *Development in Southern Africa* 593-606 at 595; GA Okoh 'Grievance and conflict in Ghana's gold mining industry: The case of Obuasi' (2014) 62 *Part A Futures* 51; D Kemp et al 'Just relations and company-community conflict in mining' (2011) 101:1 *Journal of Business Ethics* 93-109, at 93.

[49] Oguine Ike 'Nigeria's oil revenues and the oil producing areas' (1999) 17:2 *Journal of Energy & Natural Resources Law* 11-120.

[50] Sonwabile Mnwana 'Mineral wealth- "In the name of Morafe"? Community control in South Africa's "Platinum Valley"' (2014) 31:6 *Development Southern Africa* 826 -842 at 826; Alice Farmer 'Towards a meaningful rebirth of economic self-determination: Human rights realization in resource-rich countries' (2007) 39 *New York Univ Journal of International Law & Policy* 418-472 at 420 (averring that economic self-determination 'encourages democratic participation in order to determine the best use of those resources').

[51] RS Knight 'Statutory recognition of customary land rights in Africa: An investigation into best practices for law-making and implementation' (2010) 5; Martin Kwaku Ayisi 'The legal character of mineral rights under the new mining law of Kenya' (2017) 35:1 *Journal of Energy & Natural Resources Law* 25-46 at 36 (on the nature of a mineral license as profit à prendre). See Chapter 2.2.1.1 (for discussion on the right to self-determination).

[52] George S Akpan 'Host state legal and policy responses to resource control claims by host communities: implications for investment in the natural resources sector' in Bastida, Waelde & Warden op cit note 10, 284-309 at 285; John P Williams 'Global trends and tribulations in mining regulation' (2012) 30:4 *Journal of Energy and Natural Resources Law* 391-422 at 393.

[53] See Chapter 3.2.

The emphasis on a more inclusive extractive sector in Africa stems from growing demands for an expanded democratic space through citizen participation in government decision-making processes.[54] In many countries, decentralisation efforts create new subnational decision-making structures, theoretically meeting the demand for democratic participation.[55] Decentralisation also has necessary implications for the development and implementation of laws. Subnational units often have the power to influence emerging legislation and policies through public participation requirements and political bargaining in ways that communities cannot.[56] Subnational units may equally affect the implementation of laws through the innovative interpretation of statutes in local contexts.

Although primarily an agricultural economy, Kenya's extractive industry has been a strategic sector of the economy since the colonial era.[57] The recent discovery of up to 600 million barrels of recoverable oil in Kenya's Turkana County has raised the extractive sector's significance in the national development discourse.[58] The mining of rare earth minerals, including ilmenite, zircon, and rutile, has been going on in Kwale for the last decade. The Kwale resource development project generates a total of US$186 million in economic output to the country annually.[59] Turkana and Kwale are two of 47 new counties established under Kenya's 2010 Constitution.[60]

Counties in Kenya derive their status directly from the Constitution and are vested with substantive roles in delivering services.[61] The autonomy of counties is circumscribed by the constitutional requirement of interdependence, obliging the national and county governments

[54] Indigenous peoples have, under emerging norms of international human rights norms, specific expectations of benefit from natural resource extraction in their territories. See UNGA – Res. 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61 UN – GAOR, p. 1, UN Doc. A/RES/61/295. Article 26 of the Declaration empowers indigenous people to own, use, develop, and control the land, territories, and resources, and in instances in which the state wishes to engage in any activity which might affect such property, consent must be obtained from the community.

[55] Jesse C Ribot 'African decentralization: Local actors, powers and accountability' (2002) *UNRISD Programme on Democracy, Governance and Human Rights* 12-13.

[56] David W Orr 'Renegotiating the periphery: Oil discovery, devolution, and political contestation in Kenya' (2019) 6 *Extractive Industries & Society* 136-144 at 139. See also, Kendra Dupuy 'Community development in mining laws 1993-2012' (2014) 1 *Extractive Industries and Society* 200-215 (for the view that communities lack capacity to influence national level policy) ibid at 203.

[57] PM Shilaro *A Failed Eldorado: Colonial Capitalism, Rural Industrialization, African Land Rights in Kenya and the Kakamega Gold Rush, 1930 – 1952* (2008); Lotte Hughes 'Mining the Maasai Reserve: The story of Magadi' (2008) 2 *Journal of Eastern African Studies* 134-64.

[58] Government of Kenya 'Kenya Vision 2030: Second medium-term plan (2013-2017)' available at *http://www.vision2030.go.ke>*, accessed on (Extractives included as the seventh sector of the economic pillar).

[59] Base Titanium 'Economic Contribution' available at *http://basetitanium.com/kwale-project/project-economic-contribution*, accessed on 30 March 2020.

[60] *Constitution* supra note 12 First Schedule.

[61] Ibid arts 62-63 (detailing the place of counties in land governance).

to cooperate and consult in decision-making processes.[62] County governments are mandated to coordinate the participation of communities in governance,[63] including in natural resource management. These requirements have crucial implications for the development and implementation of laws, including in the extractive sector.

The national government is further obliged by the Constitution to promote equitable sharing of benefits from natural resource exploitation.[64] As a result, several new laws on extractive resource development have been enacted while others are still being debated. These laws include the Mining Act 2016 and the Community Land Act 2015,[65] the Petroleum Act 2019,[66] Natural Resources (Benefit-sharing) Bill 2016,[67] and the Local Content Bill 2016.[68] This thesis will examine the development and implementation of these laws among several more.[69]

While the law on benefit sharing in the extractive sector is still evolving, the intention to distribute revenue and other benefits to host counties and communities is evident. For example, the Mining Act 2016 provides a tripartite division of royalties from mining between the national government, host county government, and communities in the ratio 70:20:10.[70] The Act also obliges mining companies to negotiate Community Development Agreements as vehicles for attaining local content.[71]

The five years taken to negotiate the Petroleum Act through Parliament,[72] underlines the divided vision over benefit sharing between the national government and oil-rich Turkana County. The President's veto of an earlier Bill that proposed revenue share of 70:20:10 between national government, host counties, and communities met county and community resistance.[73] The counter-proposal that imposed a cap on county and community share of revenue against

[62] Ibid art 6(2).
[63] Ibid Fourth Schedule part 2 clause 14.
[64] Ibid art 69(1)*(a)*.
[65] Mining Act 2016 in GG Supplement No. 71 (Acts No. 12); Community Land Act 2016 in GG Supplement No. 148.
[66] Petroleum Act 2019 in GG Supplement No. 30 (Acts No. 2).
[67] Natural Resources (Benefit Sharing Bill) GG Supplement No. 137 (Senate Bill No. 34) 2014.
[68] The Local Content Bill 2016 in GG Supplement No. 115 (Senate Bills No. l3) 12 July 2016.
[69] Chapter 5.3.
[70] *Mining Act* supra note 65 s 183.
[71] Ibid s 47(2)*(g)*, 109(1) & 115(c); Community Development Agreements Regulations 2017 in GG No. 116 of 28 July 2017. See also, Chilenye Nwapi 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries' (2015) 8 *Law and Development Review* 187-216.
[72] Petroleum Act No. 2 of 2019 GG No. 30 (2) 14 March 2019.
[73] Petroleum Bill 2016; See also, Presidential Memorandum of Refusal to Assent to the Petroleum (Exploration, Development & Production) Bill 2016, September 13, 2016 (copy with author).

the amount of annual budgetary allocation to the resource county exacerbated the disagreement.[74] The intensity in these negotiation arises from the host county's understanding that counties are protectors of host communities' aspirations for resource benefits. Its dominant view aligns with the widely held opinion that legally mandated quotas are the surest safeguard of monetary benefits to subnational stakeholders.[75] The record of implementation of national laws that stipulate resource revenue transfer to subnational units however shows unsatisfactory results.[76]

1.3 Research Question

This thesis assesses the extent to which Kenya's system of devolved governance, in place since 2010, facilitates the development and implementation of benefit-sharing laws in the extractive sector. The study views *facilitating benefit-sharing laws* as a dynamic process. This process will depend on the level of citizens' collective organising as individuals or communities to influence institutions of law making to legislate consistent with their aspirations. The thesis hypothesises that counties are the relevant institutional anchors around which citizens and communities can mobilise their views as counties theoretically possess legal and political capacity to escalate these concerns to national level entities. The key sub-questions that further evaluate devolution as an enabler of legal implementation include the following:

- Are national governments, county governments and corporate actors complying with benefit-sharing laws?

- Do communities have access to more information about extractive activities, contracts, revenues, and benefit-sharing allocations under the devolved system?

- Have counties facilitated host communities' active engagement with, and participation in, benefit-sharing processes as defined by law?

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[74] *Petroleum Act* supra note 66 clause 85. See also, Institute for Law & Environmental Governance *Give Turkana its Fair Share of Revenue* (2018) 5-7 online at *https://ilegkenya.org/download*> accessed 21 Dec 2020. For a discussion on revenue sharing between the two levels of government, see chapter 6.3.1.2.

[75] Clark op cit note 10. The author discourages the use of quotas thus: '[T]he allocation of resource revenue on a strict percentage basis is largely ad hoc and may or may not reflect actual impact and the need for LGU (Local Government Unit) with respect to resource development.' Ibid at 550. See also, Jennifer Cook Clark 'Social cultural due diligence in mining industry' in Bastida et al supra note 10 at 331-350 at 333.

[76] The Natural Resource Governance Index 2017 observes: 'Twenty-three of the 33 national governments that transfer natural resource revenues to subnational authorities are required to commission audits of these transfers. But audits actually only took place in 12 of the assessed contexts.' See, Natural Resource Governance Institute 'Natural Resource Governance Index (2017)' available at *https://resourcegovernance.org/*, accessed 2 May 2020.

- Do counties negotiate effectively on behalf of host communities with national government and corporate actors?

- Has devolution improved the resolution of conflicting claims over resource benefits by different stakeholders?

- Do county legislation, policies, and administrative procedures enable equitable benefit sharing for communities?

1.4 Methodology

This research adopts a combined historical and comparative approach to review and analyse the evolution of benefit sharing in Kenya. The study reviews international, national, and county laws, relevant judicial decisions, and transcripts of parliamentary debates to respond to the study's fundamental questions. The legal and policy analysis enables a comparison to be drawn between the state of benefit sharing in the country pre- and post-devolution.

This research identifies two counties in Kenya as case studies to examine the impact of devolution on the development and implementation of laws on benefit sharing. These counties are the historically marginalised Turkana and Kwale, which have and continue to host extractive projects pre-and post-devolution. This research uses relevant county-level documentation and qualitative thematic analysis that provides insight into answering the sub-questions above. The primary documents analysed include County legislation, policies and plans, reports by non-state groups, and reports of resource operators particularly those describing their engagement with national, county and community stakeholders.[77]

1.5 Organisation of the Thesis

This thesis has eight chapters, including this introduction. The first four chapters are structurally conceptual, while chapters five, six, and seven are substantive as they discuss the research findings in response to the research question. Chapter 8, the conclusion, links the two parts.

This introductory chapter outlines the background to the research and the methodology. The second chapter is a conceptual and historical assessment of benefit sharing. This chapter

[77] See Chapter 7.

also isolates principles and emerging standards that benefit-sharing regimes should satisfy. Acknowledging that benefit sharing is not universally accepted, the third chapter reviews policy and theoretical discourses in favour of and against distributing resource benefits to units below the national level. A crucial justification is the desire to do justice to all stakeholders involved in or impacted by the resource development processes. At the same time, concerns around efficiency animate those who object to benefit sharing. Chapter 4 confronts the inefficiency objection to benefit sharing from the understanding that resource benefits are common property and thus susceptible to collective action problems such as non-cooperation and coordination constraints.[78] Based on common property theory, this chapter theorises that polycentric or multi-level governance systems positively impact the management of commons-including benefit sharing.

This discussion leads to a comprehensive review of the legal history of benefit sharing in Kenya in Chapter 5. The chapter reveals a growing normative entrenchment of benefit sharing.[79] Chapter 6 assesses the role of Kenya's new counties in resource governance. It describes the new institutions established at the county level, emphasising how they serve to shift power and enhance accountability, and the consequences thereof to benefit sharing.[80] Chapter 7 is a case study of the response by Turkana and Kwale, two resource-host counties in Kenya's socio-economic margins to resource development activities in their counties. In particular, the chapter engages with the conceptualisation by the two counties of their roles in influencing legal development and implementation as determinant of whether resource benefits reach both their counties and communities.[81] Chapter 8 concludes the thesis by summarising the research findings and locating these findings within a broader discussion on the impact of theoretical dissensus on the design of benefit-sharing institutions and mechanisms. It also identifies gaps and possible areas for future inquiry.

[78] Elinor Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (1990); See, Chapter 4.
[79] Chapter 5.3.
[80] Chapter 6.4.
[81] Chapter 7.3.1, 7.4.1, 8.2.1 & 8.3.5.

CHAPTER 2: CONCEPTUALISING BENEFIT SHARING: EVOLUTION, NATURE, AND TYPES

2.1 Introduction

As set out in the introductory chapter, the central issue in this thesis is whether and to what extent devolved governance aids host regions and communities to share in the benefits accruing from the exploitation of sub-surface resources in Kenya. This examination must start from a shared understanding of the meaning and nature of benefit sharing as well as the types of resource benefits.

The concept of benefit sharing has emerged primarily from international treaties, conventions, and the principles and guidelines derived from these norms.[82] Despite its widespread usage in hard and soft norms of international law, none of the texts defines benefit sharing.[83] Neither have decisions of treaty-monitoring bodies sufficiently clarified the concept of benefit sharing.[84] An analysis of these treaties however suggests that benefit sharing is the

[82] Some of the treaties and Declarations of international and regional institutions refer to benefit sharing include the following: African Union *Mining Vision* op cit note 43; Convention on Biological Diversity (1992) 1760 UNTS 79, 31 ILM 818; *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (CBD Decision X/1) (2010); Convention on the Law of the Non-Navigational Uses of International Watercourses (1997) 36 ILM 700; Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) 1971 (1976) UNTS No. 14583 vol 996, see Resolution X.19: Wetlands and River Basin Management: Consolidated Scientific and Technical Guidance (2008); Economic Community of West African States (ECOWAS) *Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector* (2009) art 8.5; Food and Agriculture Organisation (FAO) *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012) UN Doc. CL 144/9 Appendix D art 8.6; Food and Agriculture Organisation of the United Nations (FAO) *International Treaty on Plant Genetic Resources for Food and Agriculture* (2009); *Guidelines on Biodiversity and Tourism* (CBD V/25) (2000) paras 4(b) and (d); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010) UNEP/CBD/COP/DEC/X/1; *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (1992) UN Doc. A/CONF.151/26; Olivier De Schutter 'UN Special Rapporteur on the Right to Food' *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge* (2009) para 33; World Health Organisation (WHO) *Pandemic Influenza Preparedness (PIP) Framework for the sharing of influenza viruses and access to vaccines and other benefits* (2011).

[83] E Morgera op cit note 33 at 354.

[84] International Labour Organisation (ILO) *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 ILM 1382 at art 15(2) (guaranteeing the 'right' of indigenous people to participate in the benefits of natural resource exploitation); Convention on the Law of the Non-Navigational Uses of International Watercourses (1997) 36 ILM 700 (providing in art 5 for equitable and reasonable utilisation of watercourses and participation in its benefits by watercourse states); See also E Morgera op cit note 33 at 354 (pointing at 'the remarkable lack of "conceptual clarity"' regarding benefit sharing and questioning 'whether there is just one concept of benefit sharing or many....'

legal or voluntary commitment to channel monetary or nonmonetary advantages accruing from extractive activities to different stakeholders within a state.[85]

Based on this understanding, the present chapter explores the evolution, nature, scope, and possible models of benefit sharing. The chapter will first examine the historical evolution of benefit sharing in international law. A discussion of the core elements and types of benefit sharing, based on a review of international and regional treaties, form the second and third sections of the chapter. This assessment will inform subsequent discussion on the current state and potential legal application of benefit sharing to Kenya's extractive sector.

2.2 Evolution of Benefit Sharing in International Law

The concept of benefit sharing has grown in tandem with developments in international human rights and environmental law. Arguably, the decolonisation period sowed ideas that seeded benefit sharing.[86] These decades – especially the 1950s and 60s – are associated with efforts by newly independent nations particularly in Africa to wrest control of their country's natural wealth from former colonial authorities.[87] As discussed below, the right to self-determination became the prominent human rights tool for grounding demands for the relocation of resource benefits from colonial to independent states in the 1950s and 1960s.[88]

Decolonisation, however, failed to yield the full promise of equitable development in Africa.[89] Many states' failure to extend monetary and other benefits to resource host communities or regions, either directly or indirectly, led to widespread disaffection.[90] This failure resulted in the demand for more rights-based approaches to the sharing of resource benefits. The most prominent rights-based grouping relevant to this discussion is the indigenous peoples' movement.[91] At its core, the indigenous peoples' movement seeks to place

[85] Morgera ibid at 354. Also, Yinka Omorogbe 'Resource control and benefit sharing in Nigeria' in Lila Barrera-Hernández et al, op cit note 6 at 271.
[86] Between 1922, when self-government was restored to Egypt, and 1994, when nonracial democracy was achieved in South Africa, 54 new nations were established in Africa during the decolonisation process. See e.g., David Birmingham *The Decolonization of Africa* (1996).
[87] UN General Assembly *Declaration on Granting of Independence to Colonial Countries and Peoples* (1960) Res. 1514 2288 UN Doc. A/4684 Preamble.
[88] See part 2.1.1.
[89] Joel Ngugi 'Decolonization-modernization interface and the plight of indigenous peoples in post-colonial development discourse in Africa' (2001) 20 *Wisconsin International Law Journal* 297.
[90] Akpan op cit note 52 at 283-316.
[91] Dorothy L Hodgson 'Becoming indigenous in Africa' (2009) 52:3 *African Studies Review* 1-32.

communities at the centre of decision making in development processes, including resource exploitation, within their territories.[92]

Accelerated resource exploitation and increased human activities on land gave rise to extensive environmental damage.[93] The failure by resource operators to internalise costs of ecological harm results in a disproportionate allocation of benefits and burdens of large-scale projects.[94] The process of formulating how to optimise resource use, without compromising future sustainability, led to the emergence of concepts of sharing costs and benefits of resource development. These advances in environmental law are further discussed below.[95]

2.2.1 Human Rights Law and the Development of Benefit Sharing

While the values that underpin human rights pre-existed the world wars,[96] they only became embedded in binding international legal instruments after the Second World War under the framework of the United Nations.[97] The first generation of human rights focused on civil and political rights, while the second generation extended its reach to socio-economic entitlements.[98] Rather than focus on individuals, the third generation of rights seek to protect collective rights of specific groups, often disadvantaged within their states.[99] Self-determination is relevant across the three generations of rights.

2.2.1.1 Self-Determination and Benefit Sharing

Human rights treaty-making commenced in earnest in the early 1960s. Self-determination found its place in the first two major human rights treaties of the era.[100] Both the Covenant on

[92] S James Anaya *Indigenous Peoples in International Law* (2000); S James Anaya 'Indigenous peoples participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights indigenous peoples have in lands and resources' (2005) 22:1 *Arizona J International & Comparative Law* 7-18.
[93] Roderick G Eggert 'Sustainable development and the mineral industry' in James M Otto et al (eds) *Sustainable Development and the Future of Mineral Investment* (2000) 2-15.
[94] M Noga 'The problem of pollution hotspots: Pollution markets, Coase and the common law' (2017) *Cornel Journal of Law & Public Policy* 16.
[95] See part 2.2.2.
[96] Vincenzo Ferrone 'The rights of history: Enlightenment and human rights' (2017) 39:1 *Human Rights Quarterly* 130-141.
[97] United Nations General Assembly *Universal Declaration on Human Rights* (1948) G.A. Res. 217A (III) UN Doc. A/810 at 71. The Declaration provides for the right of all 'to share in scientific advancement'. Ibid, art 27(1).
[98] Carl Wellman 'Solidarity, the individual and human rights' (2000) 22 *Human Rights Quarterly* 639-657, at 639
[99] Ibid. For a critical assessment of the notion of generation of rights see, Satvinder Juss 'The coming of communitarian rights: Are third-generation human rights really first-generation rights?' (1998) 3 *International Journal on Discrimination & L* 159.
[100] International Covenant on Civil and Political Rights (ICCPR) G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force Mar. 23, 1976, and International Covenant on Economic, Social and Cultural Rights (ICESCR) G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No.

Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights grant the right to self-determination to *peoples.* The notion of peoples in international law applies to the entire population of a political community or state.[101] Increasingly, self-determination is also applicable to identifiable population groups and communities within a state.[102] The implication is that the right to self-determination in human rights law has a dual right holder: a state party to the two treaties and a specific group within the state.[103]

Self-determination, viewed as a peoples' choice to self-govern, is understood widely as an instrument of decolonisation, and is thus political.[104] A close examination of the language of the two treaties discussed above, however, suggests that self-determination is not only a mobiliser against colonial rule but an enabler of economic emancipation.[105] This inherent capacity of self- determination targeted at the enhancement of the economic capability of citizens of a state is broadly referred to as economic self-determination.[106] The Universal Declaration on Human Rights, which envisions that a state must be structured to ensure the use of its resources serves the realisation of the economic and other rights of its citizens, supports this conception of self-determination.[107]

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16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force Jan. 3, 1976. Article 1 of both treaties provides that:

> 'All peoples have the right to self-determination. By that right, they freely determine their political status and freely pursue their economic, social, and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

Both the ICCPR and the ICESCR enjoy near universal ratification with 172 and 169 ratifications respectively. This exemplifies global consensus on the norms embodied by these treaties.

[101] S Kwaw Nyameke Blay 'Changing African perspectives on the right to self-determination in the wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29 *Journal of African Law* 147-154; Solomon Dersso 'The jurisprudence of the African Commission on Human and Peoples "Rights with respect to peoples" rights' (2006) 6:2 *African Human Rights LJ* 358-81 at 362.

[102] The concept of indigenous peoples in Africa is still contested. it is argued that to link the concept of indigenous peoples to only European colonial expansion 'leaves us without a suitable concept for analysing the same type of internal relationships that have persisted after the liberation from colonial dominance.' See, S Saugestad 'Contested images: First peoples or marginalized minorities in Africa?' in A Barnard et al (eds) *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'* (2001) 303.

[103] Richard Kiwanuka 'The meaning of "peoples" under the African Charter on Human and Peoples Rights' (1988) 82 *American Journal of. International Law* 80-101; Clive Baldwin & Cynthia Morel 'Group rights' in Malcolm Evans et al (eds) *The African Human and Peoples Rights: The System in Practice 1986-2006* 2 ed (2008) 250.

[104] See Antonio Cassese *Self-determination of Peoples: A Legal Reappraisal* (1995) 93-4 (on the application of self-determination to territories that had not yet attained political independence, but also to those of independent and sovereign states).

[105] J Oloka-Onyango 'Heretical reflections on the right to self-determination: Prospects and problems for a democratic global future in the new millennium' (1999) 15:151 *American University International Law Review* 169-73 at 169-70.

[106] Farmer op cit note 50 at 419-20.

[107] United Nations General Assembly *Universal Declaration on Human Rights* (1948) G.A. Res. 217A (III) UN Doc. A/810, art 22.

Economic self-determination invites citizens and groups within the state into the sphere of natural resource management.[108] While not prescribing a specific natural resource management model, the right to self-determination requires that any dealings relating to natural resource exploitation must serve the interests of the people.[109] As such, any framework to award resource exploration and development rights, must not only serve the bilateral interests of the host state and investor but also accommodate equitable benefit sharing intra-state.[110] The right to self-determination in the two international treaties implies that the vision and strategy of resource host state rather than an external investor's interest is the controlling factor in resource development negotiation.[111] Moreover, the requirement that resource exploitation must not prejudice a peoples' livelihood[112] clarifies that any mining development must 'do no harm' to affected populations.[113] Peoples' enjoyment of self-determination extends to their pursuit of social, political, economic, and cultural choices defined by their constitutional, legal, and administrative order.[114]

Outside the decolonisation context, the right to self-determination is seen as either constitutive or ongoing.[115] Constitutive self-determination requires that political structures within a state must be founded on the people's collective will.[116] On the other hand, ongoing self-determination means that the exercise of state power must permit the people to experience self-determination.[117] As such, self-determination is an ongoing goal.[118] Continuously, people, whether in part or whole, are expected under international law to have the ability to review and petition their institutions to protect their interests.[119] This view also affirms that self-determination is a process rather than an outcome, as long as it is voluntary.[120]

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[108] Temitope Tunbi Onifade 'Peoples-based permanent sovereignty over natural resources: Toward functional distributive justice?' (2015) 16 *Human Rights Review* 343–368 at 355 (for the view that citizens are the original owners of natural resources even where management rights are assigned to the State).
[109] ICCPR op cit note 100 art 1; Farmer op cit note 50 at 447.
[110] ICCPR ibid.
[111] Ibid.
[112] Hans Morten Haugen 'Peoples' right to self-determination and self-governance over natural resources: Possible and desirable?' (2014) 8 *Etikk i praksis Nordic Journal of Applied Ethics* 3-21 at 7.
[113] Mihaela Maria Barnes 'The United Nations Guiding Principles on Business and Human Rights, the state duty to protect human rights and the state-business nexus' (2018) 15 *Brazilian Journal of International Law* 42.
[114] Catherine J Iorns 'Indigenous peoples and self-determination: Challenging state sovereignty' (1992) 24:2 *Case Western Resource Journal of International Law* 199-348 at 236.
[115] S James Anaya *Indigenous Peoples in International Law* 2 ed (2004) 104–5I.
[116] Ibid at 106.
[117] Ibid at 80.
[118] Ibid.
[119] Ibid.
[120] *Western Sahara* Advisory Opinion ICJ GL No. 61 (1975) ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, International Court of Justice 32-33.

The right to self-determination is closely related to the principle of permanent sovereignty over natural resources (PSNR).[121] Developed in the 1950s in the context of the New International Economic Order (NIEO),[122] the PSNR principle asserts the authority of the state in the control and management of natural resources.[123] It further enjoins states to regulate the exploration, development, and disposal of natural resources.[124]

The PSNR further calls for the sharing of any income from resource exploitation between investors and the host state based on mutually agreed terms.[125] Resource sovereignty of the state is justified on the grounds that the state needs resource rents to meet its obligations to satisfy the basic needs of citizens.[126] As a consequence, state ownership of subsurface resources is a common feature of laws in many jurisdictions.[127]

The international significance of the norm of self-determination, in conjunction with the PSNR principle, inspired drafters of the African Charter on Human and Peoples Rights in the 1980s to entrench the right to natural resources in the treaty.[128] By virtue of the right to natural resources, an African nation's wealth and resources inhere in its peoples.[129] Further, the

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[121] United Nations General Assembly Resolution 1803 (XVII) *Permanent sovereignty over natural resources* (14 December 1962). See, Nico Schrijver *Sovereignty Over Natural Resources: Balancing Rights and Duties* (2008).

[122] United Nations General Assembly Resolution 3201 (S-VI) *Declaration on the Establishment of a New International Economic Order* (1 May 1974) available at *http://www.un-documents.net/s6r3201.htm*, accessed on 30 Jan 2020. The new international economic order (NIEO) was meant to restructure the relationship between developed and newly decolonised states by addressing imbalances in trade and inequitable transfer of technology. See, G Abi-Saab *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order* (1984) UN Doc. A/39/504/Add.1.

[123] *Permanent sovereignty over natural resources*, supra note 121.

[124] Ibid para 4.

[125] Jeremie Gilbert *Natural Resources and Human Rights: An Appraisal* (2018) 21.

[126] UN General Assembly, Charter of Economic Rights and Duties of States Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50. Article 7 of the Charter provides thus:

> 'Every state has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each state has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development…'.

[127] SG Akpan, op cit note 32 at 313.

[128] Article 21 of the African Charter provides that:

> 1)'All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people….
>
> 3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law….
>
> 5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.'

African [Banjul] Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5 (1982) 21 ILM 58.

[129] Ibid, art 21(1).

exclusive interest of the peoples must inform any processes of resource exploitation.[130] Although what constitutes the 'exclusive interest of the people' has not been interpreted,[131] it can be inferred to sanction only resource development programs implemented with the participation of and for the benefit of resource-host groups.[132] Such an interpretation is consistent with the application of the right to natural resources to both host states as well as communities within resource-rich regions.[133]

The right to natural resources under the African Charter is also balanced against the obligation to protect negotiated investment agreements between host governments and third parties.[134] Expropriation is, therefore, only permissible after payment of reasonable compensation.[135] Additionally, foreign domination of the natural resources sector, manifested by the inability of citizens' to derive optimal advantages from resource development processes, is incompatible with the right to natural resources.[136] The idea of maximum resource advantage devolving to citizens or resource communities is difficult to conceive outside the framework of benefit sharing.

The full application of self-determination favours the emergence of a participatory and democratic state.[137] A state thus oriented is more likely to anchor resource exploitation on robust institutions capable of ensuring host regions and communities receive a fair share of benefits either directly or through equitable development. As such, the application of the right to self-determination stands in opposition to the adverse consequences associated with the resource curse phenomenon.[138]

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[130] Ibid, art 21(1).
[131] Schrijver op cit note 121 at 311.
[132] Haugen op cit note 112 at 8.
[133] *Social and Economic Rights Action Center* op cit note 32. The African Commission found thus:

> 'The government did not involve the *Ogoni Communities* in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21.'

Ibid at para 55.
[134] African Charter, supra note 128 art 21(3).
[135] Hurst Hannum *Autonomy, Sovereignty and Self-Determination* rev ed (1996) 27-30 (arguing that: 'self-determination… implies meaningful participation in the process of government').
[136] Oliviero Angelo 'Self-determination & permanent sovereignty over natural resources' (2017) 30 *Ratio Juris* 290–304 at 291.
[137] Giordana Campagna & Raffael N Fasel '"Listen to them and give them a king": Self-determination, democracy, and the proportionality principle' (2018) 31:2 *Canadian Journal of Law & Jurisprudence* 257-280.
[138] Paul Collier 'Laws and codes for the resource curse' (2008) 11:1 *Yale Human Rights and Development Law Journal* at 297–322.

Despite the imprecise definition and vague content,[139] the right to self-determination is a sound foundation for benefit sharing. Further, self-determination's role as the disruptor of the domination and exploitation of a people and their resources did not cease with the end of the colonial period but continues to shape resource governance in the present.[140]

2.2.1.2 Indigenous Peoples' Standards and Benefit Sharing

Indigenous communities are *peoples* on the strength of an expanding body of international and regional human rights standards developed over several decades.[141] As *peoples*, indigenous communities have a right to a variant of self-determination consistent with states' territorial integrity.[142] This internal self-determination includes autonomy in governance and participatory engagement with development processes such as resource development.[143] The

[139] Mathew Saul 'The normative status of self-determination in international law: A formula for uncertainty in the scope and content of the right?' (2011) 11:4 *Human Rights Law Review* 609-44. See also, International Court of Justice *Case Concerning East Timor, Portugal vs. Australia* (1995) para 23-35.

[140] In tracing the history of the right to natural resources under the African Charter on Human and Peoples Rights, the African Commission observes that:

> 'The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore cooperative economic development to its traditional place at the heart of African Society.'

African Commission on Human and Peoples' Rights *Social and Economic Rights Action Center* supra note 32 para 56. See also, Michael C van Walt van Praag *The Implementation of the Right to Self-determination as a Contribution to Conflict Prevention: Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998* (1999) Centre UNESCO de Catalunya available online at *http://unpo.org/downloads/*, accessed on 30 Jan 2021.

[141] See, Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) 72 ILO Official Bull. 59, *entered into force* Sept. 5, 1991; United Nations Declaration on the Rights of Indigenous Peoples G.A. Res. 61/295, UN Doc. A/RES/47/1 (2007); African Commission on Human and Peoples' Rights *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* DOC/OS(XXXIV)/345 (2005). Although there is no universally accepted definition of the beneficiaries of indigenous rights protection, it is generally agreed that in Africa indigenous groups have the following distinct features: 1. Deep attachment to traditional lands; 2. shared experiences of subjugation, marginalisation, dispossession, or discrimination and; 3. self-identification as an indigenous community. See, Philippe Hanna, Frank Vanclay, Esther Jean Langdon et al 'Improving the effectiveness of impact assessment pertaining to Indigenous peoples in the Brazilian environmental licensing procedure' (2014) 46 *Environmental Impact Assessment Review* 58–67 at 59; S James Anaya 'Self-determination as a collective human right under contemporary international law' in Pekka Aikio et al (eds) *Operationalizing the Right of Indigenous Peoples to Self Determination* (2000) 3-18; Zelim Skubarty *As if 'Peoples' Mattered: A Critical Appraisal of Peoples and Minorities from the International Human Rights Perspective and Beyond* (2000) 45.

[142] See, *Katangese Peoples' Congress v Zaire* supra note 32.

[143] S James Anaya 'The human rights of indigenous peoples: United Nations developments' (2013) 35 *University of Hawaai. L. Rev*. 983-1012 at 996.

historical exclusion of indigenous communities justifies international law's intervention to ensure their survival and progress in the face of globalisation.[144]

The International Labour Organization (ILO) was the initial forerunner in setting standards targeting indigenous communities' protection. By the 1944 Declaration of Philadelphia, the ILO conceded that social justice was central to peaceful coexistence.[145] The ILO's commitment to social justice solidified in 1957 when the organisation adopted the first multilateral treaty on indigenous people's rights.[146] Although the treaty has since been abrogated,[147] it sought to reverse the lack of integration of indigenous communities in the social, economic, or cultural life of newly independent states. Its core approach was that indigenous groups are entitled to equal benefit of all the rights and advantages enjoyed by the rest of a given state's citizens.[148]

The ILO Convention 169[149] succeeded Convention 107. It departs from the integrationist approach of its predecessor. Instead, it favours granting autonomy to indigenous communities to make their own developmental choices, particularly activities within land collectively owned and governed under indigenous customs and law.[150] Adopted in 1991, the Convention explicitly recognises the right of indigenous people to natural resources.[151] Notably, the Convention acknowledges that the state, the legal owner of mineral rights, may license resource development activities on indigenous lands only after assessing the impact on

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[144] Ndahinda Felix Mukwiza 'Victimization of African indigenous peoples': Appraisal of violations of collective rights under victimological and international lenses*'* (2007) 14 *International J Minority And Group Rights* 1-23. See also, African Comission on Human and People's Rights *Resolution on the Rights of Indigenous Populations/Communities in Africa* (28th ordinary session, Oct. 23 – Nov. 6, 2000) available at *http://www.iwgia.org/ACHR/ResolutionsDeclarations/Resolution2000E,* accessed on 4 January 2019.

[145] ILO *Record of Proceedings*, International Labour Conference, 26th Session, Philadelphia 1944 (Montreal, 1944).

[146] Ibid.

[147] The entire philosophy of ILO Convention 107 was denounced for seeking 'to solve the "indigenous problem" using the recipe of "development" rather than affirm "indigenous peoples'" rights to perpetuate and thrive as distinct societies, cultures and territorial entities'. See, L Rodríguez-Piñero *Indigenous peoples, Postcolonialism and International Law* (2005) 291.

[148] ILO Convention (No. 107) *Concerning The Protection And Integration Of Indigenous Peoples And Other Tribal And Semi-Tribal Populations In Independent Countries* (Geneva, June 26, 1957) 328 U.N.T.S 248 (1959), Preamble.

[149] ILO No. 169 supra note 141.

[150] The Global reach of Convention 169 is contained in its Preamble:

> 'Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards… and recognising the aspirations of these peoples to exercise control over their …economic development … within the framework of the States in which they live.' - should this be in quotation marks?'

Ibid Preamble para 5.

[151] Ibid art 15(1).

'communities' interests'.[152] Indigenous communities are further entitled to participate in a share of benefits from such extractive activities.[153] Such benefit-sharing arrangements find legitimacy under the Convention if developed in direct consultation with indigenous communities or through their representative institutions.[154] Moreover, benefit sharing in indigenous peoples' context is distinct from compensation for any breaches of rights, which must be mitigated by fair compensation.[155]

International jurisprudence and norms have subsequently yielded various standards on indigenous communities and extractive industries. First, the ineffective participation of an indigenous community in conceptualising benefit-sharing measures for resource development purposes within a community's traditional territory will not yield a durable agreement.[156] Secondly, the direction of monetary benefits towards individuals as a basis for procuring an indigenous community's support for resource development activities is manipulative and will lack legal legitimacy.[157] Thirdly, negotiating resource development processes outside the framework of community governance structures undermines the group's collective character and contravenes the notion of indigenous self-determination.[158] Lastly, the obligation on the state to seek the views of an indigenous community on an extractive project is not discharged merely on the ground that such engagement has been conducted by a resource operator or any other third party.[159]

Although normatively robust, criticism against ILO Convention 169 for failing to fully mainstream indigenous rights into the corpus of international law persisted.[160] Therefore,

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[152] Ibid art 15(2).

[153] Ibid art 15(2) provides thus:

> 'In cases in which the state retains the ownership of mineral or sub-surface resources… governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities.'

[154] Ibid art 6(2) provides thus: 'The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.'

[155] Ibid art 15(2).

[156] F Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (2008) 143,158.

[157] Inter American Court for Human Rights *Kichwa Indigenous Communitiy of Sarayaku v Ecuador* (Merits and reparations, Judgment of 27 June 2012) para 194.

[158] Ibid para 186, 196. See also, Inter American Commission on Human Rights *Kalina & Lukono People v Suriname* case No. 12.639 (18 July 2013) para 128.

[159] *Kichwa Indigenous Community* supra note 157 para 187.

[160] Low ratifications, especially by African States, denied ILO Convention 169 normative universality. Only one African country has ratified Convention 169. However, the Convention influenced other multilateral institutions

efforts to bolster indigenous peoples' rights regime continued at the United Nations Working Group on Indigenous People,[161] and, later, at the United Nations Permanent Forum on Indigenous Issues.[162] The United Nations Declaration on the Rights of Indigenous Peoples was adopted in 2007[163] after a decade-long negotiation and contestation.[164] The Declaration represents a progressive reflection of widespread consensus on global standards governing indigenous peoples' rights.[165]

For instance, ILO Convention 169 recognises the right to consultation and participation of indigenous people, but the Declaration goes further to consolidate this right into a right to free, prior, informed consent (FPIC).[166] Besides, while the Convention fails to stipulate what consequences follows if extractive activities prejudice the collective interests of an indigenous group,[167] the Declaration's response is more specific. It requires that no approval shall be granted to an extractive action until FPIC is obtained from the relevant indigenous community,[168] especially where such an extractive project entails relocating the group from their lands.[169] The right to redress is further guaranteed to indigenous communities for state expropriation of lands, territories, and resources without FPIC.[170] As will be further clarified in subsequent parts of this chapter, redress mechanisms whose jurisdictions are invoked by

to formulate policies on indigenous people. See, World Bank *Operational Policy and Bank Procedure 4.10*.(2010) Washington, DC: World.

[161] Established under UN Economic and Social Council Resolution 1982/34 *Study of the problem of discrimination against indigenous populations* (7 May 1982). See also, Asbjorn Eide 'The indigenous peoples, the Working Group on Indigenous Populations and adoption of the UN Declaration on the Rights of Indigenous Peoples' in Claire Charters et al *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009) 32.

[162] Economic and Social Council (ECOSOC) Resolution 2000/22 *Establishment of a UN Permanent Forum on Indigenous Issues* (28 July 2000).

[163] United Nations' Declaration on the Rights of Indigenous Peoples G.A. Res. 61/295, UN Doc. A/RES/47/1 (2007).

[164] Steffania Errico 'The UN Declaration on the Rights of Indigenous People is adopted: an overview' (2007) 7:4 *Human Rights Law Review* 756-759.

[165] Anaya op cit note 115. He submits that the UN Declaration on indigenous peoples constitutes a 'common ground about minimum standards that should govern behaviour towards indigenous people.'Ibid at 50. See also, S James Anaya & Robert A Williams Jr. 'The protection of indigenous peoples rights over lands and natural resources under the inter American human rights system' (2001) 14 *Harvard Human Rights Journal* 41.

[166] *Declaration on the Rights of Indigenous Peoples* supra note 163 art 19. It provides: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'

[167] Ibid art 15(2) (no redress provided for state conduct that prejudices the interests of an indigenous community).

[168] Ibid art 32(2).

[169] Ibid art 10.

[170] Ibid art 28(1).

indigenous communities for violation of FPIC rights have in recent times provided additional elaboration of the content of benefit sharing.[171]

2.2.2 International Environmental Law and the Evolution of Benefit Sharing

The modern era of international environmental law[172] began in 1972 when 113 states met in Stockholm, Sweden, for the United Nations Conference on the Human Environment.[173] The Conference outcome document elaborated on 26 fundamental principles needed to protect the environment.[174] It advocated for prudent use of non-renewable natural resources and determined that benefits from their use accrue to all humankind.[175] This Declaration adopted the view that benefits from exploiting non-renewable natural resources were thus a common heritage and not open to monopolisation by any state.[176] Principle 21 of the Declaration, however, affirmed states' sovereign rights to control natural resources within their territories pursuant to their environmental policies.[177]

Following the Stockholm conference, the UN established the World Commission on Environment and Development, known as the Brundtland Commission.[178] The outcome of the Brundtland Commission was a comprehensive Report[179] framing much of what would become the 40 chapters of Agenda 21[180] and the 27 principles of the Rio Declaration on Environment and Development issued in 1992.[181] According to the Brundtland Report, global environmental challenges are largely a function of inequalities marked by the debilitating poverty in the global South and the extractive patterns of production in the North.[182] The Report

[171] See, *Saramaka People v Suriname* 2007 IACtHR Series C no 172; see also part 2.3.2.
[172] Alexendre C Kiss & Dinah Shelton *International Environmental Law* (1991) 33-54.
[173] UN General Assembly *United Nations Conference on the Human Environment* 15 December 1972 A/RES/2994.
[174] George P Smith 'Towards an international standard of environment' (1974) 2:28 *Pepperdine Law Rev* 33.
[175] UN Human Environment supra note 173 art 5.
[176] C C Joyner 'Legal implications of the concept of common heritage of mankind' (1986) 35 *International Comparative Law Quarterly* 190-191.
[177] See also, Report of the United Nations Conference on Environment and Development *Rio Declaration on Environment and Development* (Rio de Janeiro, 3-14 June 1992) UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) Principle 2.
[178] United Nations General Assembly *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond Resolution* A/RES/38/161 in December 1983.
[179] World Commission on Environment and Development *Our Common Future* (the Bruntland Report) (1987).
[180] United Nations *Agenda 21: Programme of Action for Sustainable Development* UN GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992).
[181] *Rio Declaration* supra note 177.
[182] *Bruntland Report* supra note 179.

therefore advocates for a holistic approach to development – described under the rubric of sustainable development.[183]

The principle of sustainable development is defined as the human pursuit of present needs and aspirations without compromising future generations' ability to meet their own needs.[184] When applied to extractives, sustainable development primarily requires mining development processes to address environmental and social impacts.[185] Additionally, extractive processes that ensure stakeholder participation during the resource development's life cycle, facilitates technology transfer to countries in transition and mitigates environmental harm aligns with this sustainability imperative.[186]

The UN Conference on Environment and Development held in 1992 in Rio de Janeiro entrenches the concept of sustainable development in a normative instrument for the first time.[187] Principle 3 of the Rio Declaration enacts the intergenerational equity principle through benefit sharing as a critical element of sustainable development.[188] An intergenerational approach to extractive activity ensures that both the burdens and benefits of extractives are shared between present and future generations.

The Rio Declaration further makes provision for two other principles relevant to benefit sharing. It imposes an obligation on states to facilitate public participation, information sharing, and access to justice for its citizens in environmental decision making.[189] Information is central to resource governance and assures that decision making is transparent.[190] It becomes the basis for assessing costs and making a case for the kind of benefits that can satisfy stakeholders' legitimate expectations. Lack of information on the impacts of extractive activities has since become an essential basis for the pursuit of judicial redress.[191]

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[183] Ibid. See also, Tuomas Kuokkanen 'Integrating environmental protection and exploitation of natural resources: Reflections on the evolution of the doctrine of sustainable development' (2004) 22 *Journal Energy & Nat. Resources Law* 341.
[184] *Bruntland report* supra note 179 para 49.
[185] K Clarke & D Bosworth 'Sustainable development mineral applications' (2003) quoted in James L Hendrix 'Sustainable mining: Trends and opportunities' (2006) 52.
[186] Ibid at 52.
[187] *Rio Declaration* Supra note 177.
[188] Ibid. principle 3 thereof provides, 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'
[189] Ibid, principle 10.
[190] James Van Alstine 'Transparency in resource governance: The pitfalls and potential of "new oil" in Sub-Saharan Africa' (2014) 14:1 *Global Environmental Politics* 20-39.
[191] This point was emphasised in the *Social Economic Rights Case* supra note 32. In addressing the largely environmental complaint at issue, the tribunal emphasized state obligation to provide information to resource rich

Moreover, the Rio Declaration mandates the use of environmental impact assessments (EIAs) before approval of development activities.[192] The EIA is understood as a process that evaluates a development proposal to determine its effect on the environment and assess measures to mitigate adverse impacts.[193] Significantly, EIAs have become important tools for transparency in the resource sector.[194] They provide opportunities for those whose economic, social, and environmental well-being are likely to be affected by mining activities to bring forward their concerns ahead of resource development processes.[195] They may also provide groups outside the immediate mining area, but whose aesthetic, cultural, or spiritual interests in the site may be compromised, an opportunity to share their views on resource development.[196] As such, EIAs give an opportunity for mapping possible beneficiaries of extractive processes and any benefit-sharing measures. Proposed measures to mitigate adverse consequences and secure stakeholder buy-in are embodied in EIA license conditions and must be complied with by project proponents.[197] However, effective stakeholder participation occurs when EIAs become a means by which adequate and relevant information on a given project is available to the public.

The developments of soft law standards on sustainability eventually gave rise to international environmental treaties that specifically codify benefit sharing. Benefit sharing is one of the specific objectives of the Convention on Biological Diversity (CBD).[198] Further, the Nagoya Protocol,[199] an Optional Protocol under the CBD enacted in 2010, has benefit sharing as its sole subject. While these two treaties focus on sustainability concerning biological

communities. Flowing from the information asymmetries on impact of extractive activities, the Commission determined that divesting benefits of oil production from communities violated the African Charter. Ibid para 2 & 55. See also, Daniel J Dunn 'Environmental citizen suits against natural resource companies' (2003) 17:3 *Natural Resources & Environment* 161-3, 197-202.

[192] *Rio Declaration* supra note 177, principle 17. See also, Cymie R Payne 'Environmental impact assessment as a duty under international law: The International Court of Justice judgment on *Pulp Mills on the River Uruguay*' (2010) 1:3 *European Journal of Risk Regulation* 317-324.

[193] International Association for Impact Assessment, Principle of Environmental Impact Assessment Best Practice, 1999 as 'the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made.'

[194] Aud Tennøy, Jens Kværner & Karl Idar Gjerstad 'Uncertainty in environmental impact assessment predictions: the need for better communication and more transparency' (2006) 24:1 *Impact Assessment and Project Appraisal* 45–56.

[195] James F Cress and Ma. Cecilia G. Dalupan 'Sustainable development and mining laws: Is a "mine veto" needed?' (2003) 17:3 *Natural Resources & Environment* 164-7, 202-04.

[196] Ibid.

[197] J McKillop & AL Brown 'Linking project appraisal and development: The performance of EIA in large-scale mining projects' (1999) 1 *Journal of Environmental Assessment Policy and Management* at 407.

[198] *Convention on Biological Diversity* supra note 82, art 8(j).

[199] *Nagoya Protocol* supra note 82. See also, E Tsioumani & M Buck *Unraveling the Nagoya Protocol: a commentary on the Nagoya Protocol on Access and Benefit Sharing to Convention on Biological Diversity* (2015).

diversity and genetic resources, the principles and mechanisms they set down are the most comprehensive elaboration of the general types and elements of benefit sharing to date. As such, the formulation of benefit sharing by these treaties is relevant to this study.

The above discussions shows that environmental norms, policies, and practices have made significant contributions to the development of the concept of benefit sharing. The CBD and its Nagoya Protocol are undeniably responsible for placing benefit sharing squarely within treaty law. As treaty obligations demand compliance, it follows that the failure to entrench benefit sharing in municipal environmental and resource laws, regulations, and policies of state parties will constitute a breach.

2.3 Nature of Benefit Sharing

International law is yet to explicitly spell out the contents of benefit sharing. Consequently, this study will use scarce interpretative guidance from treaty bodies as a thread to piece together core elements of benefit sharing. The interpretation of the right to development, property, and natural resources, offered by treaty bodies, will come to the aid of this effort to explore the content of benefit sharing. Equally significant, the elaboration of benefit sharing under the CBD provides further clarity. Based on this approach to the formulation of the term's conceptual content, benefit sharing emerges as a cord of three strands: a safeguard; an equitable compensation mechanism; and, a product of voluntary commitment.

2.3.1 Benefit Sharing as a Safeguard

Development processes can induce disadvantages to those it impacts. Such disadvantages include environmental damage and displacement.[200] Safeguards exist to mitigate such harm.[201] Conversely, those affected negatively by development processes may take action that is adverse to the implementation of development projects.[202] Safeguards then become a set of governance arrangements to de-risk investment and development programs.[203]

[200] Adam McBeth 'Crushed by an anvil: A case study on responsibility for human rights in the extractive sector' (2008) 11 *Yale Human Rights & Development Law Journal* 127.
[201] David Freestone (eds) *The World Bank and Sustainable Development: Legal Essays* (2012).
[202] Lisa J Laplante & Suzanne A Spears 'Out of the conflict zone: The case for community consent processes in the extractive sector' (2008) 11 *Yale Human Rights & Development Law Journal* 69.
[203] Freestone op cit note 201.

Benefit sharing appears to be a safeguard in at least two ways. First, it secures predictability in access to natural resources. Secondly, it is a protective mechanism of indigenous and local communities' survival in a resource context.

Fair and equitable sharing of benefits arising from the extraction of resources is a specific objective of the CBD.[204] The CBD conceptualises access to natural resources as a sovereign right of states. It requires states to enact legislation to facilitate secure resource access by developers based on mutually agreed terms and after prior consent of the parties.[205] The Nagoya Protocol, on the other hand, creates a single obligation of the two principles: *access and benefit sharing*.[206]

The use of the composite term *access and benefit sharing* shows that only such stakeholders who guarantee resource access are entitled to benefits under the Nagoya Protocol. Such an interpretation acknowledges that prospecting, development, and distribution of natural resources which have long lead time is impossible without certainty of access to the substratum upon which the resource is found- land.[207] Stable access to the mineral ore or oil well is critical for investment in the infrastructure needed to exploit the resource. Therefore, access constitutes the security of supply of the raw materials – minerals, fossil fuels, or biodiversity – required to meet global, industrial, or biochemical needs.[208] Benefit sharing becomes the incentive that converts opposers, who would ordinarily disrupt access to the resource, to promoters of resource exploitation.[209] Consequently, benefit sharing is a safeguard or mechanism fashioned by law for ensuring the security of access to natural resources and any operations relating to their extraction.

The Inter-American Court clarified the safeguard character of benefit sharing in international human rights law in *Saramaka v Suriname*.[210] The Court views benefit sharing as

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[204] *CBD* supra note 82 art 1. The other two objects are: 1) the conservation of biological diversity and; (2) the sustainable use of its components.
[205] Ibid art 15, read together with art 1.
[206] *Nagoya Protocol* supra note 82 art 1.
[207] Developed countries conceded to the view of developing countries that the Nagoya Protocol protects legal certainty of access to resources while recognising the place of benefit sharing. See generally, Tuomas Kuokkanen 'Integrating environmental protection and exploitation of natural resources: Reflections on the evolution of the doctrine of sustainable development' (2004) 22 *Journal of Energy & Natural Resources Law* 341.
[208] Józef Dubiński 'Sustainable development of mining mineral resources' (2013) 12 *Journal of Sustainable Mining* 1–6 at 5.
[209] See, K Naito, F Remy & J Williams *Review of Legal and Fiscal Frameworks for Exploration and Mining* (2001). The authors argue that while states control access to mineral resources located within its territory, local populations may impose terms and conditions for such access through formal and informal means. Id at 391.
[210] *Saramaka* supra note 171 para 138.

one of the safeguards for the reason that it guarantees indigenous communities' survival in a resource exploitation context.[211] The link between indigenous communities' cultural identity and their land, which is more likely to be impaired by resource extraction activities, renders this safeguard critical.[212]

2.3.2 Benefit Sharing as a Form of Equitable Compensation

International human rights law lays down strict requirements for prompt and just compensation in the case of expropriation of private property.[213] However, given that subsurface resources in many jurisdictions vest in the state,[214] no obligation to compensate landowners a sum equivalent to the value of subsurface resources arises.[215] Moreover, in most instances, land held through customary rules rarely attracts the same kind of legal protection as a private holding.[216] Therefore, issues of compensation in instances involving extractive activities within land owned through custom are even more problematic.[217]

Indigenous groups are considered some of the losers in the historical distributional allocation of property rights.[218] Consequently, international human rights law requires that in

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[211] Ibid para 157.

[212] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ("Endorois case") (2010) Comm. No. 276/2003 para 241.

[213] The jurisprudence of the European Court of Human Rights, for instance, require that compensation must be fair compensation, and the amount and timing of payment is material to whether a violation of the right to property is established. See e.g., *Katikaridis and Others v Greece* (1996) European Court of Human Rights Case No. 72/1995/578/664. See also, Article 23(2) of the American Convention on Human Rights which provides that 'no-one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.' Article 21(2) of the African Charter refers to the right to compensation in the case of spoliation thus: '…dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.'

[214] James M Otto & John Cordes (eds) *Sustainable Development and Future of Mineral Investment* (2000) 4-24.

[215] HC Manning 'Mineral rights v surface rights' (1969) 2:4 *Natural Resources Lawyer* 330. While a landowner's consent is often a requirement when mining in private land, when such consent is not forthcoming, the State invokes the doctrine of *taking* or *compulsory acquisition* to facilitate mineral development. When so invoked, valuation for purposes of compensation for the land does not include the potential value of the mineral ore. See, Cindy Oraro & Natasha Teyie 'Mineral rights' in J Osogo Ambani & Melba Kapesa Wasunna (eds.) *Mining Law: Commentaries on Kenya's Framework Legislation* (2018) 28.

[216] Tenure insecurity of customary held land on the continent is common. See, Andrew R Falk 'Ahead of the curve: promoting land tenure security in Sub-Saharan Africa to protect the environment' (2016) *Seattle J. Social Justice* 15:1.

[217] *Endorois v Kenya* supra note 212 at para 296. See also chapter 7.4.3.

[218] *Report of the African Commission's Working Group* supra note 141; see also, Erica-Irene A Daes *Final report of the Special Rapporteur: Indigenous peoples' permanent sovereignty over natural resources* (2004) UN Doc. E/CN.4/Sub.2/2004/30. The Report recommends that:

> 'In situations where indigenous peoples, for valid legal reasons, do not own or control the natural resources pertaining to all or a part of their lands or territories, the indigenous peoples concerned must nevertheless *share in the benefits* from the development or use of these resources without any discrimination and must be fairly compensated for any damage that may result from development or use of the resources.'

addition to the requirement for legal compensation, other advantages must flow from resource development to address any deprivation suffered by indigenous groups based on non-use of traditional lands and territories.[219] Benefit sharing is, therefore, increasingly viewed as such corrective compensation.[220] In *Endorois v Kenya*, the African Commission determined that benefit sharing was a form of equitable compensation.[221] The equitable compensation approach interprets benefit sharing as such measures as may be taken in excess of legal compensation.

In *Saramaka v Suriname*,[222] the court determined that indigenous peoples' right to benefit from any proceeds of development is implied in the American Convention.[223] As was held in *Endorois v Kenya*, the court construed benefit sharing as some form of 'reasonable, equitable compensation.'[224] *Kichwa Indigenous People of Sarayaku v Ecuador* characterised benefit sharing as an integral element to just compensation.[225] From this perspective, benefit sharing is the means to mitigate present and future threats caused by resource development processes to a community's livelihood and survival.[226]

An examination of the CBD further provides insights into the equity dimensions of benefit sharing. Under the CBD, only 'fair and equitable' benefit sharing is admissible. What constitutes fair and equitable is not defined by the Convention. Some commentators have argued that 'fair and equitable' standard is a value judgment to be determined based on context,[227] while others have proposed some essential elements to the standard.[228] Under the

[219] Ibid para 295.
[220] *Report of the Special Rapporteur on the Rights of Indigenous Peoples, Extractive industries and indigenous peoples* (2013) UN Doc. A/HRC/24/41 at 88; Human Rights Council *Expert Mechanism on the Rights of Indigenous Peoples, Advice No. 2, Indigenous peoples and the right to participate in decision-making, with a focus on extracting industries* (2012) A/HRC/21/55 at 42.
[221] *Endorois v Kenya* supra note 212 para. 296 ('pursuant to the spirit of the African Charter, benefit-sharing must be understood as a form of reasonable equitable compensation…resulting from the exploitation of…natural resources').
[222] *Saramaka* supra note 171.
[223] American Convention on Human Rights (1978) O.A.S. Treaty Series No. 36, 1144 UNTS 123. Article 21(2) of this treaty provides that 'No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'
[224] *Saramaka* supra note 171 para 140. In reaching this conclusion, IACtHR borrows from language of General Comment No. 23 of the Committee of Elimination of Racial Discrimination. See, Committee on the Elimination of Racial Discrimination, General Recommendation 23 *Rights of indigenous peoples* UN Doc. A/52/18, annex V at 122 (1997) *reprinted* in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.6 at 212 (2003).
[225] *Kichwa* supra note 157 para 129.
[226] *Saramaka* supra note 171 para 140.
[227] United Nations Environment Program 'Synthesis of case-studies on benefit-sharing' UNEP/CBD/COP/4/Inf.7 (4 May 1998).
[228] M Bystrom, P Einarsson & GA Nycander *Fair and equitable: Sharing the benefits from use of genetic resources and traditional knowledge* (1999); Bram De Jonge 'What is fair and equitable benefit-sharing?' (2011) 24 *Journal of Agriculture & Environmental Ethics* 127–146.

later formulation, the 'fair and equitable' standard raises procedural and substantive dimensions.[229] Procedural compliance is satisfied if decision-making processes are non-arbitrary.[230] When applied to the extractives resource context, substantive equity demands that benefits accrue in proportion to burdens borne by specific stakeholder groups.[231]

2.3.3 Benefit Sharing as a Product of Voluntary Commitment

States parties are required by the CBD to ensure that any benefit-sharing mechanisms are based on mutually agreed terms.[232] Equally, both the principles of Permanent Sovereignty over Natural Resources (PSNR) and self-determination emphasise the need for resource extraction to enable mutual benefits to stakeholders.[233] This requirement emphasises that the degree of legitimacy of benefit-sharing measures is dependent on the capacity for fair bargaining among the parties: the state, host community, or resource operator.

FPIC is the procedural framework identified under the CBD and international human rights law for attaining mutually agreed terms.[234] Prior informed consent under the CBD is an entitlement of contracting parties – states – rather than subnational units or communities.[235] At a minimum, FPIC under the CBD demands that a resource prospector or developer obtains consent based on full and honest disclosure.[236] The disclosure must also entail what specific uses the operator will employ the extracted resource, and the extent to which third parties not involved in the access agreement will exploit or benefit from the resource.[237]

The FPIC provisions of the CBD, a states' privilege in the resource development context, are extended to communities, especially indigenous peoples, by human rights law. Additionally, FPIC is considered an element of indigenous peoples' right to self-determination and popular participation.[238]

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[229] See, Thomas M Franck *Fairness in International Law and Institutions* (1995) 47-80. See further, chapter 3.2.1
[230] Franck, ibid.
[231] See generally, chapter 3 for further elaboration.
[232] *CBD* supra note 82 art 15(7).
[233] See part 2.1.1.
[234] *CBD* supra note 82 art 15(5).
[235] Ibid. The Convention only 'encourages' State Parties to share benefits with indigenous and local communites? because it is 'desirable'. *Ibid* preamble para 12 read with art 8(j).
[236] Kerry T Kate & Sarah A Laird *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing* (1999) 22.
[237] Ibid.
[238] *Declaration Indigenous Peoples* supra note 163, art 32 para 2.

The ILO Convention 169 establishes the obligation of states to undertake consultation in good faith with indigenous people.[239] Engagement with customary and other representative institutions of indigenous communities seeking their FPIC is an element of this good faith consultation.[240] The absence of a representative institution does not defeat the possibility of consulting a community concerned. Instead, states are encouraged to grant opportunity, time, and appropriate support to indigenous communities to organise themselves to define the form of such a representative institution.[241] Such consultation aims to ensure the implementation of only legislative or administrative measures sanctioned through an FPIC process. More specifically, projects to develop, utilise, or exploit natural resources on indigenous communities' territories require FPIC preceded by good-faith negotiation.[242]

The introduction of good faith standard into FPIC negotiation has far-reaching implications. Parties' obligation in a contract to act in good faith has long been an integral element of contract law.[243] Good faith is a principle that addresses perceived unfairness in contract negotiation by availing to an aggrieved party's such defences as duress, misrepresentation, and undue influence, among others.[244] Equality of bargaining between parties is also considered an element of good faith standard.[245]

In international investment law, good faith negotiation protects the legitimate expectations of all parties by ensuring a transparent, non-arbitrary and predictable legal regime including in resource development processes.[246] Good faith also preserves the social solidarity of vulnerable groups by blunting the excessively sharp consequences of state sovereignty.[247]

[239] *ILO 169* supra note 141, art 6(2).
[240] *Declaration Indigenous Peoples* supra note 163 art 16 (noting that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them').
[241] *Report Rapporteur Indigenous Peoples Extractive industries* supra note 220 at 18.
[242] *Declaration Indigenous Peoples* supra note 163, art 32(2).
[243] *Carter v Boehm* (1766) 97 ER 1162.
[244] R Kolb 'Principals as sources of international law (with special reference to good faith)' (2006) *Netherlands International LR* 18.
[245] *Lloyd Bank Ltd. v Bundy* (1974) EWCA Civ 8, QB 326, 3 All ER 757.
[246] Steven Reinhold 'Good faith in international law' (2013) 2 *University of California Journal of Law and Jurisprudence* 57; Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds) The Oxford Handbook of International Investment Law (2008) 272.
[247] R Kolb op cit note 244 at 18.

As a general principle of international law, good faith protects the object and purpose of a treaty provision against conduct that undermines its normative intention.[248]

The requirement that good faith underpins parties' conduct grants no liberty to either the state or the host community to use the FPIC process to frustrate implementing a legitimate extractive project. By this reasoning, a community that holds out in the context of FPIC to wrest an unfair bargain from the state or resource developer in an FPIC process acts incompatibly with good-faith requirements. That most resource-host communities are in a weak bargaining position when pitted against states means that rarely are they complicit in failing to discharge good faith obligations.[249] Instead, it is often states and resource developers that ordinarily run afoul of this principle. For instance, the Committee on the Elimination of Racial Discrimination (CERD) has raised questions about the standards of fairness and transparency in the context of mining negotiation in Canada.[250] Financial inducements designed to lure indigenous communities into acceding to FPIC terms is incompatible with good-faith negotiation.[251] As such, any agreements that may have been arrived upon subsequent to such inducement will lack legitimacy.

The application of good faith standard can tackle existing power imbalances by ensuring that consent processes facilitate genuine dialogue through the sharing of information and enhancing indigenous peoples' negotiating capacity.[252] Additionally, it is incumbent upon the state to protect the vulnerable party in FPIC negotiation through the provision of appropriate grievance mechanisms.[253] One way to bolster the negotiating capacity of indigenous peoples engagement in FPIC processes, address power asymmetries and deepen legitimacy is the retention of external advisers with state support.[254] An outcome negotiated through such a credible process is less likely to face host community opposition at the resource development stage, making FPIC an important ally against the resource curse.

[248] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 I.L.M. 679, entered into force Jan. 27, 1980 art 18.
[249] Committee on Elimination on Racial Discrimination, LAOS, UN Doc. CERD/LAO/CO/16-18 (highlighting concerns on constraints facing communities in FPIC negotiations).
[250] Committee on Elimination of Racial Discrimination, Urgent Action Letter to Canada, A/HRC/11/17, 5 October 2009.
[251] Ibid.
[252] Human Rights Council *Report of the Special Rapporteur on the rights of indigenous peoples James Anaya* (2012) A/HRC/21/47 at 17.
[253] Ibid at 18.
[254] Ibid at 18.

From an extractive standpoint therefore, the failure of FPIC and poorly negotiated mutually agreed terms is responsible for community opposition to resource extraction activities. The cost imposed on a project because of communal standoffs is not insignificant.[255] Effectively negotiated FPIC outcome is therefore in the best interest of all resource stakeholders.

2.4 Types of Resource Benefits

International law proposes a broad range of benefits from resource development.[256] Accordingly, a wide margin of appreciation is enjoyed by states in choosing the mode of benefit sharing. Stakeholders' needs and the underlying constitutional and legal order of a state should, therefore, guide the choice of benefit-sharing model. This section discusses these benefit models under two broad categories: monetary benefits with specific emphasis on tax benefits, and nonmonetary models such as beneficiation, capacity building, and local content.

2.4.1 Monetary Benefits

In attempting to create certainty on the nature of benefits expected under the treaty, the Annex to article 5(4) of the Nagoya Protocol lists monetary and nonmonetary examples of benefits.[257] A close examination of this non-exhaustive list reveals several types of financial benefits.

Access and license fees are identified as benefits.[258] Upfront payment[259] listed as a benefit suggests a levy payable at the very commencement of an exploitation process. Milestone payment, on the other hand, is presumably linked to payment against the attainment of specific targets set out as part of the mutually agreed terms by the parties to a resource development agreement.[260] Royalty is the other type of monetary benefit specifically identified.[261] By its ordinary usage, royalty is a type of output tax or rent imposed as a percentage or ratio of a value of production or output.[262]

The net effect of the various monetary benefits under the Nagoya Protocol shows that benefits are not one-off commitments. Instead, the obligation to share financial benefits extends

[255] George Akpan op cit note 52 at 283-316.
[256] *Bonn Guidelines* supra note 82.
[257] Ibid art 1(a-e).
[258] *Nagoya* supra note 81 art 1(a) & (e).
[259] Ibid. Signature bonuses in oil and gas fiscal regimes is an example of an upfront payment, ibid, art 1(b).
[260] Ibid art 1(c).
[261] Ibid art 1(d).
[262] Remy & Williams op cit note 209.

in the long term, presumably so far as revenue from exploitation continues to accrue through the many derivative uses of the resource.[263]

Human rights law enjoins states to develop tax regimes that ensure a reasonable measure of proceeds from natural resources is captured and applied to satisfy the needs of citizens.[264] Failure to extract sufficient income from taxation of natural resource revenue constitutes a violation of state obligation to mobilise adequate resources necessary to fulfil socio-economic rights.[265] Therefore, benefit sharing requires a close examination of the efficiency of the fiscal regime governing extractives. Moreover, given the general opaqueness of most tax regimes in the extractive sector,[266] the push for benefit sharing can contribute to enhanced fiscal transparency.[267]

In the interest of certainty and predictability, international human rights law requires the enshrinement in law of rules governing royalty distribution and other monetary benefits.[268] This is further buttressed by the CBD which emphasises the need for benefit-sharing regimes to be grounded in legislative, regulatory, administrative, and institutional frameworks of the state.[269] Therefore, the Convention discourages ad hoc approaches to benefit sharing. Consequently, while important, voluntary forms of benefit sharing are incapable of satisfying the requirements of international law given its availability and use is at the discretion of a resource operator.[270]

At a minimum, three areas need to receive clear regulatory clarification. First, the beneficiaries of resource benefits must find explicit recognition in law or policy. The Nagoya Protocol clarifies that benefits from exploiting genetic resources must be shared equitably with

[263] *Nagoya* supra note 82, art 1(e) for instance provides for payment of license fees in case of commercialisation. See also, Arianna Broggiato, Tom Dedeurwaerdere & Fulya Batur et al 'Introduction- access benefit-sharing and the Nagoya Protocol: The confluence of abiding legal doctrines' in *Implementing the Nagoya Protocol: Comparing Access and Benefit-sharing Regimes in Europe* eds (2015) 1-2.
[264] Human Rights Council, 23rd Session *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepulveda Carmona* (2014) para 72, HRC, A/HRC/23/36.
[265] Ibid.
[266] International Bar Association *Tax Abuses, Poverty and human Rights* (2013) 44-50.
[267] African Commission on Human and Peoples' Rights *Resolution on a Human Rights-Based Approach to Natural Resources Governance* (2012) available online at *http://www.achpr.org/sessions/51st/*, accessed on 20 August 2020. See also, John Southalan 'What are the implications of human rights for minerals taxation?' (2011) 36 *Resources Policy* 214–226.
[268] African Commission *Resolution Human Rights Approach* ibid.
[269] *CBD* supra note 181 art 8(j), 15(7), 16(4).
[270] Gare A Smith 'An introduction to corporate social responsibility in the extractive industries' (2008) 11 *Yale Human Rights & Development Law Journal* 1.

the state of origin and the indigenous and local communities.[271] Moreover, the Protocol is more emphatic than the CBD in elaborating that indigenous and local communities ought to be identified for purposes of ensuring they benefit from the exploitation of natural resources within their traditional territories.[272] In this respect, the Protocol requires the enactment of domestic legislation to grant recognition to biodiversity-rich communities and provide a framework to govern the negotiation of benefit sharing based on mutually agreed terms.[273] This requirement goes beyond the CBD, which mandates general domestic legislation to facilitate benefit sharing. In furtherance of this approach, the State of Togo was obliged to put in place law to empower access to benefits from resource exploitation by Togo's 'local communities.'[274] Therefore, a human rights-based approach to benefit sharing incorporates the participation of actors other than state and resource developing entities in proceeds from extractives.

Secondly, international law calls for legally established mechanisms for holding and disbursing benefits. The Nagoya Protocol calls for establishing dedicated trust funds towards community development and disbursing monetary benefits.[275] Similarly, joint ventures and joint ownership are listed as benefit-sharing mechanisms.[276] This approach suggests that host states and indigenous and local communities can enjoy equity participation in the processes and outcomes of resource development.

Thirdly, the Protocol recognises the possibility of communities themselves formulating rules governing benefit sharing through community protocols.[277] This proposition likely relates to the horizontal sharing of benefits within a beneficiary group. Specifically, this approach implies that once revenue share has devolved to a beneficiary group or unit, the rules governing the means for sharing or using such revenue internally are determined at the group or administrative unit level.[278] In the absence of community-developed regulations, the offer of

[271] *Nagoya* supra note 181 art 5.
[272] *Ibid* art 5(2)(5).
[273] *Ibid* art 5(2).
[274] UN Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations on the initial report of Togo, adopted by the Committee at its 50th session, 29 April-17 May 2013 : Committee on Economic, Social and Cultural Rights, 3 June 2013, E/C.12/TGO/CO/1 para 27.
[275] *Nagoya* supra note 82 art 1(f).
[276] Ibid art 1(i).
[277] Ibid art 12(1). See also, KS Bavikatte, DF Robinson & MJ Oliva 'Biocultural community protocols: dialogues on the space within' (2015) *IK: Other Ways Knowing* 1:2 1–31.
[278] In *Saramaka*, the Inter American Court noted thus: 'any internal conflict that arises between members of the Saramaka community regarding [benefit-sharing...] must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case.' *Saramaka* supra note 171 paras 25-27.

money and benefits is considered paternalistic of indigenous people.[279] In circumstances where locally conceived benefit sharing frameworks are absent, indigenous communities view monetary benefits as a form of bribery aimed at compromising local leadership to endorse a project.[280]

The above discussion shows that international law does not prescribe a specific model of monetary benefits. Instead, it envisions the possibility that multiple forms of benefits are possible.[281] Community development agreements, indigenous impact and benefit contracts, or redistribution of taxes and revenues to specific indigenous peoples' development purposes are considered appropriate benefit-sharing measures.[282] Such wide array of models of monetary benefits grants states wide latitude against which to design benefit sharing arrangements that are responsive to their contexts.

2.4.2 Nonmonetary Benefits: Proceeds from Beneficiation as Benefits

The benefits to be shared are those arising from direct utilisation of resources and more remarkably, *subsequent applications, and commercialisation.*[283] This formulation dramatically impacts the range of benefits that can accrue given the multitude of derivative products that results from industrial and biotechnological processes. Therefore, the expanded breadth of benefits under the CBD brings the idea of beneficiation, typical in extractives, within the ambit of benefit sharing.[284]

Beneficiation entails transforming a natural resource from raw form to a higher value product for local consumption or export.[285] Promoters of beneficiation argue that exporting raw natural resources means exporting high-level jobs and revenue that accrues from finished

[279] G Citrioni & K Quintana Osuna 'Reparations for indigenous peoples in the case of the Inter-American Court of Human Rights' in F Lenzerini (ed) *Reparations for Indigenous Peoples: International Comparative Perspectives* (2008).
[280] *Kichwa* supra note 157 para 193-4.
[281] ILO, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (2009, ILO) 107-108.
[282] Ibid. See generally, Ciaran O'Faircheallaigh 'Using revenues from indigenous impact and benefit agreements: Building theoretical insights' (2018) 39:1 *Canadian Journal of Development Studies / Revue canadienne d'études du développement* 105.
[283] *CBD* supra note 82 art 5.
[284] *Africa Mining Vision* supra note 43 (calling for downstream value addition and beneficiation to expand resource revenue).
[285] Republic of South Africa 'A beneficiation strategy for the mineral industry in South Africa' *Department of Mineral Resources* 2011 pg ii available online at *http://www.eisourcebook.org.pdf*, accessed on. See also, Ben Turok 'Beneficiation and value chains: The interface between mining and manufacturing' (2014) 2014:55 *New Agenda: South African Journal of Social and Economic Policy* 46 - 47.

products from resource-rich countries to technologically advanced countries for processing.[286] The failure to add value at resource source leads to a reduction in resource revenue and other benefits potentially available for distribution.[287] However, opponents contend that a country with natural resources may not develop a competitive advantage by means only of beneficiation.[288] The Absence of enabling infrastructure coupled with skill shortage and limited innovation severely constrain the potential of beneficiation.

2.4.3 Nonmonetary Benefits: Capacity-Building, Direct Participation in Commercial Activity, and Local Content

Building resource host communities' capacity to facilitate their participation in the economy created by natural resource exploitation, is another form of nonmonetary benefit sharing under both the CBD[289] and Nagoya Protocol.[290] Equally significant is the obligation for technology transfer in favour of the host state or community.[291] In conjunction with enhanced capacity, technology transfer increases the possibility of direct participation by states or communities in the future commercial activities arising from resource development within their territory.[292]

Arguably, the nonmonetary elements of benefit sharing seek to catalyse local content in the resource exploitation value chain.[293] In identifying contribution to the local economy as a nonmonetary scheme of benefit sharing, the Nagoya Protocol recognises that sustainable resource exploitation requires promoting a resource-rich region's socio-economic development.[294] Such an approach supports local participation and ensures sustainable access to resources, as alluded to in previous sections.

As multinational corporations often conduct resource extraction activities, local content demands are a critical underlying demand.[295] In this context, local content is considered an affirmative action measure designed to enhance equitable benefits for countries and

[286] Ibid.
[287] Turok op cit note 285 at 46-47.
[288] Ibid.
[289] *CBD* supra note 82 art 18.
[290] *Nagoya* supra note 82 art 22.
[291] *CBD* supra note 82 art 18.
[292] See, United Nations Conference on Trade and Development 'Draft International Code of Conduct on the Transfer of Technology' (1985) Document TD/CODE TOT/47 (New York: UNCTAD).
[293] Strathmore Dialogue paper No. 2 *Developing sustainable in country value addition strategy: real time policy options for Kenya's petroleum sector* (2018) 2.
[294] *Nagoya* supra note 82.
[295] Laplante & Spears op cit note 202 at 72.

communities on the frontline of resource exploitation activities.[296] What is 'local' has tended to be viewed from a nationalist or localist perspective.[297] Those who embrace a localist philosophy to local content contend that local content mechanisms should be bottom-up, with citizens from resource-host localities receiving preferential treatment.[298] In contrast, nationalist approaches demand that local content focus on ensuring measures benefit the nation without considering populations proximate to the natural resource site.[299]

Aggressive nationalistic local content may sometimes be deemed incompatible with international trade law obligations of states.[300] Under the non-discrimination principle of international trade law, states should accord foreign companies the same treatment as national corporations.[301] The implication of this principle is that local content policies must be carefully tailored to permit only such differential treatment as may be necessary to achieve fair trade outcomes.[302]

Given the significant monetary value of local procurement and other local content measures, its potency as a benefit-sharing mechanism cannot be overemphasised.[303] Besides supporting sustainable exploitation of resources, most nonmonetary benefits empower resource-rich stakeholders to exploit opportunities availed by resource exploitation processes. Local or national actors' participation as research collaborators and joint venture partners is the clear intention of nonmonetary schemes of benefit sharing.

2.5 Conclusion

This chapter has examined benefit sharing as articulated in international law, notably international environmental law, human rights law, and indigenous rights law. The common thread across these legal arenas demonstrates that benefit sharing is a complex and evolving mechanism for allocating burdens and benefits of resource exploitation. Whether based on mutually agreed terms or FPIC, benefit sharing is a negotiated process and outcome. Good faith

[296] Strathmore Dialogue paper op cit note 293.
[297] Nwapi op cit note 71 at 187–216.
[298] Richard Briffault 'Localism and regionalism' (1999) Working Paper No.1 Columbia Law School, *Public Law and Legal Theory* 18 available online at *https://papers.ssrn.com/sol3/papers*, accessed on 30 June 2019.
[299] Nwapi op cit note 71 at 187–216.
[300] Ibid.
[301] The General Agreement on Tariffs and Trade 1994, art. III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 33 I.L.M. 1154 (1994).
[302] I Ramdoo 'Do international trade rules prevent local content policies?' *GREAT Insight Magazine* (2016) 5:6.
[303] OECD 'Local content policies in mineral-exporting countries: Case studies' 2017 available at *http://www.oecd.org/officialdocuments/*, accessed on 24 Jan 2021.

engagement between stakeholders in the pursuit of such a negotiated outcome is central to a credible benefit-sharing framework.

The chapter traces the genealogy of benefit sharing to developments in the three spheres of international law. The main contribution of environmental law is the explicit embodying of benefit-sharing obligation in treaties. The menu of benefits outlined, especially in the CBD and Nagoya Protocol, have been used in this chapter to develop the types of benefit-sharing models applicable in diverse contexts, including in extractives. The interpretations of treaty monitoring bodies are conclusive in their view that benefit sharing flows from the right to self-determination as manifested through several rights: the right to natural resources, property, development, and participation.

In summary, this chapter has synthesised international standards against which to assess benefit-sharing approaches at the state level. Additionally, such state-level benefit-sharing frameworks must specify recipients of benefits or prescribe transparent means for their identification. Equally, such law must incorporate free, prior consultation of local communities while safeguarding indigenous groups' cultures' survival in the extractive process by procuring their informed consent.

The status of benefit sharing in international law may yet to settle but commentators have argued that it is emerging as a general principle of international law.[304] It is also viewed as a component of the general principle of equity, as it transcends many treaty regimes.[305] Additionally, benefit sharing is increasingly considered an important element of good governance in the management of natural resources.[306]

While as discussed above benefit sharing is celebrated in the main as the mitigator to resource conflicts, skeptics posit that aggressive demands for benefit sharing may distabilise the resource environment or create other efficiency constraints in the sector. The next chapter outlines the contending theoretical justifications for and against benefit sharing and seeks a coherent basis for grounding demands for dispersing resource benefits to stakeholders below the national state.

[304] E Morgera 'Fair and equitable benefit-sharing: history, normative content and status in international law' in E Orlando et al (eds) *Encyclopedia of Environmental Law: Principles of Environmental Law* (2017) 332-334.
[305] W Friedmann 'The Use of "General principles" in the development of international law' (1963) 57 *American Journal of International Law* 289–290.
[306] Gilbert op cit note 125 at 80.

CHAPTER 3: THEORETICAL JUSTICATION FOR AND CRITICISM OF BENEFIT SHARING

3.1 Introduction

The previous chapter answers the question 'what is benefit sharing?' In responding to this question, the chapter traces the historical evolution of the concept of benefit sharing in international law locating its roots in self-determination, human rights, and environmental law. The chapter further highlights the types of benefits contemplated by international law as well as the nature of benefit sharing as a safeguard that ameliorates resource development risks.

This chapter addresses the potential justifications for and critique of benefit sharing. The first part of this chapter defends benefit sharing based on justice and property rights grounds. The chapter then outlines discourses critical of benefit sharing. These criticisms largely centre on the concern that community involvement brings uncertainty in negotiating for mineral rights and implementation of resource development processes.[307] Further, to the extent that FPIC might constitute community veto of development choices, states believe that such holdout increases the cost of negotiation.[308] These concerns have crystallised into efficiency-related objection to benefit sharing and are the subject of the second section of this chapter.

3.2 The Case for Benefit Sharing

This section considers the various explanations offered in support of the concept of benefit sharing. These justifications are characterised here as justice-based discourse (3.2.1 below) and ownership or control discourse (3.2.2 below).

3.2.1 Pro-Benefit Sharing Discourses Founded on Justice

The CBD and the Nagoya Protocol recognise that benefit sharing must be fair and equitable.[309] As such, fairness and equity are the objective criteria for assessing whether a benefit-sharing regime successfully secures the specific outcome of redistributing resource wealth.[310] Justice

[307] David Humphreys 'A business perspective on community relations in mining'(2000) 26*Resource Policy* 127.
[308] See, African Union *Decision on the United Nations Declaration on the Rights of Indigenous Peoples* Doc. ASSEMBLY/AU/9 (VIII) ADD.6. Also, Marcus Colchester & Maurizio F Ferrari *Making FPIC Work: Challenges & Prospects for Indigenous Peoples* (2007); David Szablowski 'Operationalizing free, prior, and informed consent in the extractive industry sector? Examining the challenges of a negotiated model of justice' (2010) 30:1-2 *Canadian Journal of Development Studies* 111-130 at 114.
[309] *CBD* supra note 82 principle 1; *Nagoya Protocol* supra note 82 art 5.
[310] Bram De Jonge 'What is fair and equitable benefit-sharing?' (2011) 24 *Journal Agriculture Environment & Ethics* 127-46.

is central to the realisation of fairness and equity whose aim is to recalibrate the disparity in resource development capacity between technologically advanced countries of the North and resource-rich countries of the Global South.[311]

Fairness in international law is both procedural and substantive.[312] Procedurally, fairness is the degree to which rules governing decision-making processes are perceived to afford stakeholders a reasonable opportunity for engagement.[313] Substantively, fairness relates to the extent to which norms on the distribution of costs and benefits generate outcomes that meet participants' expectations.[314] The substantive fairness dimension denotes distributive justice, while the process element approximates procedural justice.[315] A shared perception of fairness between lawmakers, implementers, and beneficiaries leads to the evolution of lasting rules for allocating benefits.[316] Such rules are also likely to mobilise compliance.[317]

From the standpoint of the CBD and Nagoya Protocol, benefit sharing advances justice for two categories of groups. First, justice is seen primarily from the perspective of resource-rich states and communities.[318] Their pursuit of justice is associated with ensuring that these actors participate effectively in benefits from resource exploitation efforts.[319] Secondly, to a resource operator, justice is about the legal predictability of rules for resource access and the processes and requirements for securing FPIC from both the state and local communities.[320]

Justice then, whether distributive or procedural, seeks to render equal treatment to all regardless of personal advantage or disadvantage.[321] Equity, on the other hand, is alive to

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[311] Ibid. See also, J Nyerère 'South-South opinion' in Altaf Gauhar (ed) *The Third World Strategy: Economic and Political Cohesion in the South* (1983) 9-10 (where Mwalimu Julius Nyerère, the first president of Tanzania, described the Third World as the majority of the world's population, possessing the largest part of certain important raw materials, and yet having no control and hardly any influence over the manner in which nations of the world arrange their economic affairs).

[312] Thomas M Franck *Fairness in International Law and Institutions* (1995) 7.

[313] Ibid.

[314] Ibid; See also, Matthew D Adler & Eric A Posner 'Rethinking cost-benefit analysis' (1999) 109 *Yale Law Journal* 167-245 at 211.

[315] Franck op cit note 312.

[316] David Szablowski *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (2007) 15.

[317] Franck op cit note 312 at 311.

[318] *CBD* supra note 82 Preamble.

[319] *Nagoya Protocol* supra note 82 art 5.

[320] Ibid art 6(3) *(b) (c)* - 6(3)*(b)* & *(c)*. See also, Szablowski, op cit note 316 at 162.

[321] Melanie McDermott, Sango Mahanty & Kate Schreckenberg 'Examining equity: A multidimensional framework for assessing equity in payments for ecosystem services' (2013) 33 *Environmental Science & Policy* 416-27 at 417. See also, Ronald Dworkin 'What is equality: Part 2. Equality of resources' (1981) 10:4 *Philosophy and Public Affairs* 283–345 (criticising Rawls' huristic 'veil of ignorance' for deeming all decisions as 'ambitions' (choice-based decisions) and ignoring the role of 'endowments' (the inherent inequality arising from arbitrary nature of geographical and material placement of an individual within a political community).

relative circumstances of different sections of the population in assessing the fairness of outcomes.[322] The invocation of equity is aimed at tempering the strict application of the law, which in some instances can lead to unfair results.[323] In essence, the application of equity constitutes a constructive amendment or reinterpretation of the law to the extent that the law through the generality of its language fails to yield reasonable outcomes.[324] A court of equity is bound to apply such principles of international law as may be appropriate to balance various considerations relevant to the production of a mutually acceptable result.[325] An equitable approach to benefit sharing therefore requires that distribution of resource benefits considers the differential impact of resource development on diverse resource-affected groups.[326]

Among numerous typologies of justice discussed in the literature,[327] three are relevant to benefit sharing: commutative, distributive, and compensatory justice.[328] Each of these principles of justice provides a different yet interrelated lens for mobilising the application of benefit sharing. The discussion that follows examines these three ideas.

3.2.1.1 Commutative Justice

According to the commutative justice theory, benefit sharing is the fair bargain or exchange between a resource host and resource operator in advance of any agreement.[329] Commutative justice ideas are discernible from CBD's approach to benefit sharing to the extent that it conditions access to resources on the bargaining for and implementation of mutually agreed terms.[330] These mutually agreed terms are grand bargains to be arrived at after FPIC.[331] Presumably, the existence of mutually agreed terms arrived at through FPIC is evidence of good-faith negotiation.[332]

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[322] McDermott, ibid at 417.
[323] Franck op cit note 312 at 57.
[324] Anastasios Gourgourinis 'Delineating the normativity of equity in international law' (2009) 11:3 *International Community Law Review* 327-348 at 330 (referencing Aristotle).
[325] *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* Judgment I.C.J. Reports (1982) para 71.
[326] De Jonge op cit note 310 at 138.
[327] Catherine Gross *Fairness and Justice in Environmental Decision Making: Water Under the Bridge* (2014) 7-38 (for a comprehensive review of various typologies of justice); Plato *Plato's The Republic* (1943).
[328] D Schroeder & B Pisupati *Ethics, Justice and the Convention on Biological Diversity* (2010) 13.
[329] Ibid at 13-14.; H L A Hart *The Concept of Law* 3 ed (2012) 158.
[330] *CBD* supra note 82, art 15, read together with art 1; Bram De Jonge & Michiel Korthals 'Vicissitudes of benefit-sharing of crop genetic resources: Downstream and upstream' (2006) 6:3 *Developing World Bioethics* 144-157 at 149.
[331] *CBD* supra note 82 art 15.
[332] *Nagoya Protocol* supra note 82, art 1.

The rationale for benefit sharing advanced by commutative justice theorists is attractive so far as it approaches resource governance as a contractual undertaking.[333] However, the theory assumes parity between the parties, the existence of a functional regime for information sharing, and a corresponding capacity to reach consensus on contested issues.[334] The combined presence of these factors is rare in practice.[335] In many contexts, resource proponents have vast amounts of knowledge and information before engaging with either the state or community where extractive resources are situated.[336] The experience which most major operators involved in extractive activities possess will, in all likelihood, tilt the negotiating process in their favour.[337] This reality inevitably skews the resulting consultation and consent processes and outcomes.[338] It is imperative to create further safeguards to ensure that FPIC processes are credible and the resulting mutually agreed terms are legitimate. In particular, FPIC must first require that prior consent is attained before the commencement of exploratory or development processes and, second, call for periodic consent at critical milestones.[339] Such a staggered consent process will allow for more stakeholders to appreciate the cost of resource development processes as more information becomes available.

An additional drawback of relying on commutative justice principles alone in the design of benefit-sharing regimes is its premise that only resource-endowed regions or communities deserve a share of benefits.[340] This conclusion is arrived at based on the presumption that the participants in the negotiation of mutually agreed terms are the biodiversity-rich regions of the contracting state.[341] The principle of derivation in petroleum law, grounded in the proposition that the first order of sharing resource revenues is among resource-contributing regions, exemplifies commutative justice thinking.[342] While this may be justifiable in contexts where the resource-host community or region is economically deprived, the converse may generate

[333] Doris Schroeder & Thomas Pogge 'Justice and the Convention on Biological Diversity' (2009) 23:3 *Ethics and International Affairs* 267-280 at 277.
[334] Yvonne Denier *Efficiency Justice and Care: Philosophical Reflections on Scarcity Healthcare* (2007) 14.
[335] A Ballantyne 'How to do research fairly in an unjust world' (2010) 10:6 *American Journal of Bioethics* 26-35.
[336] J Brathwaite & P Drahos *Global Business Regulation* (2000) 25. See also, Szablowski op cit note 316 at 293-4.
[337] Szablowski ibid.
[338] Humphreys et al, op cit note 307 at 4.
[339] John Southalan *Mining Law & Policy: International Perspectives* (2012) 130-31.
[340] Bege Dauda, Yvonne Denier & Kris Dierickx 'What do the various principles of justice mean within the concept of benefit-sharing?' (2016) 13 *Bioethical Inquiry* 281-293 at 287.
[341] *CBD* supra note 82, art 4; *Nagoya Protocol* supra note 82, preamble para 9 read with art 5(2) and 7.
[342] Oguine Ike 'Nigeria's oil revenues and the oil producing areas' (1999) 17:2 *Journal of Energy & Natural Resources Law* at 11-120; Abdullah Al Faruque 'Transparency in extractive revenues in developing countries and economics in transition: A review of emerging best practices' (2006) 24:1 *Journal of Energy Natural Resources Law* 66-103 at 93.

unsustainable outcomes, thus falling short of the fairness standard. In the latter case, the discovery and development of resources within a relatively prosperous region implies that only that region is entitled to a share of benefits while leaving out less resource endowed regions of the state.[343] The inequality resulting from applying a pure form of commutative justice will likely worsen rather than reduce resource-induced tensions and thereby defeat the very objective of benefit sharing.

3.2.1.2 Distributive Justice

The theory of distributive justice proposes that there must be a fair allotment of a society's resource benefits and burdens in proportion to principles of need, equality, or contribution.[344] A needs-based approach to distribution will consider such factors as population size, level of socio-economic development, and demand for balanced development across a country.[345] These factors will be assigned different weights by policymakers in the formulation of a distributional formula.

The equality approach to distribution of resource benefits is agnostic to differential impact of resource development on host regions and communities, urging instead the equal treatment of all communities and regions of the state.[346] Consensus on the adoption of an equality model of distribution is feasible where limited information exists regarding the location and value of extractive resources.[347] In such circumstances, it is likely that all regions will favour centralised control of resource benefits as the state is presumed to have the capacity to ensure equal distribution of benefits across all interested areas and actors.[348] However, where the location of resources and their potential value become known before the adoption of a

[343] Nigeria's oil producing Niger Delta states of Delta, Rivers, and Bayelsa rank high in the human development index compared to the oil-rich Northern states, including Yobe and Borno. An application of pure notion of commutative justice in determining which states benefit from oil revenue means that oil-producing Niger Delta states will be highly wealthy leaving the Northern States with little possibility of developing. See, Yinka Omorogbe op cit note 85 at 264. The principle of derivation used in determining oil revenue sharing in Nigeria reserves 13 per cent of revenue to petroleum host states and distributes the 87 per cent on the basis of the principal of equality among all 36 states by the federal government. See, Yinka Omorogbe ibid at 268.
[344] K A Hegtvedt 'When is a distribution rule just?' (1992) 4:3 *Rationality Society* 308–331; D Miller *Principles of Social Justice* (1999) 26-30. See also, Gross, op cit note 326 at 25.
[345] Ike op cit note 342 at 114.
[346] Nakuru High Court Misc Civil Application No. 183 of 2000 *William Ngasia and Others v Baringo County Council and Others* (Judgement of 2002) 7.
[347] Brosio Giogio 'Oil revenue and fiscal federalism' in J M Davis et al (eds) *Fiscal Policy Formulation and Implementation in Oil-Producing Countries* (2003) 243-273 at 255
[348] Ibid at 256.

resource-sharing framework, pressure favouring control of resource benefits by host regions is known to mount.[349]

Another example of the pull towards equal distribution is the demand for universal and unconditional cash transfer of resource revenue to all members of a polity.[350] While the idea of sharing resource revenue equally among citizens may have worked in contexts such as Alaska,[351] its success largely hinges on the population size. The larger the population size, the smaller the cash transferred to the individual, and the more limited its ability to satisfy the aspirations of citizens. Additionally, direct cash transfer on an equal basis ignores the need for resource revenues to have an intergenerational effect because of the non-renewable nature of extractives.[352] Only where the distribution of resource wealth benefits historically disadvantaged groups without impairing the income prospects of other groups within the society can derogation from the equality basis be permissible.[353]

Contribution criteria of distributive justice argues that the allocation of benefits must be proportional to a region's input to the nation's resource output.[354] Additionally, it assesses contribution as either passive or active.[355] Active contribution occurs when the claimant to benefits has provided value addition to the resource development process.[356] It is inarguable that resource-host regions and communities meet the constant supply of other natural resources that are vital in resource development processes.[357] This may be in the form of water used in extractive processes or, as in the case of Magadi, they contribute – albeit involuntarily – their wood fuel to meet the energy demands of resource development.[358] On the other hand, passive contribution occurs where a claimant to benefits refrains from interfering with the extraction of natural resources and the evacuation of said resources outside the resource producing area

[349] Ibid.
[350] Paul Segal 'Resource rents, redistribution, and halving global poverty: The resource dividend' (2011) 39:4 *World Development* 475-489; Paul Segal 'How to spend it: Resource wealth and the distribution of resource rents' (2012) 51 *Energy Policy* 340-348 at 345.
[351] Jonathan Anderson 'The Alaska Permanent Fund: Politics and trust' (2002) 22:2 *Public Budgeting and Finance* 57-68.
[352] Chapter 2.2.
[353] Rex Martin 'Rawls on international economic justice in "The law of peoples"' (2015) 127:4 *Journal of Business Ethics* 743-759 at 744.
[354] Ike op cit note 342 at 115.
[355] Anna Deplazes-Zemp 'Commutative justice and access and benefit sharing for genetic resources' (2018) 21:1 *Ethics, Policy & Environment* 110-126 at 115.
[356] Ibid.
[357] Ibid.
[358] See Chapter 5.2.1.

for processing.[359] Whereas active contribution suggests some merited input in the production process,[360] acquiescing to extractive activities without interference is a factor in assessing passive contribution.[361]

The influence of distributive justice is discernible in the CBD and is apparent both at intra- and inter-state levels.[362] Acknowledging that capacity constraints limit resource-rich nations in exploiting their own natural endowments, the CBD obliges institutions in the Global North to transfer such technologies as are necessary for beneficiation of extractive resources from countries in the Global South.[363] Intra-state, the CBD's requirement that local communities participate in resource benefits based on their stewardship recognises that communities are integral to extractive processes.[364]

A human rights approach to benefit sharing is also distributive in that the state is under an obligation to apply maximum resources to satisfy basic human needs and meet the socio-economic rights of the people.[365] Arising from this requirement, the failure to establish a fiscal regime that can maximise revenue collection for attaining the population's socio-economic needs falls short of state responsibility.[366] Moreover, a fiscal regime that is singularly focused on satisfying the revenue demands of only the central government with little regard to the needs of host regions and communities may be considered inequitable.[367]

The preceding discussion instructs that – unlike the commutative justice design of benefit sharing that advantages only host communities and regions – distributive justice is aware of the arbitrary nature of natural resources' spatial distribution.[368] As such, it incorporates other parameters such as needs of the society in general into its formulation of

[359] Deplazes-Zemp op cit note 355; See also, Chris Armstrong 'Against "permanent sovereignty" over natural resources' (2015) 14:2 *Politics, Philosophy & Economics* 129-151 at 135.
[360] Gross op cit note 327 at 26.
[361] Deplazes-Zemp op cit note 355 at 113-115.
[362] Bege Dauda & Kris Dierickx 'Benefit-sharing: an exploration on the contextual discourse of a changing concept' (2013) 3 *BMC Medical Ethics* online at http://www.biomedcentral.com/1472-6939/14/36.
[363] *CBD* supra note 81.
[364] Ibid.
[365] Covenant on Economic Social and Cultural supra note 99. The Covenant commits State Parties:

> (i) to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.

Ibid art 2 (1). See also, Armstrong op cit note 359 at 139-140.
[366] Southalan op cit note 267 at 224.
[367] Faruque op cit note 342 at 66-103.
[368] Chris Armstrong *Global Distributive Justice: An introduction* (2012) 136-161.

benefit-sharing arrangements.[369] The uneven distribution of extractives within a state together with the existence of religious, ethnic, or linguistic cleavages is a powder keg that justifies a benefit-sharing mechanism informed by distributive justice.[370]

3.2.1.3 Compensatory Justice

The goal of compensatory justice is the restoration of the victim of an infringement to the position occupied before the transgression occurred.[371] The Latin principle *restitutio in integrum* aptly captures the goal of compensatory justice.[372] However, assessing the initial status of a victim group, necessary for arriving at compensatory justice, is neither uncontroversial nor a straightforward undertaking.[373]

Compensatory justice in natural resource governance starts from the premise that resource development generates disadvantages or imposes burdens on host communities and regions.[374] Consequently, the restoration of an adversely impacted group to its initial position, by ensuring that they receive compensations proportionate to the losses incurred, is a just outcome.[375] Where such a group is a cultural entity, the whole group is deemed to have sustained collective harm, and compensation is payable to the entity and not individuals.[376] Risk takers who bear with possible inconveniences in the service of resource development, according to this view, must not be left worse off.[377] The fact that resource-rich communities

[369] Ike op cit note 341 at 114.
[370] Nicholas Haysom & Sean Kane *Negotiating natural resources for peace: Ownership, control and wealth sharing* (2009) available online at *http://comparativeconstitutionsproject.org/files/resources_peace.pdf*, accessed on 20 March 2020; Michael Ross *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (2012) cited in Svetlana Tulaeva & Soili Nysten-Haarala 'Resource allocation in oil-dependent communities: Oil rent and benefit sharing arrangements' (2019) 8:86 *Resources* 1-20 at 4.
[371] Renée A Hill 'Compensatory justice: Over time and between groups' (2002) 10:4 *Journal of Political Philosophy* 392-415.
[372] Robert Goodin 'Compensation and redistribution' in John Chapman (ed) *Nomos XXXIII: Compensatory Justice* (1991) 143-77 at 145.
[373] Elizabeth Adjin-Tettey *Discriminatory Impact of Application of Restitutio in Integrum in Personal Injury Claims* (2009) 128.
[374] Naito Koh, John P Williams & Felix Remy *Review of Legal and Fiscal Frameworks for Exploration and Mining* (2001) 393.
[375] Hill RA 'Compensatory justice: Over time and between groups' (2002) 10:4 *Journal of Political Philosophy* 392–415.
[376] Will Kymlicka *Liberalism, Community and Culture* (1989) 258.
[377] S Vermeylen 'Contextualizing "fair" and "equitable": The San's reflections on the Hoodia benefit-sharing agreement' (2007) 12:4 *Local Environment* 423-436. See also, George S Akpan 'Host State legal and policy responses to resource control claims by host communities: Implications for investment in the natural resources sector' in Bastida,Waelde,& Warden supra note 10 at 283-309.

shoulder considerable risk and inconvenience for resource exploitation to occur instructs that they enjoy benefits reciprocal to the hazards they face.[378]

Whether compensation for injury caused by resource development is a form of resource benefit attracts considerable doubt.[379] Such an approach assumes that benefit sharing is a product of an infringement of an entitlement whose remedy is compensation.[380] The distinction between reparation for the loss of access to natural resources and benefit sharing as a stand-alone obligation is effectively blurred by conflating benefit sharing and compensation.[381] This restrictive approach undermines the reality that, whereas compensation envisages a one-off payment, benefit sharing is a long-term partnership by which stakeholders participate in benefits from resource exploitation through the life of the extractive development.[382] The conflation could provide an excuse for a state to believe that it has no additional obligation to share resource benefits with communities once compensation for land loss due to resource development has occurred.[383]

Both the Inter-American Court and the African Commission on Human and Peoples' Rights recognise benefit sharing as a form of equitable compensation.[384] Such an interpretation decouples benefit sharing from ordinary compensation, which requires proof of violation as a condition to entitle one to a share of resource benefits.[385] This approach is also consistent with the idea that compensatory justice involves a redistribution of material and social resources to raise a disadvantaged group's functional capabilities.[386]

[378] George S Akpan 'Host State legal and policy responses to resource control claims by host communities: Implications for investment in the natural resources sector' in Bastida,Waelde,& Warden supra note 10 at 283-309.
[379] Gilbert op cit note 125 at 91.
[380] Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc. A/HRC/15/37 (2010) paras 67, 89 & 91.
[381] Elisa Morgera 'Under the radar: the role of fair and equitable benefit-sharing in protecting and realising human rights connected to natural resources' (2019) 23:7 *The International Journal of Human Rights* 1098-1139.
[382] Gilbert op cit note 125 at 81. See also, Southalan op cit note 339 at 77.
[383] Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous People op cit note 380. This is particularly likely when land on which extractive development occurs is communally owned and has not been formally allocated to a group or individuals by the state.
[384] See *Endorois* supra note 212 para 297; *Kichwa Indigenous People* supra note 156 para 194.
[385] Gilbert op cit note 125 at 91. While compensation for harm is assessed at the time of breach, equitable compensation is assessed with the benefit of hindsight by considering the totality of loss of opportunity by an affected group. See, *AIB Group (UK) PLC v Mark Redler & Co Solicitors* (2014) UKSC 58, Supreme Court
[386] Amatya Sen *The Idea of Justice* (2009) 266-7.

3.2.2 Pro-Benefit Sharing Discourse Based on Ownership/Control

The legal vesting of subsurface resources in the state suggests that any income accruing from exploitation of natural resources is solely under the government's control at the national level.[387] From this perspective, the sharing of resource benefits with non-state stakeholders' amounts to a departure from the classical notion of property that accords a private owner exclusive rights over resources within their land.[388] The exclusive and monolithic state control of natural resources is no longer uncontested.[389]

First, ample evidence exists of the failure of governments' administration of the resource sector in Africa to yield benefits for the people.[390] The fact that resource control questions are the primary drivers of conflicts pitting governments and extractive industry operators on one hand and host communities on the other exemplifies this failure.[391] Benefit sharing therefore becomes a counterweight to the statist view of resource control. It does so by according equal weight to state interests in maintaining reasonable control of the extractive industry while also affording host regions and communities opportunity to share in the benefit of the sector.[392]

Secondly, international indigenous rights law has, over time, reimagined the beneficiaries of the right to self-determination beyond the state to encompass indigenous peoples, considered bearers of local sovereignty.[393] Subsurface resources within the understanding of indigenous peoples' rights constitute the property of indigenous

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[387] Koh, Williams & Remy op cit note 374 at 393; Omorogbe op cit note 85; M A Ajomo 'The 1969 Petroleum Decree: A consolidation legislation, resolution in Nigeria's oil industry' (1979) 1 *Nigeria Annual Journal of International Law* 57; *Social Economic Rights Centre* supra note 32 (The Commission determined thus: 'undoubtedly and admittedly, the government of Nigeria through the NNPC has the right to produce oil, the income of which will be used fulfil the economic and social rights of Nigerians'). Ibid at para 54.

[388] Anthony Scott *The Evolution of Resource Property Rights* (2008) 6. The author discusses five characteristics of a property right: exclusivity, duration, flexibility, quality of title, and divisibility); Abebe Abebayehu Chekol 'Petroleum operations in Sub-Saharan Africa: Does permanent sovereignty of a State over natural resources clash with claims of indigenous peoples' (2008/09) 12 *CEPMLP Annual Review* available online at *https://www.dundee.ac.uk*, accessed on 20 April 2021.

[389] Miranda Lilian Aponte 'The role of international law in intrastate natural resource allocation: Sovereignty, human rights, and peoples-based development' (2012) 45 *Vanderbilt Journal of Transnational Law* 785–840; Southalan op note cite 339 at 42; African Union *Africa Mining Vision* (2009) available online at *https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf>*, accessed on - repeat ref.

[390] Duruigbo Emeka 'Permanent sovereignty and peoples' ownership of natural resources in international law' (2006) 38 *George Washington International Law Rev* 35-38; Southalan op cit note 267.

[391] Laplante & Spears op cit note 202 at 69.

[392] Field op cit note 45 at 107.

[393] Anaya James *Indigenous Peoples in International Law* (1996) 106; S Date-Bah 'Rights of indigenous people in relation to natural resources development: An African's perspective' (1998) 16 *Journal of Energy & Nat. Resources Law* 389-412.

communities.[394] At a minimum, indigenous rights discourse discloses that indigenous communities should be recipients of direct monetary and nonmonetary benefits from the development of extractives within their territories.[395] However, some indigenous communities view benefit sharing as a form of 'carrot and stick' that secures community sanction to resource development on traditionally held territories at the cost of cultural survival.[396] On the other hand, pro-mineral development advocates emphasise that benefit sharing is necessary for the stability of the resource development environment as it extends social license to operators while advancing the resource vision of indigenous communities.[397] Adequately negotiated impact-benefit agreements that identify community development commitments between resource operators and indigenous communities represent this stabilising effect of benefit sharing.[398]

Even where indigenous rights are not invoked as the basis for asserting a claim for benefit sharing, resource host communities in countries such as Nigeria insist that the federal government's stranglehold over oil wealth is responsible for triggering the resource curse.[399] In these communities' view, the policy that grants the central state monolithic ownership and control over resources has devasted the natural environment of resource regions and impoverished its citizens.[400] By opening space for nuancing state's stranglehold on resource ownership and control, benefit sharing becomes a necessary instrument to alleviate resource-induced deprivation justifying a multi-actor engagement in resource governance.[401] The claim for benefits here is consistent with the idea of economic self-determination which holds that the people within a state have the right to participate in decisions on the management of resource wealth so as to ensure that resource exploitation advances their interest.[402]

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[394] John Southalan 'Australian indigenous-resource developments: *Martu People v Reward Minerals'* (2009) 27:4 *Journal of Energy & Natural Resources Law* 671-685; Saleem H Ali *Mining, the Environment and Indigenous Development Conflicts* (2003).
[395] *Endorois* supra note 212 para 297.
[396] Morgera op cit note 381 at 1109.
[397] Songi Ondotimi 'Defining a path for benefit sharing arrangements for local communities in resource development in Nigeria: the foundations, trusts and funds (FTFs) model' (2015) 33:2 *Journal of Energy & Natural Resources Law* 147-170 at 152; See also, ILO Convention 169 art 15(2).
[398] Ciaran O' Faircheallaigh 'Aboriginal-mining company contractual agreements in Australia and Canada: Implications for political autonomy and community development' (2010) 30:(1–2) *Canadian Journal of Development Studies* 69; Field op cit note 44 at 111.
[399] Ondotimi op cit note 397 at 152.
[400] *Social and Economic Rights Action Center* supra note 32.
[401] Ondotimi op cit note 397 at 148; Ibironke T Odumosu-Ayanu 'Governments, investors and local communities: Analysis of a multi-actor investment contract framework' (2014) 15 *Melbourne Journal of International Law* 1-42, at 6.
[402]Farmer op cit note 50 at 427; see ch 2.2.1.1.

The control discourse of benefit sharing has given rise to a two-fold classification of resource benefits: control-based benefits and support-based benefits.[403] The origin of this thinking is the proposition in the *Endorois* decision suggesting that resource benefits impact both the choices and capabilities of a host community.[404] Based on this reasoning, control-based benefits align with choice and seek to advance the worldviews of resource-rich communities in the development process while remaining faithful to society's broader interests.[405] An example of a control-based benefit model is benefit sharing based on derivation. It extends a more significant portion of royalties and other resource wealth to resource-rich regions and communities.[406] The involvement of host communities in joint ventures or equity participation in resource operations are other examples of control-based benefits.[407] However, resource-host communities' preoccupation with control of monetary benefits can politicise resource development, impacting prudent management of resource revenues.[408]

In contrast, support-based benefits are capability enhancing to the extent that they allocate opportunities to individuals and communities within resource-rich regions to pursue their chosen path to progress.[409] Most of the local content measures, including employment and procurement quotas,[410] constitute support-based benefits. Equally, direct cash transfers to individuals within resource regions enables them to make choices appropriate to their needs.[411] When support-based benefits are inadequate and inefficient, the demand for control-based benefits will likely gain ascendancy.[412] This shift in demand creates a potentially adversarial

[403] Morgera op cit note 381 at 1113.
[404] *Endorois* supra note 212 para 279; Cynthia Morel 'From theory to practice: Holistic strategies for effective advocacy' in Lennox & Short (n 17) 355, 359.
[405] Omorogbe op cit note 85 at 264. By the strength of the derivation principle, resource producing states within federal or quasi-federal units are entitled to an earmarked percentage of resource revenue, the balance being allocated equally to the rest of the states/units. Ibid at 267.
[406] Mukhtar Abdullahi 'Politics of resource control and revenue allocation: Implications for the sustenance of democracy in Nigeria' (2014) 7 *Journal of Politics and Law.*
[407] See generally, Emeka Duruigbo 'Community equity participation in African petroleum ventures: Path to economic growth' (2013) 35 *North Carolina Central Law Rev*. 111-159. Also, Morgera op cit note 381, 1098-1139 at 1114.
[408] Omorogbe op cit note 85 at 272.
[409] Morgera 'op cit note 381 at 1115. See also, Emma Wilson 'What is benefit sharing? Respecting indigenous rights and addressing inequities in Arctic resource projects' (2019) 8:74 *Resources* 1-23 (for a discussion of control from the perspectives of enhanced participation of indigenous communities in the formulation of policies, plans, programmes and strategies for resource development in the Arctic region).
[410] M Warner *Local Content in Procurement: Creating Local Jobs and Competitive Domestic Industries in Supply Chains* (2011); T Acheampong, M Ashong & V C Svanikier 'An assessment of local-content policies in oil and gas producing countries' (2016) 9 *Journal World Energy Law Bus* 282-302.
[411] Gaille Scott 'Mitigating the resource curse: proposal for microfinance and educational lending royalty law' (2011) 32:1 *Energy Law Journal* 81-98 at 88.
[412] Abdullahi op cit note 406 at 102.

clash between the state and the resource operator on the one hand and host communities on the other.[413]

As argued before, FPIC is a central procedural feature of benefit sharing and bears both control and support features. The term 'free' in FPIC addresses both direct and indirect factors that can hinder indigenous peoples' free will.[414] As such, a good climate for an FPIC process exists only if intimidation, coercion, manipulation, and harassment are absent.[415] Additionally, only when stakeholders can access relevant and timely information on the potential costs and benefits of resource development is the informational dimension of FPIC satisfied.[416] Therefore, FPIC is the antidote against paternalistic and top-down forms of benefit-sharing arrangements in the form of handouts or company-centred corporate social responsibility.[417]

3.3 The Case against Benefit Sharing: Efficiency Argument

The existence of the state as an organising mechanism is the very antithesis of chaos.[418] States design institutions to reduce the cost of entering bargains[419] and to resolve conflicts efficiently to facilitate commercial activities.[420] As extractives are an essential source of government revenue, rational institutions to secure this asset is in the public interest. An institutional arrangement that devolves benefit sharing to the sub-state level, whether regional units or community level, is seen as depriving the centralised state a certain measure of control in the efficient management of the utilisation of resource rents.[421] The resulting complexity of managing institutions within multiple levels is likely to increase transaction costs and provide more resource embezzlement opportunities.[422] In heterogeneous states in Africa, where ethnic,

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[413] See generally, Christina Katsouris & Aaron Sayne *Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil* (2013) available online at *https://www.chathamhouse.org*>, accessed on 20 Jan 2021.
[414] Morgera op cit note 381.
[415] Szablowski op cit note 308 at 117-18.
[416] International Council on Mining and Metals (ICMM) *Indigenous Peoples and Mining: Position Statement* (2013) available online at *http://www.icmm.com* accessed on 2 May 2021; Human Rights Council *Draft study on Free, Prior and Informed Consent: A human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples* A/HRC/EMRIP/2018/CRP.1 (2018) 7.
[417] Maria S Tysiachniouk 'Disentangling benefit-sharing complexities of oil extraction on the North Slope of Alaska' (2020) 12:5432 *Sustainability* 1-31 at 21-2.
[418] See generally, Thomas Hobbes *Leviathan* (1962).
[419] Jules L Coleman 'Efficiency, exchange, and auction: Philosophic aspects of the economic approach to law' (1980) 68:2 *California Law Review* 221-249.
[420] See Isabel Feichtner 'International (investment) law and distribution conflicts over natural resources' in Rainer Hofmann et al (eds) *International Investment Law and Sustainable Development* (2015) 256-284.
[421] Gilbert op cit note 125 at 33.
[422] Samuel Assembe-Mvondo, Maria Brochaus & Guillaume Lescuyerc 'Assessment of the effectiveness, efficiency and equity of benefit-sharing schemes under large-scale agriculture: Lessons from land fees in Cameroon' (2013) 25:4 *European Journal of Development Research* 641–656 at 649. See also, Keith Slack 'Capturing economic and social benefits at the community level: Opportunities and obstacles for Civil Society in

linguistic, or cultural groups coexist, centre-periphery conflicts can also emerge, further undermining efficient outcomes.[423]

Three reasons can be gleaned from the literature to evidence the inefficiency of benefit sharing. First, the non-insurable nature of community disruption to resource development increases the chances that disputes over the sharing of benefits with non-state stakeholders will rise. Secondly, the indeterminacy of FPIC lengthens the negotiation process and is likely to increase transaction costs.[424] Lastly is the nature of monetary benefits as common property.

States and multilateral agencies have developed mechanisms to de-risk resource development projects.[425] The Multilateral Insurance Guarantee Assurance (MIGA) is one such mechanism.[426] It explicitly targets political risks to large-scale development projects, including extractives.[427] However, risks that arise from community disruption to resource development are excluded from the protective cover of MIGA. Policymakers are apprehensive that disbursing resource revenue to non-state stakeholders may lead to disagreements that fall outside the insurable interest of MIGA. Thus, when community opposition to resource development occurs, they invariably trigger a *force majeure* declaration.[428] The risks presented to investors by unpredictable community engagement outcomes thus discourage investment in such a market.[429]

Tony Addison and Alan Roe (eds) *Extractive Industries: The Management of Resources as a Driver of Sustainable Development* (2018) 652-672 (documenting how subnationalism in Ghana and Peru have exercabated rent capture of resource benefits intended for local and community development). Also, Arellano-Yanguas & Acoste op cit note 39 for similar views.

[423] UN Security Council, Final Report of the United Nations' Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in Democratic Republic of Congo, S/2002/1146 (16 October 2002) online at *https://www.securitycouncilreport.org/* accessed 20 August 2020. See also, Chapter 7.

[424] Barry Barton 'The theoretical context of regulation' in Barry Barton et al (eds) *Regulating Energy and Natural Resources* (2006) 11-33 at 17.

[425] International Bank for Reconstruction and Development *The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)* (1985) online at https://www.miga.org accessed 10 Jan 2022. Merli Margaret Baroudi 'Innovation in political risk insurance: Experience from the Multilateral Investment Guarantee Agency' (2017) 8:3 *Global Policy* 406-413.

[426] Richard W Edwards Jr. & Ibrahim F I Shihata 'The Multilateral Investment Guarantee Agency' *Proceedings of the Annual Meeting* (American Society of International Law) 80 (9-12 April 1986) 21-25 available at *https://www.jstor.org/stable* accessed on 20 Jan 2021. (MIGA, a World Bank instrument, was designed to issue guarantees against noncommercial risks in host countries; to provide a broad range of promotional services, including technical assistance and policy advice; and to take any other incidental action which is necessary or desirable to achieve the overall objective).

[427] Baroudi op cit note 425 (submitting that some of the political risks covered under MIGA include expropriation, terrorism, politically motivated acts of civil war, and breach of contract). Ibid at 407.

[428] Paul S Orogun 'Resource control, revenue allocation and petroleum politics in Nigeria: the Niger Delta question' (2010) 75:5 *GeoJournal* 459-507 at 463.

[429] Ondotimi op cit note 397 at 151.

In support of the near inevitability of protracted conflict is the assertion that at the operational community level, the requirement for FPIC can be an open-ended invitation to engage stakeholders in an indeterminate process.[430] The process of identifying the resource project community stakeholder is one of the daunting tasks.[431] In some instances, people living nearest to the mining project are the targets of consultation.[432] Others define the relevant beneficiaries of consultation as those with cultural or historical ties to the affected geographical area or resource.[433] Others yet still see only indigenous groups as being entitled to FPIC.[434] This set of challenges means that FPIC implementation at the operational level is time consuming and potentially costly.

The other demanding task centres on the lack of common standards in the consultation and consent requirements in FPIC.[435] Some policies endorse resource development processes when only a section of a host community is consulted, and its consent procured.[436] Other standards grant the affected community the right to veto a project but such veto need not be construed as a complete repudiation of a project.[437] This lack of uniform standards thus contributes to operational uncertainty.

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[430] Patrick Keenan 'Business, human rights, and communities: The problem of community contest in development' (Illinois Public Law and Legal Theory Research Papers Series No. 14-18, 2013) 1-35 available online at *https://papers.ssrn.com/sol3/papers.cfm*, accessed on 24 Jan 2020. See also, Humphreys op cit note 307 at 127.

[431] B Labonne 'The mining industry and the community: Joining forces for sustainable social development' 23 (1999) *Natural Resources Forum* 315 at 317. See also, David Szablowski op cite note 316 at160. Ibironke presents the possibility of organizing many resource communities into clusters for purposes of negotiating Global Memorandums of Understanding in Nigeria. See, Ibironke, op cit note 401 at 16.

[432] María Victoria Cabrera Ormaza & Franz Christian Ebert 'The World Bank, human rights, and organizational legitimacy strategies: The case of the 2016 Environmental and Social Framework' (2019) 32 *Leiden Journal of International Law* 483-500 (arguing that the *ratione personae* of consultation is often indeterminate). See also, Ibironke, op cit note 401 at 11.

[433] Shalanda H Baker 'Why the IFC's free prior informed consent policy does not (yet) matter to indigenous communities affected by development projects' (2013) 30:3 *Wisconsin International Law Journal*; Hemant R Ojha, Rebecca Ford & Rodney Keenan et al 'Delocalizing communities: Changing forms of community engagement in natural resources governance' (2016) 87 *World Development* 274-290 (on the evolving character of communities).

[434] IFC Performance Standards on Environmental and Social Sustainability, Performance Standard 7. In many contexts in Africa, the concept of indigenous peoples is still contested and often unrecognized by states. The application of FPIC standard to host communities impacted negatively by resource development activities notwithstanding the reluctance by states to recognize such communities as indigenous does not necessarily hollow out the entitlement of the right to indigenous communities. See, Ndahinda op cit note 144 at 2.

[435] Ibid, Performance Standard 7 at para 12. The IFC guideline states that "[t]here is no universally accepted definition of FPIC," which is "established through good faith negotiation between client and the affected communities." See also, Chapter 7.3.3.

[436] IFC, supra note 434 at 49 (according to the IFC, "FPIC does not necessarily require unanimity and maybe achieved even when individuals or groups within the community explicitly disagree").

[437] See, Human Rights Council *Draft study on Free, Prior and Informed Consent: A human rights-based approach*, (Study of the Expert Mechanism on the Rights of Indigenous Peoples) A/HRC/EMRIP/2018/CRP.1 (2018) (The Study instructs that a 'No' vote to a project could express various conclusions: opposition to a project,

Additionally, a rigid implementation of an FPIC process where consultation or dialogue with an indigenous community terminates once a project receives state endorsement can also be problematic.[438] This approach has the potential to create certainty for one set of stakeholders – investors – while disenfranchising others – host communities.[439] However, in reality, community preferences may change over time, particularly as information about the impact of resource development projects which at project commencement may be abstract become concrete.[440] The import of this view is that a host community may endorse a project at commencement but conclude midway through a project that the benefits are insufficient to support the costs it bears.[441] The difficulty in maintaining community support for a project, separate from obtaining it in the first instance, is a significant challenge for which conventional community consultation approaches are inadequate. Therefore, since the implementation of benefit sharing grounded on FPIC does not please all the stakeholders, its capacity to mitigate resource conflict remains unsettled.[442]

Another complexity that lends itself to efficiency concerns is the nature of monetary benefits. This concern arises from the characterisation of resource rents, earmarked for redistribution among various levels of government and host communities, as common pool resource.[443] According to the view elaborated further in the next chapter,[444] the unregulated withdrawal of resource rents by strategic actors, a phenomenon known as elite capture,[445] arises from weak transparency and can lead to resource depletion.[446] The resulting inefficient extraction of rents typical in common-pool resources,[447] is thus another reason for state

disaffection with consultation processes or deficient compliance with required standards and expectations. The state and project proponents must engage in a process of decoding the meaning of a negative veto by an indigenous community). Id, at para 25 & 26; Alexander Dunlap 'A bureaucratic trap: Free, prior and informed consent (FPIC) and wind energy development in Juchitán, Mexico' (2018) 29:4 *Capitalism Nature Socialism* 88-108 (on the manipulation of FPIC).

[438] *A guide to ILO Convention 169* supra note 281 at 63.

[439] Emily Greenspan *Free Prior Informed Consent in Africa: An Emerging Standard for Extractive Industry* (2014, Projects Research Backgrounder, Oxfam America, Washington, DC) at *www.oxfamamerica.org,* accessed on 20 March 2021.

[440] Keenan op cit note 430 at 10.

[441] Ibid at 21.

[441] Ibid at 19.

[442] Field op cit note 45 at 108; César Rodríguez-Garavito 'Ethnicity.gov: Global governance, indigenous peoples, and the right to prior consultation in social minefields' (2011) 18:1 *Indiana Journal of Global Legal Studies* 1.

[443] Barry Weingast, Kenneth Shepsle & Christopher Johnsen 'The political economy of benefits and costs: A neo-classical approach to distributive politics' (1981) 89:4 *Journal of Political Economy* 642-664.

[444] Chapter 4.

[445] Jesse Salah Ovadia 'The dual nature of local content in Angola's oil and gas industry: Development vs. elite accumulation' (2012) 30:3 *Journal of Contemporary African Studies* 395-417.

[446] Thomas Dietz, Elinor Ostrom & Paul C Stern 'The struggle to govern the commons' (2003) 302:5652 *Science* 1907-1912 at 1907.

[447] Anthony Scott op cit note 388 at 27.

opposition to the idea of benefit sharing. While the state is not immune to elite capture, there is strong concern that further devolution of resource benefits will multiply the range of actors seeking to exploit such resources for private gain rather than public good.

3.4 Conclusion

This chapter is a search for a coherent theoretical basis to ground demands by host regions and communities for participating in a share of extractive resource benefits on the one hand and resistance by some states towards distributing such benefits on the other. Based on the understanding that only when demands for benefit sharing crystalise into an entitlement can any group directly benefit from resource development,[448] this chapter sets out to review the justifications for and critiques against benefit sharing.[449] While implicit and not often articulated on the face of most policy instruments, this chapter shows the importance of understanding the arguments that ground different resource distribution approaches or the reasons for their rejection. The influence of these theories on international legal instruments that recognise benefit sharing become apparent in this chapter and will be more evident in this thesis' assessment of specific constitutional and statutory rules on resource governance in Kenya.[450] What will also become clear is that the choice of principles for allocating benefits ought to precede policy and design of benefit-sharing institutions as well as constitutional and statutory rules.[451]

[448] Hanna Fenichel Pitkin 'Justice: On relating public and private' (1981) 9:3 *Political Theory* 327-352 at 347 (asserting that the transformation of a claim into an entitlement requires a certain threshold of social mobilisation); Chris Armstrong 'Justice and attachment to natural resources' *The Journal of Political Philosophy* (2014) 22:1 48-65 at 51 (for the view that one can obtain a provisional claim over an object simply by declaring their will to control it and accepting to submit that claim to the adjudication of a civil and political authority); Nicholas Rescher *Fairness: Theory and Practice of Distributive Justice* (2002) 2-3.
[449] Brian Barry *Why Social Justice Matters* (2005).
[450] Chapter 5.
[451] Sen op cit note 326 at 56 (for the proposition that the vested interest of actors should not be the guide to resource allocation choices but rather prefigured principles).

CHAPTER 4: 'DESIGN PRINCIPLES' AND POTENTIAL FOR BOTTOM-UP GOVERNANCE OF RESOURCE RENTS

4.1 Introduction

The previous chapter established the importance of assessing the implicit or explicit assumptions that underpin policies and rules on benefit sharing. In the absence of such an exercise, the chapter observes that a stipulated regime of rules may produce adverse consequences. Further, the chapter pays attention to the concerns of skeptics to the distribution of monetary resource benefits among multiple beneficiaries, as likely to occasion inefficiency. This pessimism towards devolving resource benefits arises from the failure to conceptualise robust rules for regulating rents and managing the participation of resource users in the governance of benefits.

While monetary benefits in certain contexts exhibit attributes of a 'common pool resource',[452] this chapter demonstrates that such rents need not trigger the dilemmas often associated with unregulated commons: overexploitation, misuse, and inefficiency.[453] The first part of the chapter discusses the nature of rents as a common and introduces the concept of common pool and common property resources respectively.

Drawing on common property literature, the second part of the chapter pays attention to the co-creation of rules for regulating a common property resource resulting in a more sustainable governance of commons.[454] These rules now termed 'design principles'[455] represent a bottom-up attempt at norm development which is distinct from top-down approaches to law-making favoured by over centralised states. These rules, contrary to the anxieties of a bureaucratic approach to governance, demonstrate viability in facilitating the

[452] Bimo Abraham Nkhata, Charles Breen & Alfons Mosimane 'Engaging common property theory: Implications for benefit-sharing research in developing countries' (2012) 6:1 *International Journal of the Commons* 52–69 at 53.
[453] Garret Hardin 'The tragedy of the unmanaged commons' in Dustin J Penn, Iver Mysterud, E O Wilson (eds) *Evolutionary Perspectives on Environmental Problems* (2009) 105-108.
[454] Ostrom op cit note 78; Sharman Haley 'Institutional assets for negotiating the terms of development: Indigenous collective action and oil in Ecuador and Alaska' (2004) 53:1 *Economic Development and Cultural Change* 191-213 at 202-204.
[455] Ostrom ibid at 88-102.

cooperation necessary for sustainably utilising common property, including resource benefits.[456]

The last part of the chapter spotlights the design principle advocating for the establishment of institutions for resource governance nested at different levels of the state and beyond. The literature posits that the existence of such multi-level institutions accommodates collaborative rulemaking likely to redress conflicts and undermine the overexploitation of common property resources.[457]

4.2 Resource Rents as a Specie of Common Property

The development of extractives tends to yield exceptionally large surpluses relative to production costs which become concentrated in the hands of resource developers and central states.[458] These surpluses are known as rents and accrue to the state without the corresponding need for accountability to its citizens.[459] In most jurisdictions, the appropriation of such rents in the form of royalties or up-front bonuses or taxation of economic activities from resource development is a 'state right' by virtue of state ownership of subsurface resources.[460] These resource rents have been identified as common property to the extent that the central government collects and determines its use.[461]

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[456] Forrest D Fleischman, Brent Loken & Gustavo A Garcia-Lopez et al 'Evaluating the utility of common-pool resource theory for understanding forest governance and outcomes in Indonesia between 1965 and 2012' (2014) 8:2 *International Journal of the Commons* 304-336 at 307.

[457] Vincent Ostrom, Charles M Tiebout & Robert Warren 'The organization of government in metropolitan areas: A theoretical inquiry' (1961) 55 *American Political Science Review* 831-842.

[458] Mick Moore 'Revenues, state formation, and the quality of governance in developing countries' (2004) 25:3 *International Political Science Review* 297-319 at 305; See also, Daniel Workman 'Crude Oil Exports by Country, World's Top Exports' 3 January 2020, available at http://www.worldstopexports.com, accessed on 10 July 2021 (for the view that $1.1 trillion worth of oil were exported in 2019).

[459] Leif Wenar & Jeremie Gilbert 'Fighting the resource curse: The rights of citizens over natural resources' (2020) 19:2 *Northwestern Journal of Human Rights* 30-79 at 75-6.

[460] Manuel Riesco 'On "Mineral Rents and Social Development in Chile"' (2008) available online at *https://www.unrisd.org* accessed on 6 July 2021.

[461] Barry Weingast, Kenneth Shepsle & Christopher Johnsen 'The political economy of benefits and costs: A neo-classical approach to distributive politics' (1981) 89:4 *Journal of Political Economy* 642-664; Christopher Berry 'Piling on: multilevel government and the fiscal common-pool' (2008) 52:4 *American Journal of Political Science* 802-820; Robert A Greer, Tima T Moldogaziev & Tyler A Scott 'Polycentric governance and the impact of special districts on fiscal common pools' (2018) 12:2 *International Journal of the Commons* 108-136 at 108; James Poterba & Jurgen von Hagen (eds) *Fiscal Institutions and Fiscal Performance* (1999) (The authors argue: 'The government's general tax fund is a "common property resource" from which projects of public policy are financed. This induces a "common-pool problem" in which competing political groups vie for government expenditures that are financed using broad-based tax instruments.' Ibid at 3.

To appreciate the meaning of common property as distinct from common pool resource requires the disassembling of ownership into its basic attributes.[462] The elements of ownership – access, use, management, exclusion, or alienation[463] – may be united within an individual or group or be unevenly distributed among various stakeholders.[464] Viewed from this lens, common property is a system of proprietorship where some of the bundle of ownership rights over a resource, particularly its access and use or enjoyment, devolve to a community.[465] On the other hand, a common pool resource is a type of good, natural or man-made, the size or nature of which renders exclusion of potential users costly, politically inconvenient, or impossible.[466] In other words, where the political will to govern a common is lower than the cost and convenience of enforcement, the preponderance on the part of the state to allow rent-seeking behaviour increases.[467] A commons, therefore, becomes either a common pool resource or common property resource depending on the success, or otherwise, of collective action rules.[468] Invariably, any analysis of the commons must go beyond taxonomies and classification and pay attention to the regime that governs the particular common.

Access is concerned with the ability of a person to derive benefit from resources, including property rights or other socio-legal relations.[469] Three elements thus distinguish common property resources (CPRs) from other forms of property. These elements are: the existence of a property held in common, 'a community' as the basic unit entitled to withdraw resource units from a common pool, and the practice of 'commoning'.[470]

The qualification of a resource as a CPR arises from its capacity to satisfy the fundamental rights of a community, such as life, health, or livelihoods.[471] A community in this context is a group, howsoever defined, whose fundamental rights will be at stake through the resource development process.[472] 'Commoning' represents the joint practice by such a community to formulate and implement rules for creating, restoring, maintaining, and

[462] Maria Rosaria Marella 'The commons as a legal concept' (2017) 28 *Law Critique* 61-86 at 77.
[463] AM Honore 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (1961) 107-147 at 122.
[464] Ismael Vaccaro & Oriol Beltran 'What do we mean by "the commons"? An examination of conceptual blurring over time' (2019) 47 *Human Ecology* 331-340 at 333.
[465] Ibid at 334.
[466] Ostrom op cit note 78 at 30.
[467] R Quentin Grafton 'Governance of the commons: A role for the State?' (2000) 76:4 *Land Economics* 504-517 at 505.
[468] Vaccaro & Beltran op cit note 464 at 337.
[469] Jesse C Ribot & Nancy Lee Peluso 'A theory of access' (2003) 68:2 *Rural Sociology* 153-181 at 154.
[470] Thomas C Grey 'The disintegration of property' in Roland Pennock et al *Property Nomos n. XXII* (1980) 69-85.
[471] Marella op cit note 462 at 68.
[472] Ibid at 67.

governing a common resource.[473] It follows further that permitting members of a common property regime to determine the rules of access or appropriation of a resource is critical to sustainable use.[474] In contrast, where a common pool resource exists but lacks legitimate rules governing access, it is open to overexploitation by participants who adopt strategic behaviour.[475] Legitimacy of rules is a function of the extent of the validity of these rules in constraining or guiding the decisions of resource users.[476]

A state that captures and misuses resource rents is known in the literature as a 'rentier state', a term which implies not only dependence on resource rents but more fundamentally, the failure to use and distribute such resource revenue in a manner that produces value to the populace.[477] Under this condition, the state appropriates resource rents, however, such rents are then captured by private actors due to weak institutions that regulate the resource sector and fail to provide transparency and accountability.[478] In this circumstance, resource rents create a 'common' 'honeypot' to be raided by a diverse group of rent seekers.[479] A rentier state typically manages this honeypot of resource rents as a common pool resource. As such, the resource income fails to translate into positive development outcomes for the citizen,[480] in a manner compatible with the notion of economic self-determination.[481] In contrast, a fiscal state is a state that relies on taxes, including resource rents, but uses these taxes to improve social wellbeing.[482] A fiscal state will thus treat resource rents as a common property resource and evolve rules and institutions governing fiscal allocation and management of resource revenue, thereby facilitating redistribution to achieve sustainable outcomes.[483]

Two problematic characteristics, arising partly due to the conflation in the literature of the concepts of common pool and common property (*res communes*) resources, can be gleaned from the foregoing discussion. First, common pool resources are often under the use of a

[473] Peter Linebaugh *The Magna Carta Manifesto: Liberties and Commons for All* (2008).
[474] Ostrom op cit note 78 at 101.
[475] Gilbert op cit note 125 at 189.
[476] Hart op cit note 329 at 102-3.
[477] Paul Alexander Haslam 'Overcoming the resource curse: Reform and the rentier state in Chile and Argentina, 1973–2000' (2016) 47:5 *Development and Change* 1146-1170 at 1148.
[478] *Social and Economic Rights Action Center* supra note 32 at para 57.
[479] Karl op cit note 30 at 257.
[480] P Stevens, J Sachs & A Warner 'The curse of natural resources' (2001) 45 *European Economic Review* 827-838.
[481] See Chapter 2.2.1.1.
[482] Attiya Warris 'Delineating a rights-based constitutional fiscal social contract through African fiscal constitutions' (2015) *East African Law Journal* 24-48 at 27.
[483] Maria S Tysiachniouk 'Disentangling benefit-sharing complexities of oil extraction on the North Slope of Alaska' (2020) 12:5432 *Sustainability* 1-31 at 2.

collectivity whose members enjoy open access to the resource.[484] In such a system, some participants-known as strategic members- of the group will seek to maximise short-term exploitation of the resource units even if their conduct compromises the long-term availability of the resource.[485] The consequence of repeated actions by strategic participants leads to resource depletion, a condition called the 'tragedy of the commons' in the literature.[486] In resource governance terms, the fiscal regime's failure to provide rational administration of the fiscal common resource increases the likelihood of rent misuse.[487] The absence of institutional incentives to promote collective action by facilitating coordination, information exchange, and the sanctioning of infractions of rules, if any, is responsible for this challenge.[488]

The second problem associated with CPRs is that commons tend to generate or obtain less economic rent than the resource is capable of producing.[489] This challenge is caused by uncertainty imposed on participants by an unreliable access regime.[490] A regime of access whose rules are deficient in transparency will, for instance, either privilege or disadvantage some of the actors in the resource sector, thereby reducing competition and eventually the rent appropriated.[491] The disproportionate information on production held by resource corporations, can lead to the understatement of production levels by said corporations, thereby reducing rent captured by government.[492] Further, the regressive taxation regime common among a number of mining jurisdictions indicates that government take falls with an increase in profitability of resource development activities.[493] This particular problem of CPRs parallels the resource curse paradox of plenty, marked by the underperformance of economies of resource-wealthy countries.[494]

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[484] Anthony Scott op cit note 388 at 27.
[485] David Feeny, Fikret Berkes & Bonnie J McCay et al 'The tragedy of the commons: Twenty-two years later' (1990) 18:1 *Human Ecology* 1-19.
[486] See generally, Garrett Hardin 'The tragedy of the commons' (1968) *Science* 162:3859 at 1243-48.
[487] Kwon Gohoon 'Post-crisis fiscal revenue developments in Russia: From an oil perspective' (2003) 3 *Public Finance Management* 505-529.
[488] Ostrom op cit note 78 at 52.
[489] Partha Dasgupta 'Common property resources: Economic analytics' (2005) 40:16 *Economic and Political Weekly* 1610-1622 at 1610 (for the view that open entry drives the resource rents to zero); see also, Scott op cit note 388 at 27.
[490] Scott, Ibid.
[491] Karl op cit note 30 at 266.
[492] Tracy-Lynn Field *State Governance of Mining, Development and Sustainability* (2019) 197.
[493] Southalan op cit note 267 at19.
[494] Emma Gilberthorpe & Ellisaios Papyrakis 'The extractive industries and development: the resource curse at the micro, meso and macro levels' (2015) 2 *The Extractive Industries and Society* 381-390 (where she highlights some of the factors accounting for the resource curse, including weak and non-responsive institutions, spatial concentration of mineral resources at point of extraction, ethnic heteregoneity, regional inequalities etc.); Yanguas op cit note 11, 617-638; Paul Collier *The Bottom Billion: Why the Poorest Countries are Failing and What Can*

4.3 Design Principles: Bottom-Up Institutional Response to the Nature of Resource Rents

The consequence of the twin challenges associated with the management of common pool resources has given rise to the proposal that only two institutional arrangements can ensure the sustainability of CPRs: centralised government and private property.[495] This approach coincides with the prevalence of centralised and top-down control of natural resources as articulated under the doctrine of permanent sovereignty over natural resources.[496] However, this view contradicts the evidence that over-centralisation of governance of extractive resources, coupled with weak institutions, enables rent seekers to appropriate the common resource rent.[497]

Since the late 1980s, a growing number of common property scholars have, as a result, contested the linear view presented as the antidote to the CPR challenges.[498] They question the presumption that users of common property lack the capacity to self-organise in the formulation of rules to aid in sustainable resource governance.[499] Instead, these scholars argue that when users of common property are given more voice and autonomy in the design of institutions for governing commons, inter-group cooperation is feasible and sustainable use likely.[500] As sets of rules or specific mechanisms that govern interaction among users, institutions are critical in achieving this sustainable and equitable use of resources.[501]

Originating from the study of models of self-organising in the management of diverse commons – irrigation waters, communal forests, and coordination of urban security – common property scholars have developed eight principles for the resilient governance of CPRs.[502] These principles, referred to as design principles, are guidelines for designing institutions that conduce with the resolution of CPR dilemmas by fostering coordination and cooperation among participants.[503] Further, these design principles hold the potential to nurture trust and reciprocity among CPR participants, enabling them to develop and enforce shared rules

Be Done About It (2007) 38-52 (summarising the resource curse literature); M Humphreys 'Natural resources, conflict, and conflict resolution: Uncovering the mechanisms' (2005) 49:4 *Journal of Conflict Resolution* 508-37.
[495] Hardin op cit note 486. See also, Dietz, Ostrom & Stern op cit note 445 at 1907.
[496] Barry Barton & Michael Goldsmith 'Community and sharing' in Harnandez et al op cit note 6 at 33.
[497] Karl op cit note 30 at 262.
[498] Ostrom op cit note 78 at 52; Elinor Ostrom *Understanding Institutional Diversity* (2005); Michael D McGinnis (ed) *Polycentric Governance and Development: Readings from the Workshop in Political Theory and Policy Analysis* (1999); Nkhata, Breen & Mosimane op cit note 452, 52-69.
[499] Dietz, Ostrom & Stern op cit note 445.
[500] Nkhata, Breen & Mosimane op cit note 452 at 60.
[501] Ostrom op cit note 78 at 52.
[502] Ibid at 90-102.
[503] Ostrom op cit note 498 at 259-60.

necessary to overcome collective action dilemmas.[504] Unlike state norm development that borrows from what is considered efficient, the design principles are distilled from observing what works from the perspective of common property resource users themselves.[505] Local actors, therefore, become agents in the formulation and translation of rules for self-governance.[506]

Based on observing sustainably managed commons, Elinor Ostrom, the leading common property commentator, proposes eight design principles.[507]The first principle calls for the delimitation of the physical extent of the common property and the identification of communities with rights of access.[508] The principle emphasises that clarity regarding the membership class with the right to access and use a CPR and the spatial scope of the resource, can inform the evolution of rules for sustainable governance.[509] Further, the principle advocates for such boundary identification to be conducted in a participatory manner with the involvement of actual resource users.[510]

Arguably, while the idea of group-defined boundaries can encourage sustainable collaboration, narrowing the beneficiaries or duty bearers to only communities contiguous to the common resource can fail to fully account for the wider impact of resource use activities.[511] To facilitate a community that is discontiguous with the common resource to adopt a sustainable approach to resource development, however, it may be necessary to ensure that such a community maintains a stake in the resource.[512] The more information that such groups may have regarding the impact of the common resource on their fundamental rights, the more likely they will be invested in the sustainable use of the resource.[513]

[504] Ostrom op cit note 78 at 90.
[505] DA Westbrook 'Theorizing the diffusion of law: conceptual difficulties, unstable imaginations, and the effort to think gracefully nonetheless' (2006) 47:2 *Harvard International Law Journal* 489-505.
[506] GA Sarfaty 'International norm diffusion in the Pimicikimak Cree Nation: A model of legal mediation' (2007) 48:2 *Harvard International Law Journal* 441-482.
[507] Ostrom op cit note 78 at 90-102.
[508] Ostrom op cit note 498 at 260.
[509] Daniel W Bromley *Environment and economy: Property rights and public policy* (1991) 2 at 15.
[510] Ostrom op cit note 498 at 261.
[511] Andrew Murray *The Regulation of Cyberspace: Control in the Online Environment* (2006) 164.
[512] Jamie Darin Prenkert & Scott Shackelford 'Business, human rights, and the promise of polycentricity' (2014) 47 *Vanderbilt Journal Transnational Law* 495. See also, Elinor Ostrom 'Polycentric systems for coping with collective action and global environmental change' (2010) 20 *Global Environmental Change* 550 at 552.
[513] Prenkert & Shackelford ibid at 49.

The second principle is the rule of proportionality in the allocation of benefits and costs.[514] Under this rule, resource use will be optimised when those who bear higher costs in the resource exploitation process receive enhanced benefits.[515] At its core, this rule recognises the place of equity in the allocation of advantages and costs of resource development processes.[516] The inequitable access to fiscal resources by actors other than those who bear a higher cost in the resource development context is a form of exploitation largely responsible for the resource-curse problem.[517]

The third principle acknowledges the centrality of participation by actual resource users in formulating and modifying norms governing common property boundaries and cost assessment.[518] The involvement of beneficiaries in designing rules and institutions on benefit sharing can yield a more sustainable regime for the governance of common pool resources.[519] A top-down approach rather than popular participation in rulemaking undermines compliance with subsequent norms governing benefit distribution to the extent that it promotes the evolution of pro-elite policies.[520]

Even when the first three principles discussed above are in place, rules require monitoring, a regime of graduated sanctions for violators, and accessible and cost-efficient mechanisms for redress.[521] These rules constitute the fourth to sixth principles. The common thread that ties these three principles together is the need to lower the cost of monitoring and redress processes,[522] hence the emphasis on the localisation of monitoring and conflict resolution mechanisms.[523] Additionally, the principles are categorical on the need for accountability of these mechanisms to the actual resource users.[524] However, in order to mitigate possible elite manipulation of grievance redress procedures, the sixth principle calls

[514] Ostrom op cit note 498 at 262-3.
[515] Ibid at 263.
[516] Tang Shui-Yan, Richard F Callahan & Mark Pissano 'Using common-pool resource principles to design local government fiscal sustainability' (2014) 74:6 *Public Administration Review* 791–803 at 793; Ronald L Trosper 'Northwest coast indigenous institutions that supported resilience and sustainability' (2002) 41:2 *Ecological Economics* 329-44.
[517] Shui-Yan ibid at 791; See also, see also, Berry op cit note 461 at 802-820 (for the view that when benefits that accrue to a particular group from the general revenue pool are disproportionate to the group's tax burden, the group will likely 'overfish' the shared tax pool through unrealistic expenditure budgets). Ibid at 802.
[518] Ostrom op cit note 498 at 264.
[519] Nkhata, Breen & Mosimane op cit note 452 at 60.
[520] Ostrom op cit note 498 at 264.
[521] Ibid at 264-268; See also, Syma A Ebbin 'The Anatomy of Conflict and the Politics of Identity in Two Cooperative Salmon Management Regimes' (2004) 37:1 *Policy Sciences* 71-87.
[522] Ostrom op cit note 498 at 265,
[523] Ostrom op cit note 78 at 96.
[524] Ostrom op cit note 498 at 266.

for nesting such redress mechanisms at a hierarchically higher sphere than the resource operational level.[525]

The seventh principle further mobilises the agency of resource users by advocating for minimal recognition by external actors of norms formulated by such users for application at the operational level.[526] To the extent that such rules do not derogate from a resource governance regime's core objectives, the principles advocate non-interference with local law.[527] The rules may, for instance, prescribe procedures on consultation, thereby providing a clear notion to resource developers of what would satisfy a community's consultation expectations and thus reduce conflicts.[528] To ensure such an outcome, it might be necessary that capacity support – scientific, policy, or legislative – be offered to actors at the operational level to inform their rulemaking processes.[529]

The eighth principle posits that more complex common properties require that allocation, monitoring, and enforcement of access must be nested and linked through multiple local, regional, national, or international jurisdictions to promote efficiency.[530] This principle has been called the principle of polycentric governance.[531] The defining characteristic of polycentricity is decision making by multi-level governance units with overlapping jurisdictions.[532] Polycentric governance is examined in greater detail in the next section as it presents the most significant potential for ensuring coherent management of complex CPRs, including resource rents.

Viewed together, the eight design principles advance three critical governance goals: recognition, agency, and transparency and accountability. The first and seventh principles, for instance, emphasise recognition without which parity in participation is illusory.[533] The third and eighth principles pay attention to the agency of resource users manifested by participatory rulemaking and collaborative decision making. This is what lends legitimacy and credibility to

[525] Ostrom op cit note 498 at 268.
[526] Ibid at 268-9.
[527] Ibid at 269.
[528] Louisa Parks *Benefit Sharing in Environmental Governance: Local Experiences of a Global Concept* (2020) 92.
[529] Ostrom op cit note 498 at 282.
[530] Ostrom op cit note 78 at 102.
[531] Elinor Ostrom 'Beyond markets and States: polycentric governance of complex economic systems' (2010) 100:3 *American Economic Review* 641-672 at 643.
[532] C Skelcher 'Jurisdictional integrity, polycentrism, and the design of democratic governance' (2005) 18:1 *Governance: An International Journal of Policy, Public Administration, and Institutions* 89-110 at 89.
[533] Nancy Fraser 'Recognition without ethics?' (2001) 18:2-3 *Theory Culture & Society* 21-40 at 27.

norms,[534] thus ensuring likelihood of compliance. Lastly, the application of the second, fourth, fifth, and sixth principles will inevitably deepen transparency because monitoring without a degree of information is impossible. Sanction systems and redress fit well as accountability-enforcing measures. The eight design principles thus advance transparency from below and coalesce into a multidimensional strategy capable of counteracting the resource curse.[535]

The response of common property scholars to the challenge of managing CPRs is relevant to the discussion on efficient fiscal management of resource rents.[536] Consequently, the eight design principles apply to non-renewable natural resource settings where cooperation and coordination are shared goals.[537] While not widely applied to the extractive sector, these principles can improve legal and policy efficacy.[538] Evidence exists that where the design principles have been called to aid mineral, oil, and gas development, they have served to facilitate the reach of benefits to communities.[539]

4.4 Polycentric Governance as a Response to CPR Challenges

Polycentricity indicates the existence of multiple and substantially autonomous governing authorities at different scales of decision making.[540] A polycentric governance system, however, connotes more than the existence of a multi-scalar decision-making framework.[541] It requires that these levels exhibit three interrelated attributes that ensure coordination among the units necessary for fostering cooperation.[542] First, it must show that the multiple and overlapping decision-making centres or units take each other into account when engaging with a given common property's governance.[543] The rationale for decision-making units taking each

[534] Ostrom op cit note 498 at 271-2.
[535] Karl op cit note 30 at 274; Wenar & Gilbert op cit note 459 at 33.
[536] Tang, Callahan & Pissano op cit note 516 at 793.
[537] Sung-Wook Kwon & Richard C Feiock 'Overcoming the Barriers to Cooperation: Intergovernmental Service Agreements' (2010) *Public Administration Review* 70:6 at 876-884.
[538] David Sloan Wilson, Elinor Ostrom & Michael E Cox 'Generalizing the core design principles for the efficacy of group' (2013) *Journal of Economic Behavior & Organization* 90S 521-532 at 522.
[539] Martin Ross 'How mineral-rich states can reduce inequality' in Humphreys, Sachs & Stiglitz op cit note 30 at 250 (referencing revenue-sharing measures negotiated between national and subnational levels in Indonesia serving to undermine secessionist demands for instance); Also, Sharman Haley 'Institutional assets for negotiating the terms of development: Indigenous collective action and oil in Ecuador and Alaska' (2004) 53:1 *Economic Development and Cultural Change* 191-213.
[540] Keith Carlisle & Rebecca L Gruby 'Polycentric systems of governance: A theoretical model for the commons' *Policy Studies Journal* (2017) 927-952; Haley Sharman 'Sustainable development and oil: Lessons from the Ecuadorian Amazon' (2002) 26 *Cultural Survival Quarterly* 65-68.
[541] Carlisle & Gruby Ibid at 928.
[542] Graham Marshall 'Polycentricity and adaptive governance' (2015) (Working Paper presented at the 15th Biannual Inter-national Conference of the International Association for the Study of the Commons, Edmonton, Canada) available online at *https://dlc.dlib.indiana.edu/dlc*>, accessed on 12 April 2020.
[543] Ostrom, Tiebout & Warren op cit note 456 at 831-842.

other into account suggests an overarching intent of the units within polycentric systems to draw from the experience of various units to resolve common property challenges.[544] Secondly, the different jurisdictions must demonstrate the autonomous capability to pursue competitive, contractual, or cooperative arrangements with each other.[545] Finally, a centralised dispute resolution framework accessible to each of the levels of governance is a prerequisite.[546]

Units enjoy decision-making authority when they have considerable independence to formulate rules and norms touching on an aspect of resource utilisation.[547] Based on this understanding, it is feasible to view institutions with legislative, executive, and judicial functions as having the independent competence to evolve rules with binding character.[548] Communities of resource users can also be said to enjoy autonomous rulemaking competence, which is binding upon its membership.[549] Units or institutions lacking a similar degree of autonomy in rule formation are considered relevant in a polycentric system where they support the independent units.[550]

The multiple jurisdictions envisioned under a polycentric system may be local, provincial, national, or global.[551] Jurisdictional competencies could include producing public goods or providing specific services, including financing, coordination, monitoring, sanctioning, and dispute resolution.[552] The execution of these functions across jurisdictions requires extensive interaction that may give rise to cooperation, reciprocity, and trust.[553]

Contested access regimes or benefit-sharing arrangements may create winners and losers among the different autonomous units, leading to conflict.[554] Similarly, the uneven capacity to influence polycentric governance's goals, processes, and outcomes can engender

[544] Carlisle & Gruby op cit note 540 at 929.
[545] Ibid.
[546] Ibid.
[547] Elinor Ostrom 'Coping with tragedies of the commons' (1999) 2 *Annual Review of Political Science* 493-535 at 552; Ostrom op cit note 498 at 283.
[548] Carlisle & Gruby op cit note 540 at 940.
[549] Bobbi Low, Elinor Ostrom & Carl Simon et al 'Redundancy and diversity: Do they influence optimal management?' in Fikret Berkes et al (eds) *Navigating Social-Ecological Systems: Building Resilience for Complexity and Change* (2003) 83-111.
[550] Michael D McGinnis & Elinor Ostrom 'Reflections on Vincent Ostrom, public administration, and polycentricity' (2011) 72:1 *Public Administration Review* 15-25.
[551] Elinor Ostrom & James Walker (eds) *Trust and Reciprocity: Interdisciplinary Lessons for Experimental Research* (2005).
[552] Michael D McGinnis 'An introduction to IAD and the language of the Ostrom workshop: A simple guide to a complex framework' (2011) 39:1 *Policy Studies Journal* 163-177 at 171.
[553] Ostrom op cit note 498 at 269.
[554] Graham Marshall 'Nesting, subsidiarity, and community-based environmental governance Beyond the local scale' (2007) 2:1 *International Journal of the Commons* 75-97.

conflicts between different units.[555] Such distributional contests between different units can undermine cooperation and impede a governance system's capacity for self-organisation.[556] Whereas the integrity of polycentric systems is protected and strengthened by multiple institutions and actors that comprise the system, this diversity can mask non-transparent behaviour – a likely cause of discord.[557] Therefore, a robust conflict system is an absolute necessity for the survival of a polycentric system.[558]

Overlaps between the various levels in a polycentric system address challenges ordinarily common in monocentric regimes. Polycentric systems do so by allowing the sphere with more responsive competency to intervene in the resolution of a challenge besetting the management of a common property.[559] Independence from the domination of one level of government liberates the higher level to formulate rules governing only its domain of competence. At the same time, the opportunity for mutual monitoring and adaptation over time exists between different levels.[560] To the extent that polycentric governance demonstrates creative problem-solving that draws on bottom-up approaches, it is bound to enjoy greater legitimacy – an important coefficient to implementation.[561] In contrast, externally imposed rules with weak or expensive monitoring and sanctioning mechanisms lead to weak compliance.[562] Thus, polycentric systems' effectiveness in rationalising CPR challenges is based on its inherent adaptability in fostering equity, inclusivity, information exchange, and accountability.[563]

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[555] Tiffany H Morrison, W Neil Adger & Katrina Brown et al 'Mitigation and adaptation in polycentric systems: Sources of power in the pursuit of collective goals' (2017) 8 *Wiley Interdisciplinary Review on Climate Change* at 479.

[556] Amy R Poteete & Elinor Ostrom 'Heterogeneity, group size and collective action: The role of institutions in forest management' (2004) 35:*3 Development and Change* 435-61.

[557] Tiffany H Morrison, W Neil Adger & Katrina Brown et al 'The black box of power in polycentric environmental governance' (2019) 57 *Global Environmental Change* at 2.

[558] PJ Boettke, JS Lemke & L Palagashvili 'Polycentricity, self-governance, and the art & science of association' (2015) 28:3 *The Review of Austrian Economics* 311-335.

[559] Ostrom op cit note 498 at 286.

[560] Elinor Ostrom 'Polycentric systems for coping with collective action and global environmental change' (2010) 20 *Global Environmental Change* 552.

[561] Michael D McGinnis 'Costs and challenges of polycentric governance: An equilibrium concept and examples from U.S. Health Care' 2 May 2011 at 1, available at *https://ssrn.com/abstract=2206980* accessed on 30 Jan 2020.

[562] Elinor Ostrom 'Collective action and the evolution of social norms' (2000) 14:3 *Journal of Economic Perspectives* 137-158 at 147. See also, Manuel Wörsdörfer 'Free, prior, and informed consent' and inclusion: Nussbaum, Ostrom, Sen and the Equator Principles framework' (2014) 5:3 *Transnational Legal Theory* 464-488, at 464.

[563] B K Sovacool 'An international comparison of four polycentric approaches to climate and energy governance' (2011) 39 *Energy Policy* 3832-3844 at 3832.

Whether a system is polycentric is more a function of substantive autonomy in decision making than mere classification.[564] Consequently, *de jure* polycentric governance asserted in law may not deliver *de facto* polycentric outcomes.[565] Rather than present a panacea, polycentric governance will only pass muster if it delivers coherent decisions and improved performance.[566]

What is evident from the above discussion is that polycentric governance supports local norm development likely to match local circumstances.[567] Additionally, autonomous decision making aided by devolved decision-making can increase reciprocity and cooperation by citizens reducing the risks of failure of implementation.[568] Finally, citizens' sense of self-determination which strengthens under polycentric governance can enable transparency and ownership of formulated rules thereby enhancing compliance.[569]

4.5 Conclusion

This chapter has not attempted to reconcile the pro- and anti-benefit sharing sentiments discussed in chapter three. This was not necessary. Instead, it confronts the basis for rejecting benefit sharing based on efficiency concerns arising from the characterisation of monetary rents as common property. It demonstrates, using common property theory, how resilient and transparent institutions for resource governance can be imagined. As such, it affirms the viability of benefit sharing to the extent that it is anchored on governance frameworks that are facilitative to transparency and participation of citizens. It thus suggests that in designing resource governance models, a state cannot call to its aid the efficiency concerns as grounds for denying host regions and communities a share in resource benefits.

The chapter has reappraised the eight design principles proposed by common property scholars. The principles are presented not as magic bullets but rather as guidelines for the adaptive management of common property whose success is highly context specific. These principles are cast as bottom-up strategies evolved by resource users themselves and, as such,

[564] See generally, Claudia Pahl-Wostl 'A conceptual framework for analysing adaptive capacity and multi-level learning processes in resource governance regimes' (2009) 19 *Global Environmental Change* 354-365.
[565] Graham R Marshall 'Polycentricity, reciprocity, and farmer adoption of conservation practices under community-based governance' (2009) 68 *Ecological Economics* 1507-1520.
[566] Ostrom, Tiebout & Warren op cit note 457 at 831-842.
[567] Rebecca L Gruby & Xavier Basurto 'Multi-level governance for large marine commons: Politics and polycentricity in Pulau's protected area network' (2014) 36 *Environmental Science and Policy* 48-60.
[568] Marshall op cit note 565 at 1507-1520.
[569] Ostrom op cit note 78 at 52.

are curative of abuse of common property and therefore likely to create a resilient mechanism for the sustainable utilisation of commons. Despite the multiple participants and varying levels of formal institutions vying to exploit CPRs, including fiscal resources such as resource rents, the core design principles provide possible cooperation and reciprocity opportunity.

The next chapter discusses Kenya's legal framework governing benefit sharing. In assessing this framework, it will become apparent whether Kenya's law and institutions have been formulated based on a clear understanding of the pitfalls represented by the nature of resource rents. Additionally, the extent to which the legal and fiscal regime governing the resource sector may have benefitted from the design principles proposed by common property scholars as elaborated in this chapter will become evident.

CHAPTER 5: LEGAL AND POLICY FRAMEWORK GOVERNING BENEFIT SHARING IN KENYA

5.1 Introduction

The previous chapter's attention to the nature of monetary benefits as a type of common property susceptible to tragic overuse and capture, affirms the prerequisite for coherent legal and institutional frameworks to manage resource benefits. In response, the current chapter investigates Kenya's legal framework on benefit sharing from the colonial period to the present. This chapter seeks to demonstrate that over the last couple of decades, Kenya's legal regime on benefit sharing has continued to evolve in favour of recognition. This journey towards institutionalising benefit sharing in the extractive sector mirrors the changes in the country's socio-political landscape from the colonial period to the present.[570] While the colonial state was predatory,[571] the immediate post-independence period fared no better.[572]

In seeking to examine the evolution of benefit sharing in the country's juridical system, two broad phases emerge: the pre-2010 and post-2010 phases. The pre-2010 phase can be further categorised into the colonial and immediate post-independence period.[573] Benefit sharing received limited formal recognition during this phase except for the short-lived adoption at the turn of independence of a royalty-sharing approach to resource benefits.[574] The later part of this period is also marked by the emergence of corporate social responsibility (CSR), a voluntary benefit-sharing mechanism.[575] The rise of CSR must have been linked to the global movement for responsible mining, which initiated the sensitivity to stakeholder perceptions regarding the inexorably high environmental and social costs associated with

[570] HWO Okoth-Ogendo 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (1972) 71:282 *African Affairs* 9-34.
[571] Bruce Berman *Control and Crisis in Colonial Kenya: The Dialectic of Domination* (1990); Mueni Wa Muiu 'Colonial and postcolonial State and development in Africa' (2010) 77:4 *Social Research* 1311-38; Crawford Young *The African Colonial State in Comparative Perspective* (1994) 43-76.
[572] Makau wa Mutua 'Human rights and state despotism in Kenya: Institutional problems' (1994) 41:4 *Africa Today* 50-56.
[573] Stretching between 1900 and 2010, this period is marked by many socio-political changes in the country: colonialism, independence, autocratic rule, ethnic nationalism, electoral violence, and struggle for democratisation. See e.g., Stephen N Ndegwa 'Citizenship and ethnicity: An examination of two transition moments in Kenyan politics' (1997) 91:3 *The American Political Science Review* 599-616.
[574] Chapter 5.3.
[575] See generally, Beatrice Labonne 'The mining industry and the community: Joining forces for sustainable social development' (1999) 23 *Natural Resources Forum* 315-322; Uwafiokun Idemudia 'Oil extraction and poverty reduction in the Niger Delta: A critical examination of partnership initiatives' (2009) 90:1 *Journal of Business Ethics* 91-116.

extractive developments.[576] The post-2010 phase's hallmark is the adoption of the new Constitution through a popular referendum that ushered in multi-level governance and the normative and institutional frameworks established to implement this new order. Therefore, the year 2010 is an important temporal marker that, in theory, ushered in an era of enhanced policy recognition of benefit sharing in favour of resource-host communities.

The main constitutional, statutory, and policy provisions governing the extractive sector in each phase will underpin our assessment of the extent of legal recognition of benefit sharing. Additionally, judicial decisions on mining-related disputes touching on communities in each phase provide a critical opportunity for assessing legal evolution. The practice of benefit sharing pursued by extractive corporations, if any, will provide an essential source of information to engage discussions in this chapter. The first section of the chapter will review the pre-devolution phase in two parts: the colonial and post-colonial eras. The attention of the second section turns on the legal developments post-devolution. This part also pays attention to any influence of the design principles discussed in the preceding chapter on the benefit-sharing framework introduced into Kenya post 2010.

5.2 The Legal and Policy Framework on Benefit Sharing: The Colonial Phase

Between 1897, when Kenya became a British sphere of influence,[577] and its political independence in 1963, the progressive alienation of land and its resources was the preoccupation of colonial authorities.[578] The Orders in Council of 1897 and 1899 pursuant to the Foreign Jurisdictions Act were the legal foundations for the assumption of governmental jurisdiction to implement the Berlin Conference agreements' intentions to Kenya.[579] The annexation of Kenya's land and resources were the immediate intention of these Orders-in-

[576] David Millon 'Communitarianism in corporate law: Foundations and law reform strategies' in Lawrence Mitchell (ed) *Progressive Corporate Law* (1995) 73; WC Kim 'The changing nature of multinational business' (2000) 18:3 *Strategic Management Journal* 145-152.

[577] East Africa Order in Council, 1902. In 1920, Kenya became a colony and was annexed as part of the British dominium. The Kenya Annexation Order in Council (11 June 1920) reprinted in 113 *British and Foreign States Papers 1920* (1923) 74-75.

[578] East Africa (Acquisition of Lands) Order in Council S.R.O. 551/1898; Alison Field-Juma 'Governance and sustainable development' in Calestus Juma et al (eds) *In Land We Trust: Environment, Private Property & Constitutional Change* (1996) 19.

[579] See generally, YP Ghai & JPWB McAuslan *Public Law and Political Change in Kenya: A Study of Legal Framework of Government from Colonial Times to the Present* (1970) 12-34; Aman W Kabourou 'The Maasai land case of 1912: A reappraisal' (1988) 17 *Transafrican Journal of History* 1-20 at 13. See also, CR Pennell 'The origins of the Foreign Jurisdiction Act and the extension of British sovereignty' (2010) 83:221 *Historical Research Journal* 465-485. See also, Chanan Singh 'The Republican Constitution of Kenya: Historical background and analysis' (1965) 14:3 *The International and Comparative Law Quarterly* 878-949 at 900.

Council. A review of land governance under colonial law is thus relevant to the discussion on the sanctioning of extractive activities on such land and the extent to which any form of benefit sharing was conceivable.

The First Order in Council[580] granted the Commissioner-General of the Protectorate the ability to alienate 'crown lands' defined as 'all public lands' within the East African Protectorate.[581] The definition of crown lands was clarified by the Crown Lands Ordinance of 1902 as land unenclosed and unoccupied by native communities subject to alienation on the strength of the extension of Her Majesty's protection and irrespective of lack of consent of tribal authorities.[582] However, the 1915 Crown Lands Ordinance that repealed the 1902 Ordinance brought all land in Kenya under the rubric of 'crown lands'.[583] Such land included land in the actual occupation of native communities, even where the land in question was previously reserved for the use and support of African community members.[584] Though under this law, the Governor or Commissioner could designate land as a reserve for the benefit of communities, such reservation of land was not to confer on Africans any property rights.[585]

Subsequent legal developments rendered native legal interest on land so fluid and uncertain that courts determined that Africans were tenants at the will of the Crown.[586] The import of this administrative and legal approach was to render the entire Kenyan territory *terra nullius*,[587] where the demands for land and resources of colonials were enforced whenever required with little regard for native occupation or land use.

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[580] Orders in Council were enactments of the Queen of England applied to different Colonies or Protectorates. Once enacted, an Order in Council was laid before both chambers of Parliament and had the same effect as an Act of Parliament. See, Foreign Jurisdiction Act, 1890. 53 & 54 Vic. c. 37. (Imperial), sec 11. The Foreign Jurisdiction Act extended the specific authority to the sovereign 'to hold exercise and enjoy any jurisdiction...in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory' (s.1) and 'every act and thing done' in pursuance of that jurisdiction was declared to be as valid as if it had been done according to the local law then in force in that country (s.3). Chanan Singh 'The Republican Constitution of Kenya: Historical background and analysis' (1965) 14:3 *The International and Comparative Law Quarterly* 878-949 at 900.

[581] East Africa Lands Order in Council 1901 reprinted in 95 *British and Foreign States Papers* (1905) 999.

[582] Ghai & McAuslan op cit note 579 at 26.

[583] The Official Gazette of the East Africa Protectorate No. 677 *The Crown Lands Ordinance, 1915*.

[584] George Bennett *Kenya-A Political History* (1963) 8-9.

[585] *Crown Lands Ordinance* supra note 583, sec 54.

[586] HWO Okoth-Ogendo *Tenants of the Crown: Evolution of Agrarian Law & Policy in Kenya* (1991); See also, Tim OA Mweseli 'The centrality of land in Kenya: Historical background and legal perspective' in Smokin Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya* (2000) at 3, 8. In *Isaka Wainaina wa Gathomo v Murito wa Indangara* (1921) 9 LRK, the Supreme Court conceded that the 1921 law determined that 'all native rights...[had] disappeared and natives in the occupation of such Crown land became tenants-at-will of the Crown of the land actually occupied.' Ibid at 102, 104.

[587] See generally, Lauren Benton & Benjamin Straumann 'Acquiring empire by law: From Roman doctrine to early Modern European practice' (2010) 28:1 *Law and History Review* 1-38. *Terra nullius*, a Roman law doctrine,

During the colonial period, two mining development projects emphasise this unequal application of both law and colonial policy on land and natural resources. The first was the discovery of substantial commercial deposits of soda ash in Lake Magadi in the Rift Valley.[588] The second, the discovery of gold within the (then) Kavirondo region, specifically Kakamega.[589] These two case studies are briefly outlined below to explore the nature of relations between the colonial state and local communities in the resource region, on the one hand, and corporations involved in extractive activities, on the other.

5.2.1 Lake Magadi

Prospecting for mineral resources as supplemental to agriculture development was an important revenue source for the colonial authorities.[590] In the Kenyan context, the need to defray the astronomical expenses of constructing the Kenya-Uganda railway made mining exploration more urgent.[591] On 9 August 1904, one day before the signing of the 1904 Maasai Agreement (first agreement) between the Maasai *Laibon* (paramount chief) Olonana and the British,[592] the Commissioner-General granted a 20-year lease for the development of soda ash in Magadi.[593] The pledge in the First Maasai Agreement, securing for the community the southern and northern Maasai reserves in perpetuity, did not stop the issuance of the mining lease within Lake Magadi in the southern reserve.[594] In any event, the specific application of the Crown Lands Ordinance of 1902, discussed above, should have precluded the mining of an area occupied by a native community without their consent. In granting the Magadi concession, the limiting 1902 Ordinance was avoided by relying on a rule that all mines and minerals were vested in the Commissioner despite the native community's occupation.[595]

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means land without owners. Also, Sir Charles Eliot *East Africa Protectorate* (1966). He posits, 'we have in East Africa the rare experience of a *tabula rasa*…where we can do as we will…'). Ibid at 3.

[588] Lake Magadi lies within the Rift Valley, about 170 kilometres south-east of Nairobi. It is located in present day Kajiado County.

[589] Kakamega is part of the agriculturally rich and well-watered western part of the country.

[590] SB Saul 'The economic significance of constructive imperialism' (1957) 17:2 *Journal of Economic History* 173-192.

[591] MF Hill *Magadi: The Story of Magadi Soda Company* (1964) 11. For a criticism of the cost of the Kenya-Uganda railway, see Glenda Riley *Taking Land, Breaking Land: Women Colonizing the American and Kenyan Frontier 1840-1940* (2003) 38.

[592] Lotte Hughes *Moving the Maasai: A Colonial Misadventure* (2006).

[593] The lease covered an area of 89 square miles, 117 kilometres south of Nairobi. Hill op cit note 591 at 11.

[594] Parselelo Kantai 'In the grip of the vampire State: Maasai land struggles in Kenyan politics' (2007) 1:1 *Journal of Eastern African Studies* 107-122.

[595] Draft 'King's Regulations under Article 45 of the East Africa Order in Council 1897', FO2/805, NA (providng that if government land was sold, minerals were also reserved unless otherwise stated).

A second Anglo-Maasai agreement was signed seven years later between Olonana's brother and successor, Seggi, and the British,[596] revoking the 1904 accord and confining the community to only the southern reserve.[597] This second agreement also saw the surrender of the initial 20-year mining lease in Magadi for a longer 99-year lease in favour of the mining company.[598] Despite the non-payment of land compensation to the Maasai tribe for this additional acquisition, land rent was fixed at a meagre 20 shillings per hectare for the entire duration of the lease.[599] Royalties payable to the colonial government were equally specified for the entire 99-year duration of the mining lease.[600] The most the host community received as direct benefits from extractive activities during this time was the construction of water troughs to enable the community to water its livestock, given the Maasai were entitled to first claim on the water.[601] Indirectly, a hospital constructed primarily for mine workers also served the local community.[602]

A legal suit challenging the legality of the 1911 agreement on the grounds that the signatories of the second agreement could not bind the entire Maasai community, among other grounds, was initiated by the Maasai.[603] The case was dismissed by colonial courts in Kenya on the basis that the contested agreement was a treaty between sovereigns, and courts had no jurisdiction to examine its legality or fairness.[604] While it served colonial purposes to elevate

[596] Hughes op cit note 592.
[597] Hill op cit note 591 at 47. This forced migration of the Maasai increased the human and livestock population of the Southern Reserve to well over 10,000 men, women, and children and over 1.2 million livestock.
[598] MMEM Rutten *Selling Wealth to Buy Poverty: The Process of Individualization of Landownership Among the Maasai Pastoralists of Kajiado District, Kenya 1890-1990* (1992) 182.
[599] BH Baker *Geology of the Magadi Area* (1958) 64. Both the institution of the colonial administration which received the annual land rent remitted by the mining corporation and the use to which the rent was applied is unclear from the literature.
[600] Pegged at two shillings per ton of raw soda, and three shillings per ton of soda. See, Hill op cit note 591 at 91. It remains unclear how?
[601] GF Sanford *An Administrative and Political History of the Masai Reserve* (1919) 166. In actual fact, only four water troughs were built for the community, paving the way for the abstraction of vast quantities of water to service the mine and human consumption on the part of mine workers. Hill op cit note 591 at 49-52.
[602] Hill op cit note 591 at 164.
[603] HM Courts in Mombasa East Africa Protectorate, *Ole Njogo and Others v The Hon. Attorney General and 20 others* Civil Case No. 91 of 1912 (Judgement of 26 May 1913) (EAP 1914) reprinted 54 *House of Commons Parliamentary* Papers (1914) 679-685.
[604] *Ole Njogo* ibid at 679-685. The court observed that:

> 'It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy.'

See also, Ghai & McAuslan op cit note 579, at 20-25.

agreements with the Maasai community as treaties, colonial dealings betrayed the fact that neither the Maasai nor any Kenyan community were sovereign.[605]

Despite initial challenges faced by the mining operations,[606] by the late 1950s, soda ash from Magadi accounted for up to 5.3 per cent of Kenya's total exports.[607] This upward trend continued through the decades that followed.[608] To evacuate soda for export, the mining corporation constructed a 91-mile railway line linking Magadi to the Nairobi-Mombasa railway.[609] Investment in housing for staff, including African workers, was also prioritised.[610] Concern for its mineworkers' health saw the establishment of a health facility whose services also spilled over to the mining-host community.[611] It is notable, though, that most of the mineworkers during the period were non-members of the resource-host community.[612] An exclusive mining town, Magadi, with a well-developed infrastructure emerged.[613] While the actions of the mining corporation described above were voluntary and motivated by a desire to ensure the mining operation's viability, the contribution to the social development of the mining area was a definite consequence. These benefits must, however, be weighed against the cost of mining operations borne by the resource-host community.

A critical factor in the increased profitability of the Magadi soda operations starting in the late 1940s was a reduction in the company's operating costs. This cost-cutting measure resulted from the use, by the corporation, of wood fuel rather than diesel to power its processing kilns.[614] The unlimited supply of wood fuel within reach of the mining area,[615] while providing

[605] Kabourou op cit note 579, 1-20.
[606] Hill op cit note 591 at 128.
[607] Baker op cit note 599 at 69.
[608] From a post-tax loss of £35,497 in 1926, Magadi Soda recorded profits of £410,957 in 1970. Between 1925 and 1960, Magadi Company remitted £348,000 to the colonial administration in royalties and over £1.6 million in direct taxes. Hill op cit note 591 at 135.
[609] Mervyn F Hill *Permanent Way* (1961); Hill op cit note 512.
[610] Hill op cit note 591.
[611] By 1960, 50 per cent of patients treated at Magadi hospital were members of the Maasai community living within the mining area. Hill, ibid at 159.
[612] Of the 960 labourers working in Magadi mines in 1927, the Luo and Kamba made up 600 workers while Maasai accounted for about 1 per cent. See, MMEM Rutten op cit note 598 at 241-242.
[613] Judy N Muthuri 'Corporate citizenship and sustainable community development: Fostering multi-sector collaboration in Magadi division in Kenya' (2007) 28 *Journal on Corporate Citizenship* 73-84 at 75.
[614] Hill op cit note 591 at 124. Energy costs account for 50-65 per cent of production cost. See, T de Lange & LJ Grobler 'Potential of process energy optimization (PEO)™ on a soda ash production plant' (2010) 107:4 *Energy Engineering* 54-66.
[615] Hill op cit note 591 at 124.

an immediate cheap energy solution to the firm, imposed a heavy long-term toll on Magadi's fragile physical environment.[616]

5.2.1 Kakamega Gold Deposits

The end of the First World War depressed the world's economies, and the Kenya colony was not spared.[617] In October 1931, gold was discovered near Kakamega, in North Kavirondo district in western Kenya.[618] The dire economic situation subsisting in the territory meant that this find resulted in a gold rush and an influx of European prospectors into the region.[619]

In 1930 the Native Lands Trust Ordinance (NLTO) was enacted to reinstate safeguards taken away by the Crown Land Ordinance of 1915. The new law decreed that native reserves were 'for the use and benefit of the native tribes...forever.'[620] It barred grants of mining leases in areas 'under beneficial occupation'[621] without the consent of the native tribe in question.[622] Ignoring these provisions of the law, colonial authorities issued several leases to European mining concerns.[623] A post hoc justification of these concessions was made possible through an amendment to the NLTO, which permitted excision of African reserves for mining purposes with consent from the Native Lands Trust Boards.[624]

By 1939, gold production accounted for 10.7 per cent of Kenya's exports, but this contribution gradually reduced as global demand for gold fell and the mining cost from deeper ores rose.[625] During the gold boom in 1933, the African workforce at the mines stood at 15,000, accounting for about 5 per cent of all Africans in monthly employment in Kenya.[626] The gold

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[616] MMEM Rutten op cit note 598 at 259. See also, Michael Tiampati 'Soda extraction threaten Magadi Maasai' 28:3 *Cultural Survival Quarterly* (2004) available at *https://www.culturalsurvival.org/publications/cultural-survival-quarterly/soda-extraction-threatens-magadi-maasai*>, accessed on 20 Jan 2020.
[617] See generally, David Kennedy *The First World War and American Society* (1980).
[618] AD Roberts 'The gold boom of the 1930s in Eastern Africa' (1986) 85:341 *African Affairs* 545-562 at 551.
[619] Hansard Report, House of Commons HC Deb 09 February 1933 vol 274 cc372-6W available at *https://api.parliament.uk/historic-hansard/written-answers/1933/feb/09/kenya-goldfield-ordinances*>, accessed on 24 Jan 2020. The House of Commons was informed that 800 Europeans were involved in gold mining activities in Kakamega goldfields. See also, Kenya Colony *Annual Report, North Kavirondo District, Kakamega* (1931) 14.
[620] Kenya Colony, Native Land Trust Ordinance (1930) s7.
[621] Beneficial occupation is a term used to distinguish legal owner from beneficiary. See, *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* H.L. (1975) S.T.C. 345.
[622] *Kenya colony* supra note 620, sec 8.
[623] See, William Puffey *Geological Survey of Maragoli Northern* Kavirondo (1946) 39-42. See also, Roberts op cit note 618 at 552.
[624] *Kenya colony* supra note 620, sec 13(1). Despite Section 3(2) of the Ordinance, no African was co-opted into the Native Lands Boards. See also, Kenya Colony *North Kavirondo District Annual Report* (1932) 11-12, doc DC/NN/1/13.
[625] See generally, Shilaro op cit note 57 at 377. Also, Colony and Protectorate of Kenya *Notes on mining in Kenya* (Mining pamphlet No. 2, 1936).
[626] Roberts op cit note 618 at 553.

mines also increased local trade, especially in agricultural commodities.[627] Royalty payment was pegged at 5 per cent.[628] Though in theory possible, Africans' participation in gold mining activities was unlikely as an applicant for a mining license needed to be proficient in English.[629] Based on non-proficiency in English, the colonial state effectively criminalised the participation of Africans in mining activities.[630] Additionally, unregulated alluvial mine pits that dotted the region accelerated mosquito breeding and increased malaria incidents in the area, leading to many fatalities.[631]

Local dissatisfaction with non-compensation for land, environmental impacts of gold mining, the *de facto* racial basis in the acquisition of mining licenses, and the treatment of African labourers triggered protests.[632] By the late 1930s, this disaffection morphed into a politically organised movement under the North Kavirondo Central Association, which began to agitate for a more robust African voice in land and natural resource matters.[633]

The two examples cited in this section show the importance of the extractive sector to the Kenya colony's fledgling economy. Further, these cases evidence the propensity of colonial authorities to disregard or manipulate the limited legal safeguards securing land reserved for African occupation to facilitate mining activities. The issue of the Magadi concession, in particular, reverberates with a deep sense of injustice. While colonial law and treaties reserved land for the occupation of local communities, these legal protections were disregarded in furtherance of extractive activities. Colonial-era corporation-community relations are part of

[627] Ibid at 554. See also, Kenya Colony *Kavirondo District Annual Report* (1935) 49.
[628] Kenya Colony and Protectorate *Notes on Mining in Kenya* (No. 2, 1936) at 2 (Kenya National Archives document on file with author).
[629] Colonial and Protectorate Kenya *Mining Ordinance No LXI 1933* (1933) s5 & 6. The same conditions did not obtain in Ghana where African participation in gold mining was prevalent. See, Raymond E Dumett *El Dorado in West Africa: The Gold Mining Frontier, African Labor, and Colonial Capitalism in the Gold Coast, 1875-1900* (1998) (for a documentation of Akan community participation in gold mining activities).
[630] Trading in Unwrought Precious Metals Ordinance, 1933 was enacted during the period. Under the Ordinance, any unlicensed person found in possession of gold was guilty of an offence and those convicted were liable to a fine of £1,000, or imprisonment for one year, or both. In order to enforce this law, African company employees suffered humiliating and undignified body searches, including being stripped naked. See, Shilaro op cit note 56. For similar treatment of African labourers in mines, see, William H Worger *South Africa's City of Diamonds: Mine Workers and Monopoly Capitalism in Kimberley, 1867-1895* (1987) 128-31, 139-40.
[631] Shilaro op cit note 57 at 377.
[632] Kenya Colony *Kavirondo District Annual Report 1932*, DC/NN/1/13 at 15 ((Kenya National Archives document on file with author).
[633] See generally, Shilaro op cit note 57.

the collective memory of wrongs that shape contemporary attitudes on resource governance justice.[634]

The absence of a clear colonial policy or legal provision supportive of benefit sharing did not entirely frustrate the accrual of benefits to resource host communities. In particular, the employment opportunities created by resource activities and increased agricultural and trading activities emerge as concrete spillover benefits from these two case studies. Despite their voluntary and tokenistic nature, pragmatic considerations informed the corporations involved in extractive development to find space for local community participation even during the colonial period.

5.3 Benefit Sharing in the Independence Era: 1963 to 2010

Political freedom in Africa was framed as heralding a complete break from colonial domination.[635] The presumption was that the enfranchisement of Africans will result in laws and policies representative of the best interests of citizens of the newly independent territories.[636] As will be apparent in this section, Kenya's independence ushered in less than expected and rather than disrupt an oppressive past order, entrenched and perpetuated policies of exclusion and exploitation.[637] The extractive sector, where colonial laws and policies governing the mineral sector transitioned unchanged into the newly independent state, best exemplifies this false genesis.

Kenya's independence Constitution[638] was handed down to the country by the departing British colonial administration after minimal negotiation at two Conferences held in Lancaster in the United Kingdom.[639] The 1963 Constitution created a federal system of government with

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[634] Ikechukwu Umejesi and Wilson Akpan 'When "adequate" counts for nothing: Compensation and collective memory in a postcolonial mining context' in Wilson Akpan & Philani Moyo (eds) *Revisiting environmental and natural resources questions in Sub-Saharan Africa* (2017) 103-120.

[635] James Olesugun Adeyeri 'Nationalism and political independence in Africa' in S Oloruntoba et al (eds) *The Palgrave Handbook of African Politics, Governance and Development* (2018) 12.

[636] Yash & McAuslan op cit note 579 ch V.

[637] Okoth-Ogendo op cit note 570. The author argues that:

> 'The institutions inherited at independence were heavily weighted towards the protection of settler interests, and, in the case of governmental institutions, they were particularly well adapted for the control of African political activity at the provincial level. Hence from the beginning law was used as an instrument of class domination, particularly since the colour differentia was co-extensive with the economic stratification.'

Ibid at 13.

[638] GG No. 105 *The Kenya Independence Order in Council 1963* (10th December 1963). Schedule 2 of this Order in Council incorporated the Constitution of Kenya (1963).

[639] Robert Maxon 'Constitution-making in contemporary Kenya: Lessons from the twentieth century' (2009) 1:1 *Kenya Studies Review* 1.

eight regions,[640] each with a regional legislative assembly.[641] A bicameral parliament comprising the House of Representatives and Senate was established at the national level.[642] Under this Constitution, regional legislative assemblies were subordinate to the national legislative organs as any laws adopted by the assemblies were void if deemed incompatible with a law enacted by the the former.[643]

The colonial administration's interest was to ensure a seamless transition of the economy in the immediate post-colonial period. Securing property rights and stabilising mining activities, therefore, were considered minimal means for providing economic non-disruption. Thus, the Constitution protected property of any description from state expropriation unless sanctioned by law and only after payment of prompt and full compensation.[644] Further, the Constitution vested all unextracted minerals and mineral oils (other than common minerals) in the state.[645] The setting aside of trust land occupied under customary law for resource development processes could only proceed after compensation to any beneficial owner of such trust land.[646] In such a setting, aside for mineral development purposes, the consent of the individual or community group that owned the property was vitiated.[647]

Uncharacteristically for this era, the Constitution incorporated a royalty-sharing framework as a form of monetary benefit sharing.[648] Under this constitutional arrangement, any extractive resources valued above UK£100,000 had to satisfy the royalty-sharing structure.[649] The law obliged the national government to remit two-thirds of any royalty levied on extractives over the set threshold to the regions.[650] A sixth of the royalty paid out to the regions was earmarked for the resource-host region(s),[651] while one-half of the royalty was to be equitably shared among the remainder of the regions.[652] The computation of royalty payable was further subject to payment of any administrative expenses relating to sustaining the fiscal

[640] Kenya Constitution 1963 art 91.
[641] Ibid art 92.
[642] Ibid art 34(2).
[643] Ibid art 66(4).
[644] Ibid art 19.
[645] Ibid art 213(1).
[646] Ibid arts 208(10) & 209(4). See also, Kenya Constitution 1969 art 118(2)(2).
[647] Kenya Constitution 2001 (repealed) art 76(2).
[648] *Kenya Constitution 1963* supra note 640 art 140.
[649] Ibid.
[650] Ibid art 140(1).
[651] Ibid art 140(2).
[652] Ibid art 140(2).

regime governing royalty collection.[653] This open-ended provision implied that administrative costs could balloon to the extent of undermining royalties available for distribution.

The Constitution's disbursement formula of royalty revenues across all the regions, with the resource-host region receiving a higher percentage, was an apparent attempt to apply the derivation model of resource distribution.[654] The use of the derivation model suggests a sensitivity to the necessity to compensate resource-host regions while ensuring some benefits accrue to the rest of the country, albeit on an equitable basis.[655] On its face, this approach is progressive. However, given the Constitution did not spell out the legislative remit of Regional Assemblies, it is unclear how regions were expected to apply these royalty remittances. Further, it is uncertain whether regions were required to establish a specific extractive revenue account for the royalty allocations. That the scope of their legislative mandate extended only to common minerals,[656] it is unlikely that Regional Assemblies could legislate on the governance of royalties remitted. Instead, these revenues were probably treated as part of the region's general income to defray any fiscal obligations.

Another uncharacteristic feature of the independence Constitution is that it specifically exempted royalty payments with respect to soda ash from Lake Magadi from the royalty-sharing framework. Instead, it required the disbursement of the total royalties payable from the exploitation of soda ash to the resource-host region of the Rift Valley.[657] This provision, while enabling of resource-host region's interests, is, however, suspect. First, this provision's origin is linked to specific concerns raised by delegates representing the Maasai community during the Lancaster Constitutional Conference. The Maasai delegates revisited the unjust allocation of the mining lease over Lake Magadi area, arguing it contravened the Maasai treaties with the British.[658] This generous provision was inserted into the Constitution presumably to assuage

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[653] Ibid art 140 (3).

[654] Roy Bahl & Bayar Tumennasan *How Should Revenues from Natural Resources be Shared in Indonesia? Reforming Intergovernmental Fiscal Relations and the Rebuilding of Indonesia: The 'Big Bang' Program and Its Economic Consequences* (2004).

[655] Lorena Viñuela, Kai Kaiser & Monali Chowdhurie-Aziz 'Intergovernmental Fiscal Management in Natural Resource-Rich Settings' (World Bank Report No. 91343-GLB, 2014).

[656] *Kenya Constitution 1963* supra note 640 art 247(1); Second Schedule *Matters that are within exclusive legislative competence of Regional Assemblies* Clause 17. Common mineral within the meaning of the 1963 Constitution means:

> 'Clay, murrum, sand, soda (except soda forming part of the Lake Magadi soda deposit), limestone, sandstone or other stone (not being a precious or semi-precious stone) and such other mineral substances as may for the time being be declared by or under an Act of Parliament to be a common mineral.'

[657] *Kenya Constitution 1963* supra note 640 art 140(3).

[658] Memorandum 'Masai Claims under the 1904 and 1911 Treaties' (17 September 1962) CO822/2001, NA; also in CO822/2000, NA. Hughes op cit note 57 at 152.

Maasai demands and ensure mining proceeded with the least of interruptions. However, the full royalty's beneficiary is clearly the Rift Valley region, an expansive territory where Maasai country is but a small part. It is unclear how this royalty scheme served to compensate the Maasai community for the economic disadvantages occasioned by the unjust allocation of its land in favour of mining operations. Further, while the Regional Assembly in the Rift Valley existed,[659] dealings relating to mining were arguably outside its area of exclusive legislative competence.[660] The objective of the provision was, therefore, more nefarious. It sought to conceal colonial interest in retaining the *status quo* under the guise of protecting small tribes.[661] Moreover, the constitutional choice to remit full royalty payments, with respect to the most significant mining activity of the time, to the host region appears calculated at strengthening the region at the expense of the central government's enormous revenue needs.

Within fewer than three years of Kenya's attainment of its independence, the 1963 Constitution underwent rapid amendments. The net effect of these amendments was to eliminate the federal character of the state and entrench centralisation.[662] The abolishment of the bicameral parliament and regional assemblies served this purpose.[663] Significantly, any provisions touching on mining or distribution of royalties derived from mineral development were altogether deleted from the constitutional text, making the central government the dominant (if not sole) player in extractive resource governance.[664] In these circumstances, the effect of the royalty-based model of benefit sharing incorporated in the independence Constitution, in fact, never crystallised.

The import of the radical and sudden dismemberment of the initial constitutional compact discussed above effectively eliminated any hope of a constitutional basis for claiming resource benefits. This situation was borne out by the statutory environment governing extractives in the decades following these amendments.

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[659] *Kenya Constitution 1963* supra note 640 art 91(d) read with article 92. See also, Oyugi Walter 'Local government in Kenya: A case of institutional decline' in P Mahwood (ed) *Local Government in the Third World: The Experience of Tropical Africa* (1983) 107-140 at 118.
[660] *Kenya Constitution 1963* Ibid, art 102, read with Part I and Part II of Schedule 1.
[661] Yash Pal Ghai 'Independence and Safeguards in Kenya' (1967) 3 *East African Law Journal* 79.
[662] Ogendo op cit note 570 at 19. See also, John Mutakha Kangu op cit note 1 at 72-79.
[663] Act No. 14 of 1965 deleted Schedule 1 and Schedule 4 of the Constitution. With the deletion of Schedule 1 of the Constitution, legislative and executive competence now rested completely with the centre. See, Ogendo op cit note 570 at 20-21.
[664] Kariuki Muigua 'Reflections on managing natural resources and equitable benefit sharing in Kenya' (2019) 15:1 *Law Society of Kenya Journal* 1-42 at 2.

5.3.1 The Statutory Framework and Benefit Sharing: 1960s to 2010

The statutory framework governing extractives did not significantly focus on benefit sharing. The Mining Act, a colonial law, was retained with minimal amendments as the primary legislative instrument that guided mineral development.[665] In the main, the statute provided an inadequate regulatory regime for the sector and was focused mainly on ensuring the security of the mineral right for investment.[666] Pertinently, the Act vested the ownership of minerals under or upon any land on the Government.[667] While the standard for this period, this provision did not impose any obligation on the state to control and manage the resource in the peoples' interest. Thus, this Act paid scant attention to transparency and access to information necessary for citizen participation in the sector.[668] Additionally, the Act did not mandate public consultations in exploration or mining development processes.[669] Provisions touching on community engagement or local content were equally weak or lacking in the law.[670]

Like the 1940 Mining statute, the Petroleum (Exploration and Production) Act, which was first passed in 1984, assigned ownership of hydrocarbons to the Kenyan Government.[671] The Act neither obliged community involvement nor public participation. Instead, it focused its regulatory attention on the efficient negotiation of oil agreements and the exploration, development, extraction, production, treatment, storage, transportation, or disposal of oil and gas.[672] The only reference to any form of benefit sharing was with respect to local employment.[673]

In a departure from the then mining regime, this law requires several conditions to be implied into the Production Sharing Agreement (PSC) negotiated with potential developers of oil blocks.[674] One of these conditions is the obligation for preferential employment and training of Kenyan nationals in petroleum operations.[675] A condition for preferential use of products, equipment, and services locally sourced is another condition in any PSC.[676] The PSC was also

[665] Mining Act 1940 (Cap 306, repealed).
[666] See generally, Ayisi op cit note 51 at 25-46.
[667] *Mining Act* supra note 665 sec 4.
[668] Ayisi op cit note 51 at 25-46.
[669] Ambani & Wasunna op cit note 215 at 6.
[670] Ibid.
[671] The Petroleum (Exploration and Production) Act (Cap 308, 1984, repealed) sec 3.
[672] Ibid.
[673] Ministry of Mining *Mining (Employment and Training) Regulations* 1984.
[674] *The Petroleum Act 1984* supra note 671 Schedule 1.
[675] Ibid sec 9(1)*(g).*
[676] Ibid sec 9(1)*(h*).

expected to indicate a petroleum developer's financial contribution to a petroleum training fund established under the Act.[677] The law's intention was clearly to promote local content in the petroleum sector by enhancing the capacity of Kenyan citizens and the private sector to participate. What was 'local', was deemed achieved if employment targeted Kenyan nationals and if products consumed were from within the country. Therefore, the law's focus was not necessarily on the resource-host community or region but instead on the nation in its broader sense.[678] As this thesis seeks the alignment of benefit sharing with aspirations of resource-host communities, the provisions of the Petroleum Act of 1984 are inadequate.

As earlier discussed,[679] international environmental law's evolution began to influence legal developments touching on extractives in Kenya during this period.[680] Thus, in 1999, Kenya adopted new environmental legislation inspired by the Convention on Biological Diversity.[681] This law expanded rights available to Kenyans in a developmental context beyond those in the then Constitution. For instance, the law protected the right to a clean and healthy environment.[682] Courts were further required to apply sustainable development principles, including public participation, intergenerational equity, and social-cultural environmental management approaches, among others, to adjudicate environmental matters.[683] By mandating environmental impact assessments to precede any extractive processes,[684] the law was implicitly calling for a balancing of costs and benefits of extractive activities, the precursor to benefit sharing. Thus, in *Rodgers Muema,*[685] the court granted restraining orders against mining operations, which though in compliance with licensing conditions under the Mining Act of 1940 as amended, were in violation of the Environment Management Act.[686] This case is

[677] Ibid s 11(5).
[678] See generally, Nwapi op cit note 71 at 187.
[679] See ch 2.2.
[680] *CBD* supra note 82; Williams op cit note 52 at 49.
[681] Environmental Management and Coordination Act 1999.
[682] Ibid sec 3.
[683] Ibid sec 4.
[684] Ibid sec 58(2).
[685] *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* 2001 eKLR.
[686] Ibid at 6. The Court observed:

> It is not possible to read compliance in the old Mining Act Cap 306 when it is an offence in the later EMC Act No. 8 of 1999 to fail to submit approved Impact Assessment Report. The two Acts cannot stand together unless the sections of the later Act are made to prevail over those sections of Cap 306 that are parallel to the new Act. Those that sanction what the new Act condemns are to be regarded as repealed.

emblematic as it was founded upon communities' dissatisfaction with the inadequacy of information provided by the mining company on the impact of the proposed titanium mining.[687]

In contrast to the above progressive jurisprudence, other judicial decisions were emphatic that state control of the resource sector disclosed no place for any community claim for a share of accruing benefits. Thus, in *William Yatich Sitetalia*, the High Court declined to affirm the claim by the Endorois community for benefit share from proceeds of extractive activities within a protected area.[688] The court argued that a community's proximity to a natural resource legally classified as the property of the nation as a whole was an inadequate basis to claim benefit share.[689]

During this phase, the trend appears to be that courts were more amenable to come to the aid of applicants, including communities, in contestations against mining corporations, especially if the dispute related to an environmental harm cause of action.[690] In contrast, as against a state entity or local government, courts were reluctant to interpret the law in a manner that progressed any recognition of entitlements, especially benefit sharing. The non-recognition of communities' juridical status under the previous Constitution could be held responsible for constraining the evolution of a more supportive judicial philosophy on benefit sharing.[691]

5.3.2 Voluntary Approaches to Benefit Sharing: Revisiting Magadi Soda Company Operations

Despite the weak legal underpinnings for benefit sharing during the period under focus, in practice, corporations adopted some form of voluntary measures to manage host-community perceptions that they bore the disproportionate cost of extractive activities. As a matter of pragmatic business decision, many operators came up with community targeted social provisioning programmes, known as CSRs, in response.[692] Corporate social responsibility (CSR) encompasses a broad range of activities that corporations may engage in to demonstrate

[687] Elphas Victor Ojiambo *Battling for corporate accountability: experiences from Titanium Mining Campaign in Kwale, Kenya* (Conference Paper, 2002). See also, ch 7.4.2.
[688] High Court Civil Case No. 183 of 2000 *William Yatich Sitetalia, William Arap Ngasia et al. v Baringo Country Council* (Nakuru, Judgement of 19 April 2002).
[689] Ibid.
[690] David Karanja 'Titanic struggle in Kenya' (2002) *Multinational Monitor* 6.
[691] Singh op cit note 580 at 912-13 (discussing provision of a 1958 Order in Council establishing a Council of State to protect any one community against discriminatory measures harmful to its interests).
[692] P Kapelus 'Mining, corporate social responsibility and the "community": The case of Rio Tinto Richards Bay minerals and the Mbonabi' (2002) 39:3 *Journal of Business Ethics* 275-296.

a commitment to stakeholders' human, environmental, and labour rights.[693] While designed to facilitate partnership with host communities, most CSR approaches benefit individuals rather than serve egalitarian objectives,[694] lending themselves much more to capture.[695]

The absence of explicit legal obligations mandating CSR, notwithstanding at least six objects of CSR in the extractive sector, can be discerned from the literature.[696] They include legitimacy, moral responsibility to affected groups, improved public perceptions of mining activities, compliance with financing conditions, sustainability, and meeting reporting requirements under the extractive transparency initiative.[697] The corporate social responsibility approach of Magadi Soda Company, whose mining history has been highlighted in the previous section, provides an opportunity for interrogating the extent to which these CSR objectives are applicable.

The vast land under the mining lease[698] for extraction of soda ash by Magadi Soda Company (MSC)[699] covers four group ranches[700] within present-day Kajiado County (previously Olkajuado County Council). The semi-arid conditions of the county,[701] and the urban sprawl from greater Nairobi,[702] means that the land reserved for mining is critical for the survival of the cattle-herding livelihood of the Maasai.[703] Compounding the situation is the

[693] A Dahlsrud 'How corporate social responsibility is defined: An analysis of 37 definitions' (2008) 15 *Corporate Social Responsibility and Environmental Management* 1-13; Okoji Olufemi 'Corporate social responsibility of multinational oil corporations to host communities in Niger Delta Nigeria' (2010) 18:2 *IFE PsychologIA* 25.
[694] Duncan Ojwang 'Converging Ubuntu principles with corporate social responsibility to extend corporate benefits to communities' (2015) *East African Law Journal* 49-67 at 50.
[695] Brendan O'Dwyer 'Conceptions of corporate social responsibility: the nature of managerial capture' (2003) 16:4 *Accounting, Auditing & Accountability Journal* 523-557.
[696] Abuya op cit note 48 at 598.
[697] Ibid.
[698] Approximately 225,000 acres.
[699] MSC was established in 1911 making it the oldest mining concern in the country. Its ownership has changed hands severally over its century long existence. In December 2005, Tata Chemicals Company acquired majority stake of Brunner Mond PLC, MSC's longest owner.
[700] The group ranches are OldonyoNyokie, Olkeri, Olkiramatian, and Shompole which collectively form the Magadi community. Group ranches are legally constituted under Kenya's Land (Group Representative) Act (ch 287, 1968, repealed) enabling groups of people to jointly hold freehold titles to communal land. The group ranch effectively became a 'corporate entity' governed by elected group ranch committees legally mandated to run group ranch affairs. The group representatives are obliged 'to hold any property which they hold as such, and to exercise their powers as such, on behalf and for the collective benefit of all the members of the group, and fully and effectively to consult the other members of the group on such exercise.' Ibid s 8(2). This Act has since been repealed by the Community Land Act. See, *Community Land Act* supra note 65.
[701] Rutten op cit note 519 at 113-120.
[702] Ibid.
[703] Mary Kerubo Morara, Laban MacOpiyo & Wambui Kogi-Makau 'Land use, land cover change in urban pastoral interface: A case study of Kajiado County, Kenya' (2014) 7:9 *Journal of Geography & Regional Planning* 192-202.

impact of climate change that has dramatically altered seasonal rainfall patterns, further increasing this nomadic community's economic vulnerability.[704]

The foregoing is the context within which the MSC implemented their community-corporation involvement (CCI) efforts. The MSC adopted a tripartite concept of the community, the subject matter for CCI: the resource-host community in Magadi, the national government to which it paid royalty and other taxes, and its international customers.[705] It is instructive that the company did not consider the then local government – Olkajuado County Council – as part of its constituent communities.[706] This omission is particularly relevant since the County Council was the owner in trust of the Magadi concession area leased by the MSC.[707] Land related non-compensation is a key grievance in mining disputes, and the failure to include the local County Council appears problematic.[708]

Concerning the resource-host community, the MSC, in its earlier decades of operation, pursued a CSR approach that was largely paternalistic.[709] This paternalism is evidenced by its social provisioning efforts which mainly focused on single issues identified by the corporation, notably water and health.[710] During this stage, community involvement was ad hoc, reactive, and discretionary, thus contributing to perceptions of unequal distribution of social services across the group ranches.[711]

Three factors in the late 1980s and 90s influenced changes in the way MSC implemented its CSR strategy. First, diminished state capacity to deliver social services resulting from donor-led structural adjustment programmes placed the private sector and civil

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[704] David J Campbell 'The prospect for desertification in Kajiado District, Kenya' (1986) 152:1 *The Geographical Journal* 44-55.

[705] Judy N Muthuri, Wendy Chapple & Jeremy Moon 'An Integrated approach to implementing "community participation" in corporate community involvement: Lessons from Magadi Soda Company in Kenya' (2009) 85:2 *Journal of Business Ethics* 431-44 at 434.

[706] The leased land, the subject matter of the mining process by MSC, remained trust land as it had not been set apart in terms of Section 117of the Kenya Constitution (1963).

[707] County Councils were the trustees of previous lands reserved for specific ethnic groups. See, *Kenyan Constitution 1963* supra note 563 stated:

> Each County Council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interest or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.

Ibid art 115.

[708] Abuya op cit note 48 at 594.

[709] Muthuri et al op cit note 705 at 435.

[710] Muthuri op cit note 613, at 80.

[711] Muthuri et al op cit note 705 at 435.

society at the centre of development discourse.[712] Therefore, MSC found itself saddled with additional expectation that it would complement the state in the provision of social services in Magadi.[713] The second factor was the democratisation wave witnessed in the country and continent which opened new spaces for civil society to raise governance concerns and seek to correct historical wrongs.[714] Lastly, the period's international development philosophy called on corporations to adopt a 'triple bottom line' approach to business, emphasising the need to strike a balance between economic growth, ecological needs, and social progress.[715]

In response to the changed context, particularly the reality that it was unfeasible for the corporation to meet the burgeoning demands from communities, MSC commissioned a consultant to develop a community development plan (CDP).[716] The process, funded by the International Finance Corporation,[717] attempted to incorporate multiple stakeholders using the sustainable livelihoods framework.[718] This framework enabled the mapping of a range of assets available within the Magadi community and determined the extent to which they could be deployed in advancing the social, economic, and ecological priorities identified.[719] The process also established committees to undertake a process commonly known as SWOT analysis.[720] The objective of the process was to facilitate consultation, but in essence served to project the company as a responsible corporate citizen.

Moreover, through this process, the company successfully achieved – even if only in the short-term – social legitimacy, license to operate, and its social and economic objectives.[721]

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[712] Bernhard Reinsberg, Alexander Kentikelenis & Thomas Stubbs et al 'The world system and the hollowing out of State capacity: How structural adjustment programs affect bureaucratic quality in developing countries' (2019) 124:4 *The American Journal of Sociology* 1222-1257.
[713] Muthuri op cit note 613 at 81; Labonne op cit note 575 at 317.
[714] Mbaku John Mukum & Ihonvbere Julius Omozuanvbo *Multiparty democracy and political change: Constraints to democratization in Africa* (2006).
[715] Labonne op cit note 575 at 315.
[716] Muthuri op cit note 613 at 81.
[717] The International Finance Corporation (IFC) is the World Bank's private sector lending arm. The IFC has in place stringent performance standards which define prospective clients' responsibilities for managing their environmental and social risks. See e.g. IFC Performance Standard 7: Indigenous Peoples (2012) available at *https://www.ifc.org/wps/wcm*>, accessed on?. Following its support to MSC to formulate its CCI, IFC extended a loan of US$22 million to MSC to enhance its operations. See, World Bank *Magadi Soda, Kenya - Profits and development go hand-in-hand (English). Long-term partnerships with emerging players* (2010) available at *http://documents.worldbank.org/curated/en*, accessed on?.
[718] Per Knutsson 'The sustainable livelihoods approach: A framework for knowledge integration assessment' (2006) 13:1 *Human Ecology Review* 90-99. (Essentially, the framework organises the factors that constrain or enhance livelihood opportunities and shows how they relate to each other.)
[719] Muthuri op cit note 613 at 78-80.
[720] Willice O Abuya 'Mining conflicts and corporate social responsibility in Kenya's nascent mining industry: A call for legislation' in Ingrid Muenstermann (ed) *Social Responsibility* (2018) 61-81 at 71-2.
[721] Muthuri et al op cit note 705 at 441.

More fundamentally, establishing these structures to identify community priorities and monitor their implementation essentially decentralised decision making on benefits accessible by communities.[722] The CDP, in effect, became a form of local norm binding on the corporation but also the community and other stakeholders.[723]

However, this local norm's stability, in the form of MSC's CSR policy, unraveled when the interests of the corporation collided sharply with those of the host community. This tension became evident when political patrons of the corporation vetoed attempts by Kenya's National Constitutional Conference in 2004 to undertake a site visit to the mining site.[724] That a mining corporation successfully frustrated the highest constitution-making organ from holding a hearing on the social, environmental, and economic impacts of its operations is indicative of the corporation's political influence.[725] This influence is not dissimilar to other contexts where mining companies have captured political and/or security actors, enabling such corporations to pursue practices least advantageous to both the country and the resource community.[726] Conflicts between corporations and communities in these circumstances are thus not uncommon.[727]

Within the context of the renewal of its mining lease in 2004, MSC, like its predecessors a century prior, co-opted the local and national political and security establishment to harass any community member agitating for a more participatory negotiation process.[728] Arrests of dissenters were readily employed resulting in a diminished sense of trust that was needed to secure credible community-corporation relationships, thereby further weakening ownership of

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[722] Labonne op cit note 575 at 320.
[723] Szablowski op cit note 316 at 201-209.
[724] See generally, National Constitution Conference *Verbatim report of plenary proceedings held at Plenary Hall Bomas of Kenya* (February 11, 2004) 8. The National Constitution Conference made up of elected delegates from all the regions of the country is responsible for drafting the Bomas Draft Constitution, the precursor to the 2010 Constitution in Kenya. See, Jill Cottrell & Yash Ghai 'Constitution making and democratization in Kenya (2000-2005)' (2007) 14:1 *Democratization* 1-25.
[725] National Constitution Conference *Verbatim report* ibid:

> We shall not go to Magadi because some shareholders somewhere have decided that we should not be given the opportunity to see what is happening there. We have been given the right reasons why this is being cancelled; it is to the interest of some people outside who are exploiting that area, some people who are Africans-Kenyans who are doing terrible things to our country. Mr Chairman, we are saying this; let our people not be taken for a ride. The Maasais' have been exploited for too long, the people of Kenya have been exploited for too long.

Ibid at 8.
[726] The operations of Shell in Nigeria's oil fields especially in the 1990s is a case in point. See generally, *Social and Economic Rights Action Center* supra note 32.
[727] Szablowski op cit note 316 at 210-13.
[728] Tiampati op cit note 616.

any benefit-sharing measures.[729] This unsustainable relationship was further compounded by the deeply entrenched perceptions of the local community that the company's employment opportunities had barely benefitted them.[730] The company's failure to embrace a clear policy on affirmative placements for the local community is cited as evidence.[731]

It emerges from MSC's case that while CSR can lead to the cascading of benefits to communities,[732] it is unlikely to engender communities' sustainable participation in resource benefits processes in the absence of further legal safeguards. Consequently, MSC's CSR joins a disappointing array of initiatives on the continent that have failed to respond to communities' aspirations for genuine partnership and sustainable benefit sharing.[733]

5.4 The Management of Benefit Sharing after 2010

Frequent state-sponsored amendments to the 1963 Constitution, combined with the laws and policies enacted, created a framework that revalidated the sectarian, partisan, and exclusionary character of the colonial state.[734] Contrary to the aspirations held at political independence, the country remained in a state of social stagnation marked by malignant poverty of the vast majority of its people, political conflicts, and economic inequality.[735] The campaign for constitutional reform in Kenya was thus premised on the need to recreate a democratic, human rights compliant, and socially just state.[736]

Therefore, the Constitution of Kenya 2010 aimed to disrupt the oppressive colonial state, whose impact had detracted institutions and laws of independent Kenya from the local

[729] Hughes op cit note 592 at 153 (asserting that demands for an end to Brunner Mond Group's monopoly on soda extraction and registration of a community mining firm, the Maa Resources Company, which sought to extract 500,000 tonnes of soda annually, were unsuccessful).
[730] For instance, over 3,500 Africans employed to construct the 91-mile Magadi railways were from the Kavirondo region (western Kenya) rather than the Maasai community. Hill op cit note 591 at 48.
[731] Kaanto Lemarron, Urbanus Mwinzi Ndolo & Bernard Ndonga 'Implications of soda ash mining on the livelihoods of indigenous Maasai community: A case of Tata Chemicals Magadi, Kajiado County, Kenya' (2018) 3 *International Journal of Social and Development Concerns* 122-136.
[732] Abuya op cit note 48 at 603.
[733] Guler Aras & David Crowther 'The social obligation of corporations' (2008) 1:1 *Journal of Knowledge Globalization* 43-59.
[734] *In the Matter of the Speaker of the Senate & another* (2013) eKLR (The Supreme Court decried the Sessional Paper No. 10 of 1965 for skewing investment policy in favour of regions and provinces deemed high potential while deliberately encouraging disinvestment in poorer regions). Ibid at para 169. See also, Okoth Ogendo 'Constitutions without constitutionalism: An African political paradox' in Douglas Greenberg et al (eds) *Constitutionalism And Democracy: Transitions In The Contemporary World* (1993).
[735] Karuti Kanyinga 'The legacy of white highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya' (2009) 27 *Journal of Contemporary African Studies* 324-344.
[736] AL Bannon 'Designing a constitution-drafting process: Lessons from Kenya' (2007) 116 *Yale Law Journal* 1824-72 at 1831.

population's aspirations.[737] The extent to which this quest had been normatively achieved in the natural resource sector, and specifically regarding equitable benefit sharing, is further examined below.

5.4.1 Treatment of Benefit Sharing in the 2010 Constitution

The 2010 Constitution takes as its founding premise the need to ensure equity and social justice.[738] These policy objectives will be unattainable in the natural resource sector unless the burdens and benefits of using resources are equitably shared among different stakeholders and between the present and future generations.[739] Since benefit sharing is a tool for implementing the concept of intergenerational equity,[740] the Constitution must be read as supporting the recognition of benefit sharing in Kenya.

The Constitution acknowledges the sovereignty of the state over natural resources by vesting subsurface resources, such as petroleum and minerals found within the Kenyan territory, in the state to be managed by the national government in trust for Kenya's people.[741] Not only must the national government act as trustee over natural resources, but it is obliged to sustainably exploit, utilise, and manage these resources.[742] This provision's guiding philosophy is the public trust doctrine, which obliges the national government to be accountable to its citizens and ensure they participate in resource governance decisions directly or through elected representatives.[743] The public trust doctrine, especially when viewed from an intergenerational equity lens, imposes a duty on the state to manage extractive resources in the public interest. Where it fails, the public can employ legal means to compel the state to act in good faith.[744]

To ensure that the people of Kenya participate in extractive resource decision making, the right to information is crucial. Armed with access to information, as provided under the Constitution[745] and the law,[746] citizens can hold government accountable for the management

[737] *Speaker of the Senate* supra note 734 para 173 (concurring but separate to the opinion of CJ Mutunga).
[738] Kangu op cit note 1 at 119. See also, *Constitution* supra note 12 art 10(2)*(b)*.
[739] Constitution ibid art 201.
[740] Franck op cit note 312 at 75.
[741] *Constitution* supra note 12 art 62(1)*(f)* read together with sub art (3).
[742] Ibid art 69(1)*(a)*.
[743] Lavanyya Rajamani 'Doctrine of public trust: A tool to ensure effective State management of natural resources' (1996) 38:1 *Journal of the Indian Law Institute* 72-82.
[744] Kenneth K Orie 'Constitutional arrangements for environment and development' in Juma et al op cit note 578, 331-361 at 350.
[745] *Constitution* supra note 12 art 35.
[746] Gazette Supplement No. 152 (Acts No. 31) Access to Information Act 2016.

of extractives. By virtue of the right to information, the national government is obliged to provide information to the public regarding the extractive sector ranging from the contents of contracts signed with foreign or local investors to revenues received from taxes and royalties. Such involvement of local communities in the management of extractive resources is an indication of good governance.[747] The Constitution's access to information regime is further reinforced by requiring that concessions for natural resource exploitation must be subjected to parliamentary approval.[748] The requirement for both chambers of Parliament to engage with natural resource agreements facilitates the Senate, as guardian of devolved governance,[749] to create an opportunity for county governments to provide their input on the fairness, or otherwise, of such contracts. If well utilised, such an opportunity will undoubtedly enable community concerns on mining concessions and development to be brought forward, a factor in engendering stability in the resource sector.

The Constitution requires the state to facilitate equitable sharing of benefits accruing from resource exploitation but does not explain the meaning of this term.[750] However, three opportunities are made available for further development of the concept. First, by directly incorporating international treaties ratified by Kenya as domestic law under the Constitution,[751] any developments in international law touching on benefit sharing can be imported into the country.[752] As elaborated previously in this thesis, several international treaties are relevant to the subject of benefit sharing .[753] The interpretations of these treaties by monitoring bodies are equally significant.[754] In particular, the Nagoya Protocol, which is dedicated to benefit sharing, has been ratified by the Kenyan State.[755] Secondly, courts are guided by the Constitution to develop the law, give effect to fundamental rights, and promote good governance in its constitutional interpretation.[756] As grievance mechanisms, courts have been accorded the

[747] J Gaventa 'Towards participatory local governance: Assessing the transformative possibilities' in S Hickey et al (eds) *Participation: From Tyranny to Transformation* (2004) 25-41.
[748] *Constitution* supra note 12 art 70.
[749] Ibid art 96(1).
[750] Ibid art 69(1)*(a), (d), (f).*
[751] Ibid art 2(6) (provides 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.)
[752] Tom Kabau & Chege Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44:3 *The Comparative and International Law Journal of Southern Africa* 293-310.
[753] Chapter 2.
[754] See, *Endorois* supra note 212; Also, *Case of the Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015).
[755] Nagoya Protocol supra note 82. Kenya ratified this Protocol on 12 October 2014 online at *https://www.cbd.int/abs/nagoya-protocol/signatories/* accessed 14 Jan 2021.
[756] *Constitution* supra note 12 art 20(3)*(a)* & 259(1)*(c).*

opportunity to conceptualise benefit sharing in the Kenyan context when seized with resource disputes.

Furthermore, the Constitution has mandated Parliament to make laws aimed at regulating the exploitation of minerals and petroleum in Kenya for the benefit of its people.[757] Parliament is also enjoined to enact legislation to promote local communities' enjoyment of benefits from investment in property within their locality.[758] Consequently, various policies and statutes have been passed by the Parliament to implement these Constitutional provisions.

5.4.2 Benefit Sharing Under the Mining Legal and Policy Regime

At the time of this dissertation, the mining legal and policy regime comprises the Mining and Mineral Policy[759] Mining Act[760] and several Mining Regulations.[761] A review of these frameworks is necessary to determine how they have conceptualised benefit sharing and whether the institutions for resource governance are sufficiently resilient to mitigate the resource curse challenge.

The Mining and Mineral policy is the first overarching policy that seeks to reform the mining sector by setting down principles and strategies for sustainable exploration and exploitation of mineral resources in the country.[762] The Policy enjoins the government to put in place a transparent, efficient, and unified framework aimed at regulating the mining sector.[763] The Policy also calls for mechanisms that ensure intergenerational equity in exploiting mineral resources and equitable access to benefits from mineral development.[764] A mechanism that facilitates local participation in mining by providing accurate information to enable communities to participate fully in decision making is compatible with the Policy's aims.[765]

Specific to benefit sharing, the Policy commits the government to develop and implement a framework for equitable sharing of benefits among the national government,

[757] Ibid art 71.
[758] Ibid art 66(2).
[759] Ministry of Mining & Petroleum *Mining and Minerals Policy Sessional Paper* (No. 7 of 2016).
[760] *Mining Act* supra note 65.
[761] *Community Development Agreement Regulations* supra note 71; Draft Public Finance Management (Mineral Royalty Fund) Regulations 2019.
[762] *Minerals Policy* supra note 759 at 7.
[763] Ibid.
[764] Ibid at 8.
[765] Ibid at 11.

county governments, and local communities.[766] Local content and local equity participation are further emphasised under the Policy as means for devolving resource benefits.[767] Therefore, the Policy sets the foundation for a benefit-sharing regime responsive to the needs of not only the national and county governments, but also resource-host communities.

The Mining Act formulated alongside the Mining Policy is the main post-2010 regulatory and institutional framework for the country's mining sector.[768] It reiterates the constitutional position that property in all minerals in the country belongs to the republic and is vested in the national government in trust for the people.[769] The emphasis on republican ownership of mineral resources suggests that every political administration should make decisions touching on mineral resources circumspectly as stewards and not private holders. This reasoning is given credence by the statute's elaborate provisions on principles and values applicable to the mining sector.[770] For instance, the ministry in charge of mining should be guided by the principle of public participation by providing information relating to mining activities to citizens.[771] This method of mineral development will enable communities to participate fully in decision making regarding the formulation of policies, project plans, and the commercial exploitation of mineral resources.[772] Such an approach will further help promote transparency and accountability in line with the fiduciary arrangement that has been created between the national government and the people through the doctrine of public trust.[773]

The Mining Act further integrates community participation in several mining processes. Mining developers must give preference to services delivered by the community[774] and extend affirmative employment opportunities to them and other Kenyan nationals.[775] An obligation to implement social investment programmes for a community where possible is further imposed on an operator.[776] No mining rights over community land are permissible unless prior consent is granted by the authority mandated to administer community land. In the case of unregistered community land, the National Land Commission must give such permission.[777] While this

[766] Ibid at 16.
[767] Ibid at 16.
[768] *Mining Act* supra note 65 sec 2(1).
[769] Ibid sec 6(1) and (2).
[770] Ibid sec 119.
[771] Ibid sec 5.
[772] Ibid sec 10(2)*(a)*; *Constitution* supra note 12 art 232(1)*(d)*; Ayisi op cit note 51 at 29.
[773] *Mining Act* supra note 39 s 6(1)*(c).*
[774] Ibid s 50(b).
[775] Ibid s 47(1).
[776] Ibid s 47(2)*(f)*.
[777] Ibid s 38(1)*(a)(b)*.

provision appears ambiguous, the Act clarifies that such consent is presumed once a legally binding agreement on compensation has been entered into between a community and an entity involved in the extractive activity.[778] The community, the beneficiary of all these entitlements, is defined as a group 'living around' an exploration or mining development area or a group displaced from land in which mining activities occur.[779] The idea of a community 'living around' a place might also be ambiguous when viewed against the reality of nomadic communities, not an uncommon phenomenon in Kenya.

The Act obliges a large scale mining operator to implement a community development agreement (CDA) as prescribed in the Regulations.[780] What constitutes a large scale operation under the Act is unclear, thus creating uncertainty on the scope of the Regulations' application.[781] Given the innovative use of CDAs in other contexts, however, nothing precludes any other mining operation interested in managing stakeholder expectations and enabling sustainable mining operations from entering into a CDA.[782]

The Mining Regulations governing CDAs were enacted in 2017.[783] These regulations seek to provide specific procedures to facilitate benefit sharing and foster transparency of community development activities in mining.[784] The CDA is expected to cover a range of issues such as the county government's role, opportunities for educational improvement for community members, employment, infrastructural support, and assistance in setting up microenterprises.[785] Special programmes for marginalised communities and monitoring of funds usage are other areas to be addressed by the CDA.[786]

A key innovation of the CDA Regulations is the creation of a CDA Committee, an institution of 14 members drawn from a wide range of stakeholders representing the national and county government, the community, civil society, and the mining operator.[787] The CDA Committee monitors compliance with the CDA, provides a forum for dispute resolution and

[778] Ibid sec 38(2)*(a)(b).*
[779] Ibid sec 4.
[780] Ibid sec 47(2)*(g)*.
[781] Ibid sec 14.
[782] Juliet Mazera 'Public participation and Community Development Agreements' in Ambani & Wasunna op cit note 215 at 77-90; Claran O'Faircheallaigh 'Community Development Agreements in the mining industry: An emerging global phenomenon' (2013) 44 *Community Development* 222-38; Dupuy op cit note 56, 200-214.
[783] *Community Development Regulations* supra note 71.
[784] Ibid reg 3.
[785] Ibid reg 8(4).
[786] Ibid reg 8(3).
[787] Ibid reg 7.

redress, and is the platform for engaging the community on the extent to which the CDA funding matches their development priorities.[788] As the CDA internalises most of the issues ordinarily responsible for the conflict between the community and extractive corporation, it is expected that its existence and implementation will markedly lower disagreements and undermine the resource curse. However, it is noteworthy that six out of the 14 members of the CDA Committee are not necessarily community members.[789] Depending upon the power they wield, these six may have a disproportionate influence on the operation of the CDA Committee, raising questions of legitimacy, or not, of such committee.

The law requires the holder of a mineral right to pay such amount of royalties to the national government as determined by the Cabinet Secretary in charge of mining.[790] The wide latitude given to the Minister might be problematic, as the overarching interests of the national government and the investor may dominate decision making to the disadvantage of other stakeholders.[791] The royalty-sharing scheme allocates 70 per cent of whatever royalties are negotiated to the national government, with counties and communities receiving 20 and 10 per cent, respectively.[792] The law does not spell out the time frames within which the portion of royalties devolved to counties or communities will be remitted, thus making the remittance at the discretion of the national government. Regarding community royalty entitlement, it is unclear from the legislation what entity is to receive this share on behalf of the community.

To further concretise royalty-sharing procedures, the Public Finance Management (Mineral Royalty Fund) Regulations were proposed.[793] However, the Regulations remain in draft form five years into the implementation of the Mining Act.[794] If adopted, the Regulations set out detailed rules to guide the implementation of the royalty-sharing provisions of the Act.[795] Rather than allow counties and communities to administer their respective share of

[788] Ibid reg 7(3).
[789] Ibid reg 7. They include representative of the governor of the county, representative of national government within the county, three representatives from the mining operator, one member representing civil society, the member of parliament from the area, and the ward representative of the ward within which mining operations are taking place.
[790] *Mining Act* supra note 65 sec 183(1)(2).
[791] Ibid sec 5 (providing principles that the Cabinet Secretary must adhere with, including the requirement that national values set down in article 10 of the Constitution be satisfied).
[792] Ibid, sec 183(5).
[793] Draft Public Finance Management (Mineral Royalty Fund) Regulations, 2019 online at *https://www.petroleumandmining.go.ke/*, accessed 20 January 2021.
[794] See, Commission on Revenue Allocation *Recommendation on the basis for equitable sharing of revenue between national and county governments, Financial year 2020/2021* (2019) 24-25.
[795] *Royalty Fund Regulations* supra note 793 reg 4.

royalties, the Regulations propose the establishment of a Mineral Royalty Fund (MRF)[796] to which royalties devolved to counties and communities under the Mining Act are paid.[797] The governance of the proposed fund is by a seven-member board, three of whom are members of the executive of the national government and only one representing counties.[798] This board is expected to receive, review, and approve project proposals submitted by the resource-host counties and communities and monitor the implementation of funded projects.[799]

The Draft Regulations further propose to establish an 11-member Mining Community Development Committee (MCDC) chaired by the Governor of the resource-host county.[800] The other members comprise representatives of the resource community, civil society, the County Assembly Member representing the host community, as well as the Member of the National Assembly of the area inhabited by the host community.[801] The MCDC is the institutional forum by which the resource community proposes projects or programmes to be financed by the MRF.[802] It is envisioned by the Regulations that the MCDC will also regularly assess whether the programmes funded by the MRF satisfy the aspirations of the resource community and that the programmes do not duplicate other development efforts by county or national government.[803] By not prescribing how host counties will propose programmes to be submitted to the MRF for funding, the Regulations appear to demonstrate deference to county institutions to develop the regulatory regime. This intention is, however, undermined by the fact that aside from this narrow legislative domain in which national law allocates for county regulatory action, very little space is granted to counties to define its vision for governance of resource benefits. Instead, the county is circumscribed to legislate within the confines of the parameters already outlined by national level legislation leaving it with no space to innovate on how best to disburse revenue assigned to the county as well as communities.

While the MRF Regulations have yet to be enacted, it is a top-down effort at control in which national government retains stranglehold over royalties devolved to counties and communities. This approach denies counties and communities an autonomous say on how to deploy the rents allocated to them by Statute. It thus detracts from the Constitution's intention,

[796] Ibid reg 3.
[797] Ibid reg 5.
[798] Ibid reg 7-8.
[799] Ibid reg 9.
[800] Ibid reg 20(1) & 21(1)*(a)*.
[801] Ibid reg 21(1)*(b)-(j)*.
[802] Ibid reg 21(4)*(b)*.
[803] Ibid reg 21(4)*(d)(f)(g)*.

defeats the quest for inclusive resource governance, and thus weakens mechanisms necessary to undermine the resource curse. Whereas the Regulations propose the disbursement of resources from the fund through developing a programme – a structured plan that defines concrete goals and how to achieve them – [804] such a programme requires capacities that may be absent from the resource-rich community. In any event, in the absence of these unsatisfactory Regulations, the existing ambiguities render the Mining Act's provisions touching on royalty-sharing mechanisms virtually inoperable.[805]

5.4.3 Benefit Sharing Under Petroleum and Energy Policies, Laws, and Regulations

The discovery of commercially viable oil and coal deposits in Kenya happened simultaneously with the country's adoption of a new Constitution, hence accelerating demands for policy reforms in the sector. The National Energy & Petroleum Policy, enacted as part of these reforms,[806] advocates for the establishment of harmonised regulatory and institutional mechanisms aimed at governing energy development activities for the country's benefit, as well as for the mitigation of challenges associated with resource development elsewhere.[807] The policy covers upstream petroleum activities, coal development, and geothermal, among other sources of energy.

The Policy proposes legislation to provide appropriate mechanisms for access to information by the people on how the state is managing resources for the citizens' benefit.[808] Such legislation should also provide a framework to ensure seamless coordination between government, resource operators, and communities in the petroleum sector.[809] The development of mechanisms for sharing of benefits between the national and county governments and local communities is a further aim of the policy.[810] The policy sets out to address this challenge due to the lack of an agreeable formula for working out national government, county government, and local community share of benefits from energy development.[811] In sum, this policy's proposal is aimed at promoting good governance by ensuring transparency and accountability in oil and gas development.

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[804] Ibid reg 19.
[805] See chap 7.4.1.
[806] Ministry of Energy *National Energy Policy*, 2018 online *at https://kplc.co.ke* accessed on 23 June 2020
[807] Ibid at 29.
[808] Ibid at 114.
[809] Ibid at 120.
[810] Ibid at 12 para 7*(c)*.
[811] Ibid at 65.

The Government used this policy to draft two important laws: the Petroleum Act[812] and Energy Act.[813] The Petroleum Act[814] is the latest law that regulates the petroleum sector in Kenya.[815] It affirms that all petroleum resources existing in their natural condition within Kenya and its continental shelf are vested in the national government in trust for Kenya's citizens.[816] Like the Mining Act, the guiding philosophy underpinning this provision is the public trust doctrine that obliges Kenya's government to be accountable to its people.[817] This responsibility is satisfied by giving a say to local communities in the management of petroleum activities and enabling community participation in petroleum benefits.[818]

Consequently, the Act has the most elaborate transparency requirements of all extractive related laws. First, it requires the ratification by Parliament[819] of production-sharing agreements[820] and field development plans.[821] The involvement of Parliament – both the Senate and National Assembly – in the ratification process of these instruments will undoubtedly engender further public scrutiny by devolved units and communities.[822] The law on parliamentary ratification enjoins the legislature to consider the adequacy of stakeholder consultation and the benefits accruing to the country and the local community under a petroleum agreement as material in approving or disavowing such a contract.[823]

The Cabinet Secretary is mandated by the Petroleum Act to publish all petroleum agreements, royalties, and payments received by national and county governments and communities arising from any petroleum development activities.[824] This dissemination of information provides a second-order opportunity to the public, and especially resource-host counties and communities, to assess the level of their involvement in petroleum development

[812] *Petroleum Act* supra note 41.
[813] Energy Act, 2019 GG Supplement No. 29 (1).
[814] *Petroleum Act* supra note 66.
[815] Ibid s 3.
[816] Ibid s 14(1). Reference to resources within Kenya's continental shelf in the legislation could have been informed by ongoing maritime dispute between Kenya and Somalia presumably over vast oil and gas resources within the shared border in the Indian Ocean. See, Fayokemi Olorundami 'The Kenya/Somalia maritime boundary delimitation dispute' in Z Yihdego et al (eds) *Ethiopian Yearbook of International Law* (2017) 173-185.
[817] Petroleum Act, ibid.
[818] Lavanyya Rajamani 'Doctrine of public trust: A tool to ensure effective State management of natural resources' (1996) 38:1 *Journal of the Indian Law Institute* 72-82 at 81.
[819] *Petroleum Act* supra note 66 sec 31(1).
[820] Ibid.
[821] Ibid at 30 (sets down technical activities and processes required to be incorporated into a field development plan).
[822] Parliament is required to engage the public ahead of its legislative or oversight action. *Constitution* supra note 12 art 118.
[823] Natural Resources (Classes of Transactions Subject to Ratification) Act 2015 s 9.
[824] *Petroleum Act* supra note 66 sec 119(1).

operations. Additionally, any cash or in-kind support to communities made by a petroleum development contractor is also part of this disclosure regime.[825] While CSR is not a legal requirement under the law, the condition that information on a corporation's community-related activities be disclosed and published gives incentives for institutions to be deliberate on CSR.[826]

Under the Petroleum Act, the community has a right to prior information ahead of any upstream development operations within the county or sub-county.[827] The law expects that communities seized with information before any resource development within their locality will participate constructively in dialogue processes and repudiate involvement in resource-related conflicts.[828] Although the law does not go as far as mandating community consent, it requires that community consultation must precede any award of a petroleum development permit.[829] Such community consultation must use the structures set down by counties under the County Government Act.[830]

The Petroleum Act resolves the issue of monetary benefit sharing by proposing a formula for apportioning profits among the national government, county government, and community. Profit oil is first shared between the contractor and the national government.[831] This is based on the understanding that under the production sharing agreement, which is the model adopted by Kenya, petroleum produced is divided into cost oil and profit oil.[832] Cost oil is the portion that is allocated towards reducing the upfront costs invested by the developer in the exploration and development of oil operations.[833] Only when such cost oil has been secured is profit oil available for sale and proceeds shared between the operator and national government.

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[825] Ibid sec 119(2)*(c), (d).*
[826] Ibid sec 125(h).
[827] Ibid sec 125(a).
[828] See generally, Idemudia op cit note 575 at 183-93.
[829] *Petroleum Act* supra note 66 sec 24(8).
[830] Ibid sec 24(9)*(b)* (These structures include information technology platforms, county citizen fora, and citizen fora at subcounty, ward, and village levels.); See, County Government Act (17 of 2012) sec 19 & 48.
[831] *Petroleum Act* supra note 66 sec 57.
[832] Ibid Second Schedule, *Production Sharing Contract* clause 38.
[833] For instance, the oil operator in Kenya's Turkana oil fields claims to have already incurred US$1.5 billion in exploration and development costs so far. This is the portion of cost oil that must be progressively recovered. The non-audit of developer's costs is a threat to the country's intent to benefit from the resource revenue. See, *Business Daily* 'Tullow's sh.150 billion exploration bill raises queries in costing methods' 18 April 2016, available at *https://www.businessdailyafrica.com*, accessed on 20 Jan 2020.

Based on this understanding, the Act proposes that the national government's profit share is remitted to a dedicated Petroleum Fund.[834] Under the formulae, the national government retains 75 per cent of the revenue in the fund, while the host county and community receive 20 and 5 per cent, respectively.[835] There is a sunset clause of 10 years within which the formulae for revenue sharing will be reviewed.[836] To guard against misuse of revenues devolved, the Act requires that funds allocated to the community shall be paid out to a trust fund established by the county government and managed by a board of trustees.[837] County Assemblies are obliged to legislate on the trust fund's institutional architecture and establish a framework for prudent management of funds earmarked for the community for present and future generations.[838]

Local content is one of the most developed and crystallised principles of benefit sharing under the Petroleum Act. It is defined as value addition brought to the Kenyan economy through capacity building, investment in procuring locally available workforce, services, and supplies for the sharing of benefits from petroleum development.[839] No petroleum agreement will be approved unless it provides for local content.[840] Both annual and long term local content plans must be produced by petroleum developers and submitted to the Energy and Petroleum Regulatory Authority, the primary institutional regulator of the sector.[841] The Authority is further enjoined to monitor local content plans, prepare guidelines on local content, set minimum requirements, and recommend regulations.[842] The new law's transitional provisions save local content regulations, formulated under the repealed law, until successor local content regulations are developed.[843] A County Executive member responsible for energy and petroleum is nominated to the board of the Authority by the Council of Governors.[844] This

[834] *Petroleum Act* supra note 66 sec 57(2).
[835] Ibid sec 58(1).
[836] Ibid sec 58(5).
[837] Ibid sec 58(3).
[838] Ibid sec 58(4).
[839] Ibid sec 2.
[840] Ibid sec 19(1)*(g)*.
[841] Ibid sec 50(2). The Energy & Petroleum Authority is a creature of Section 9 of the Energy Act (2019). It is the successor of the Energy Regulatory Commission established under the repealed Energy Act. It has expansive mandate spanning over 40 functions. The political contestation that informed its multi-scalar roles have been raised elsewhere. See, Matthew Tyce 'Unrealistic expectations, frustrated progress and an uncertain future? The political economy of oil in Kenya' (2020) 7 *The Extractive Industries and Society* 729-737.
[842] *Petroleum Act* supra note 66 sec 50(1)(2); *Energy Act* supra note 813 sec 10(ee). The Regulations were formed pursuant to s 255(1)*(b)* of the Energy Bill. Ibid preamble.
[843] *Petroleum Act* supra note 66 sec 128(2)*(e)*.
[844] *Energy Act* supra note 813 sec 12(1)*(e)*.

nominee presumably ensures that counties' interests are brought to bear in the policy and programmatic decisions of the board.

The Energy Act consolidates the energy sector laws and seeks to align the principles and institutions under the law with the 2010 Constitution.[845] Relative to revenue accruing to the state, the Act obliges operators to pay a royalty on the value of the geothermal resources extracted at the wellhead.[846] During the first ten years of production, the law prescribes the range of royalty payable to national government at between 2 and 2.5 per cent of the value of geothermal energy produced.[847] Subsequently, the royalty rate increases to between 2 and 5 percent.[848]The variation is based on the assumption that in the initial decade of production, the operator should be allowed to recoup costs of energy development, hence the low royalty rate.

The Act contemplates that the royalty revenue collected by the national government from geothermal exploitation shall be shared among the national and county governments, and communities at the rate of 75, 20, and 5 per cent, respectively.[849] The county allocation of royalties is further subjected to a cap and will only apply if it does not exceed the revenue share allocated to the county in a financial year under article 203(2) of the Constitution.[850] The community's share of royalty is also subjected to the ceiling that it must not exceed a quarter of the amount appropriated to the county government by Parliament in the financial year.[851] Similar to the Petroleum Act, the local community's share shall be remitted to a trust fund. In contradistinction however, while the governance structure for the trust under the Petroleum Act is prescribed by a law adopted by the County Assembly, the board of trustees under the Energy Act is appointed by regulations enacted by the Cabinet Secretary.[852]

Operators governed under the Energy Act, including coal and renewable sources of energy providers, are obliged to comply with local content requirements.[853] Monitored by the Energy and Petroleum Authority, the operators' local content plans must ensure that service providers within the county and goods manufactured in the country are accorded priority.[854]

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[845] Ibid.
[846] Ibid sec 85(1).
[847] Ibid sec 85(1)*(a)*.
[848] Ibid sec 85(1)*(b)*.
[849] Ibid sec 85(3)*(a)-(c)*.
[850] Ibid sec 85(3)*(a)*.
[851] Ibid sec 85(3)*(b)*.
[852] Ibid sec 85(3)*(b)*.
[853] Ibid sec 206(3).
[854] Ibid sec 206(3)*(a)*.

The legislative process of both the Petroleum and Energy laws was lengthy, and local content regulations quite unusually preceded their enactment.[855] The fact that Parliament enacted these regulations ahead of legislation represents a complete reversal of the legislative cycle, which warrants the enactment of subsidiary legislation only after parent law is in place.[856] It thus suggests a very high degree of policy consensus on the issue.

The regulations require that operators in the energy sector give Kenyan citizens first consideration for employment and training.[857] Similar preference is extended to services offered by Kenyan citizens and goods manufactured within the country.[858] An obligation is imposed on a non-indigenous operator in the energy and petroleum sector to enter into a joint venture relationship with an indigenous Kenyan company and afford it at least 10 per cent equity participation.[859]

Ahead of commencing any extractive activity, an operator is required to submit a local content plan to the Energy Regulatory Commission (or its successor).[860] A dedicated unit on local content within the Commission[861] is required to review the local content plan and ensure the plan complies with various thresholds set down in the Schedule to the Regulations.[862]

The Regulations establish elaborate monitoring, reporting, and sanctions frameworks for local content. For instance, an extractive operator is enjoined to submit to the Authority an Annual Local Content Performance Report covering all its projects and activities for the year under review.[863] This performance report is reviewed by the Unit and approved by the Authority. It is publicly accessible upon application.[864] Clear and measurable local content

[855] Energy (Local Content) Regulations 2014.
[856] ElizabethWeir 'Delegated legislation: the weak link of parliamentary accountability?' (1997) 20:3 *Canadian Parliamentary Review* 2.
[857] L*ocal Content Regulations* supra note 855 reg 6.
[858] Ibid reg 6(2).
[859] Ibid reg 6(3). An indigenous company is defined by the Regulations as one in which Kenyan citizens have majority shareholding and 80 per cent of whose management positions are held by Kenyans. Ibid reg 2 para 6. See also, Ana Maria Esteves, Bruce Coyne & Ana Moreno *Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors* (Revenue Watch Institute Briefing, July 2013) 2-3 (for view that ownership of a company or the country of its registration should not play any critical role in the formulation of local content policies).
[860] *Local Content Regulations* supra note 855 reg 6.
[861] Ibid reg 7.
[862] Ibid reg 8 & First Schedule.
[863] Ibid reg 33.
[864] Ibid reg 36.

obligations have been held to curtail inducement for operators to cut corners, to fulfil local content requirements to remain in business, and to mitigate corruption within the sector.[865]

The Regulations impose graduated sanctions for infringement of local content regulations. These sanctions range from monetary penalties to the non-renewal of operating licenses.[866] Any party aggrieved by the Energy Regulatory Authority's decision may appeal the sanctions to the Energy and Petroleum Tribunal.[867]

The Local Content Regulations, while progressive, view local content with little regard to the interests of either resource-rich regions or host communities. Although the same opportunities are available to indigenous companies owned by resource-host communities in theory, existing inequalities will serve to exclude community participation.[868] As such, unless specific measures are put in place to ensure capacity building and transparency, it is likely, especially in the Kenyan context, that local content beneficiaries will invariably come from outside the resource-rich region or community.[869] The problem posed by this development is to undermine the efficacy of local content as a form of benefit sharing from responding to the challenge of the resource curse.[870] Therefore, the need for local content to transform into 'community content' must become an integral policy choice for the attainment of social license to operate.[871]

It follows from the foregoing discussion that more needs to be done to make local content effective and inclusive of resource-host communities' aspirations while simultaneously ensuring that the national interest is equally served. Balancing these imperatives will call for reimagining the regulations and institutional architecture. For instance, while the Energy Regulatory Authority plays a vital role in regulating local content issues, the board of the Authority has no representative from resource-host communities.[872] Neither are resource

[865] Nwapi op cit note 71 at 198.
[866] *Local Content Regulations* supra note 855 reg 43.
[867] Ibid reg 44.
[868] Office of Auditor General *Implementation and Monitoring of Provisions on Local Content in the Petroleum Extraction and Production Industry in Kenya* (2016). The report details among others that US$7 million was received by the Ministry of Petroleum as training levy from oil companies, but beneficiaries of training programmes were unknown. Ibid at 8.
[869] Ibid.
[870] Ovadia op cit note 446 at 399 (Author avers that the general lack of information about local content frameworks allows the policies to serve as mechanisms for elite accumulation).
[871] Michael Warner *Community Content: The Interface of Community Investment Programmes with Local Content Practices in the Oil and Gas Development* (ODI, Sector Policy Brief Note 9, 2007) 5.
[872] *Energy Act* supra note 813 sec 12(1); Kenya Extractive Policy Dialogues, Paper No. 2 *Developing a sustainable in country value addition strategy: Real time policy options for Kenya's Petroleum Sector* (2018) 4.

counties represented explicitly in the Authority's board. The absence of these stakeholders' voices within the board results in diminished perceptions of the legitimacy of local content decisions.

5.4.4 Consolidated Approach to Benefit Sharing

While the laws reviewed in this chapter – the Mining Act, Petroleum Act, and Energy Act – along with their respective Regulations, provide for different forms of benefit sharing, there is an absence of coherence in several critical areas that could constrain implementation.[873] First, the idea of local content cutting across the different regimes provides different definitions and scope. Secondly, the monetary benefit share in the form of royalties or profits under the various laws provides different entitlements for national governments, county governments, and communities. The lack of a clear rationale for these differences is not clearly articulated. Lastly, the definition of what constitutes community, the recipient of benefits from extractives, varies across the various laws.

The challenges outlined above highlight the need for harmonising legislation or policies. The Natural Resources (Benefit Sharing) Bill[874] (hereinafter Benefit Sharing Bill) was proposed by the Senate with the aim of establishing a system by which benefits from resource exploitation will be shared between resource developing entities, the two levels of government, and local communities.[875] The scope of the Bill extends to several natural resources, including minerals, oil, and gas.[876] The Benefit Sharing Authority proposed by the law has the power to extend the law's application to other natural resources not explicitly mentioned.[877]

The Bill defines benefit sharing as the fair and equitable distribution of benefits derived from natural resource exploitation.[878] A local community is defined as people living within a

[873] Neil MacCormick 'Coherence in legal justification' in A Peczenik et al (eds) *Theory of Legal Science* (1984). (Contends that the coherence of a set of legal norms consists in their being related, either by virtue of being the realisation of some common value or values, or by virtue of fulfilling some common principle or principles. The more unified the set of principles underlying legislative acts, the more coherent law is). Also, Joseph Raz 'Reasoning with rules' (2001) 54:1 *Current Legal Problems* 1-18.
[874] *Benefit Sharing Bill* supra note 67.
[875] Ibid, Memorandum of Objects clause.
[876] Ibid clause 3.
[877] Ibid clause 3(2).
[878] Ibid clause 2 para 4.

resource-rich ward,[879] the subject matter of resource exploitation.[880] This definition of a community differs from that spelled out in the Mining Act, Petroleum Act, and, more importantly, the Community Land Act.[881] The latter statute vests community land on communities identified based on identity and interest.[882] That implies if a community is dis-contiguous to a ward, this will pose a challenge in determining beneficiaries under the Benefit Sharing Bill. This is especially significant given the Community Land law mandates that the exploitation of natural resources within community land must benefit the entire community, both present and future generations.[883] As such, it is unclear how the Benefit Sharing Bill will harmonise the delimitation of beneficiaries of resource advantages that may devolve to communities. It appears, however, that this constraint may be cured by the proposal in the Bill that a Community Benefit Sharing Forum be established to negotiate a benefit-sharing agreement with both the Benefit Sharing Authority and resource county.[884] Consequently, it is likely that in the process of constituting such a forum, the scope of the beneficiary community will be further negotiated.

Further, the Bill establishes the Benefit Sharing Authority (BSA) to regulate benefit-sharing processes.[885] In particular, the BSA is mandated to coordinate the preparation of benefit-sharing agreements between local communities and resource developing corporations[886] and review and determine royalties payable by corporations.[887] It is also intended that the BSA exercises oversight over funds earmarked for community development under a benefit-sharing agreement.[888] Oversight of any benefit-sharing agreements between a county and a resource developer equally fall within the purview of the BSA.[889] The adjudication of disputes that may arise over a benefit-sharing agreement is also a responsibility of the BSA.[890] Unlike the Energy and Petroleum Authority, whose board has no place for

[879] A ward is the smallest political unit of a County and is represented within a county assembly by a member of the county assembly. See *Constitution* supra note 12 art 177(1)*(a)*. County Governments Act (17 of 2012) sec 48(1)*(c)*.
[880] *Benefit Sharing Bill* supra note 67 clause 2 para 9.
[881] *Community Land Act* supra note 65.
[882] Ibid sec 2 para 5.
[883] Ibid sec 35. The Act requires that an 'agreement relating to investment in community land shall be made after a free, open consultative process' and include provisions on among others 'payment of compensation and royalties.' Ibid sec 36(1)*(d)*.
[884] *Benefit Sharing Bill* supra note 67 clause 31(1).
[885] Ibid.
[886] Ibid clause 6(1)*(a)*.
[887] Ibid clause 6(1)*(b)*.
[888] Ibid clause 6(1)*(d)*.
[889] Ibid clause 6(1)*(e)*.
[890] Ibid clause 6(1)*(h)*.

representatives of resource-host counties or communities, the BSA has representatives from both.[891] In total, six community members nominated by the Council of Governors and Forum of County Assembly Speakers are proposed for appointment to the BSA board.[892]

The Bill seeks to make the BSA the main institution involved in determining royalty and fees payable for resource exploitation.[893] However, if royalty payment is already prescribed by another law, the Bill enjoins the BSA to monitor compliance.[894] Taking a formulaic approach to the sharing of royalty, the Bill proposes that 60 per cent of royalties remain with the national government while 20 per cent should devolve to the resource-host county.[895] It further prescribes that at least 40 per cent of county allocation should be earmarked for the local community.[896] In a departure from other statutes, the Bill proposes that 20 per cent of royalties be invested in a sovereign wealth fund for use by future generations.[897] The Bill advocates for the establishment of a Natural Resource Royalty Fund vested in the BSA.[898] Royalties collected are to be remitted to the fund.[899]

The Bill that remains to be passed by parliament deepens the polycentric nature of benefit-sharing governance. The robust interplay of institutions from national to community levels suggests the desire to internalise disagreements in the devolution of resource revenues, which is likely to result in stakeholder cohesion. This intention becomes more evident as the BSA is mandated to review laws and agreements governing benefit sharing based on international best practices and recommend periodic reforms to both the Senate and National Assembly.[900]

There appears to be no incentive on the part of the national government to facilitate the enactment of this Bill as the sector already has several nascent institutions. However, the existing institutional formations leave the regulation and monitoring of benefit sharing in the hands of multiple institutions. Further, the founding philosophy of existing laws is that resource governance is mainly within the national government domain and, as such, avails limited space

[891] Ibid clause 7*(e)(f)*.
[892] Ibid clause 7(1)*(e)(f)*.
[893] Ibid clause 24.
[894] Ibid clause 24(4).
[895] Ibid clause 26.
[896] Ibid clause 26(3).
[897] Ibid clause 26.
[898] Ibid clause 34(2)*(a)*.
[899] Ibid clause 34(1).
[900] Ibid clause 40.

for counties and communities to participate. Therefore, the sector would benefit from the enactment of this Bill as it further entrenches the place of counties and communities in resource governance issues.

5.5 Kenya's Regulatory Regime on Benefit Sharing and Design Principles

While the design principles discussed in chapter four are not a magic wand to wave at any common pool resource challenge, their application tends to support the emergence of robust institutions for the sustainable governance of common property, including resource rents.[901] Whether the design principles guided the formulation of the post-2010 regulatory regime governing benefit sharing in the mining of oil and gas in Kenya, discussed above, is unclear. However, in the interest of assessing these rules from the perspective of their capacity to address resource misappropriation, this part will briefly sketch the extent of their alignment with design principles, a task which will be completed in the next chapter of this dissertation.

The mining regime has proposed rules and institutions to guide in facilitating fair and equitable share of benefits accruing from royalties. The beneficiaries of resource rents are clearly delimited to national and county governments, as well as resource-host communities. While national and county governments are definite entities, the variance in the definition of beneficiary community in several provisions is found to be concerning, as it is likely to lead to uncertainty and may trigger conflict. The first design principle on the primacy of demarcating the group authorised to benefit from a common, as well as the sixth principle on conflict resolution thus appear inadequately conceptualised. The evolution of fair rules for the distribution of costs and benefits of resource development is at the heart of sustainable governance proposed in the second design principle. This fairness is more likely to be met through the involvement of resource users and beneficiaries themselves in rule formulation as suggested by the third principle. These two principles seem to have been ignored in the mining regime to the extent that national government has arrogated upon itself the sole rulemaking role in relation to the governance of royalty share devolved to both the county and community. Although both the Mineral Rights Fund and Mining Community Development Committee are important institutions that could promote transparency and facilitate community participation, they are top-down impositions from the national level with limited involvement of actual beneficiaries. Instead of making these beneficiaries actual stakeholders in the evolution of

[901] Chapter 4; Ostrom op cit note 498.

norms needed for safeguarding proper resource use, the Regulations evince mistrust by national government of the agency and capacity of lower-level institutions to collectively organise in aid of good governance of their own resources.

In contrast, the petroleum regime is less prescriptive. As the Mining Act, it also recommends the distribution of resource rents among the three entities, national government, county government, and resource-host community with the latter suffering similar definitional ambiguities evident in the mining regime. However, the petroleum regime appears to defer more to lower-level institutions by ceding ground to counties and communities to formulate the rules and institutions for managing resource rents devolved to them. Thus, for instance, the Petroleum Act empowers the County Assembly of the host county to legislate on the structure of the Trust Fund which will receive and manage the community share of resource rents. Moreover, it leaves unregulated the county share of revenue, allowing the resource county an untrammeled scope to define how this resource will be used. In this way, the Petroleum Act is more in sync with the design principles, especially the second and third principles. Furthermore, the incorporation of graduated sanctions in the governing regime of the Energy and Petroleum Regulatory Authority suggests sensitivity to the fifth design principle.

It is noteworthy that the post-2010 institutional and normative instruments on mining and petroleum resources in Kenya were developed almost at the same time. Their distinctive philosophical underpinnings regarding the place of counties and communities in the governance of resource benefits calls for further exploration. As is hypothesised in chapter seven of this dissertation, the distinction in the treatment of benefit sharing by the two legal regimes is largely a function of the extent of county agency in the law-making process at the national level.

5.6 Conclusion

Before the advent of devolution in Kenya through the 2010 Constitution, extractive resource governance was mainly a government affair. The government made decisions within the scope of how and where these resources were going to be exploited, the allocation of benefits derived, as well as negotiating concessions with investors and granting them licenses to explore or develop. Little regard was had for the interest of resource-host regions and communities.[902]

[902] Muigua op cit note 664 at 36.

As this chapter has shown, Kenya's law and policy post-independence until 2010 was largely unresponsive towards the idea of diffused benefit sharing from extractive processes, with the central government as the only direct recipient of royalties and other rents from mining. But this indifference towards communities was already tempered by developments in international environmental law and human rights regulation. Kenya was obliged to domesticate the principles of these treaties by virtue of being a state party. The CBD and the Nagoya Protocol are the most influential international treaties relevant to this subject. These frameworks began to import into Kenyan law concepts of common impacts and benefits, inter-generational equity, and environmental sustainability. In particular, the Nagoya Protocol, although dealing with benefit sharing in the context of genetic resources, provides typologies relevant to benefit sharing in the extractive sector, as more extensively discussed in earlier chapters of this dissertation.[903]

By bringing to the forefront the idea of the trusteeship of the state over extractive resources,[904] the 2010 Constitution has fundamentally altered the governance regime to require enhanced transparency and information-sharing.[905] In conjunction with specific constitutional principles calling for benefit sharing, the legislature has enacted several crucial laws reviewed in this chapter. The chapter has raised concerns with the lack of overarching policy on local content, royalty sharing, and consistency of definitions on the scope of a resource community. The consequence of legal incoherence or incompletion is the potential weakening in implementation and delay in the enjoyment of communities' benefits. While the intention of both the Constitution and these enabling laws is to enhance community participation in resource governance that undermines the resource curse,[906] failed implementation of laws will not facilitate this intention. As such, the Senate's attempt to formulate more harmonising legislation represented by the Benefit Sharing Bill, while yet to succeed, must be appreciated as an attempt at fostering the implementation of benefit sharing.

[903] See Chapter 2.
[904] *Constitution* supra note 12 art 69(1)*(h)* read with arts 62(2) and 62(3).
[905] Ibid art 10(1)*(c)*.
[906] Idemudia op cit note 575 at 190. Also, Donald N Zillman, Alistair Lucas & George Pring (eds) *Human Rights in Natural Resource Development Public Participation in the Sustainable Development of Mining and Energy Resources* (2002).

CHAPTER 6: DEVOLUTION AND NATURAL RESOURCE GOVERNANCE IN KENYA

6.1 Introduction

The previous chapter reflected on the development of the law of benefit sharing in Kenya from the colonial period to the present. This analysis concludes that current law favours the sharing of resource benefits among the national government, host counties and communities. However, the potential reach of benefits to counties or communities will hinge on the successful implementation of devolution as constitutionally envisaged.

This chapter inquires how devolution aids in the realisation of the constitutional aspiration for equitable distribution of extractive resource benefits in Kenya, as spelt out in chapter 5.4. This is achieved by first examining the history, objectives, and institutions of devolved governance relevant to resource development. This discussion paves way to an assessment of the role of counties in resource governance and benefit sharing by reviewing the law and judicial decisions relevant to this question. The third part of the chapter assesses the extent to which Kenya's devolution satisfies the intention of multi-level governance as a mechanism for the stable distribution of common resources, such as rents, as envisaged in the eighth design principle on polycentricity.[907]

6.2 History, Objects, and Functions of Kenya's Devolved System of Governance

As detailed in chapter 5.3 of this dissertation, Kenya's 1963 Constitution was a federal charter, with the national government sharing power with eight co-equal regional governments.[908] However, two years into implementation, the Constitution was amended to eliminate federalism and make Kenya a centralised state.[909] Apart from minimal efforts to deconcentrate power from Nairobi, Kenya's capital, through the District Focus for Rural Development and later, the Constituency Development Fund,[910] this state of affairs subsisted until 2010.

[907] Ostrom op note cit 78.
[908] Yash Ghai 'Comparative theory and Kenya's devolution' in Conrad Bosire & Wanjiru Gikonyo *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 21.
[909] *Speaker of the Senate* supra note 734 at para 177.
[910] Ibid para 176-182.

By the time of promulgating the 2010 Constitution, the country was considered one of the most economically unequal on the continent.[911] Three years prior, political actors mobilised deep ethnic and regional divisions to trigger the country's worst electoral violence.[912] Following this conflict, a comprehensive governance reform process was initiated, culminating in the new Constitution.[913] As such, the 2010 Constitution can itself be viewed as a political settlement designed to ensure equity.[914]

Devolution is thus the centrepiece of Kenya's constitutional attempt at deconstructing the state[915] by, among others, addressing historical contradictions and identity conflicts.[916] However, based on fears of ethnic regionalism,[917] the choice was made to organise state power through a two-tiered system: national and county level; the latter comprising 47 counties.[918] These 47 devolved units enjoy permanence as the dissolution of any unit must be preceded by an amendment to the Constitution.[919] While counties are constitutionally entrenched to protect recentralisation,[920] a ward, the smallest unit of devolution, is not. Consequently, the number of wards can be altered without implicating constitutional changes.[921] Further, devolution beyond the county is encouraged by law.[922]

6.2.1 The Objectives of Devolution in Kenya

Chapter 11 of the Constitution details the objects of devolution, its organs, functions, and intergovernmental relationship between the two levels of government. Principally, devolution is a mechanism to give powers of self-governance to the people, enhance citizen participation

[911] Society for International Development *Pulling Apart: Facts and Figures on Inequality in Kenya Report* (2004) (Report showed the country's top 10 per cent households controlled 42 per cent of the total income while the bottom 10 per cent controlled less than 1 per cent); Steven R Levitsky & Lucan A Way 'Beyond patronage: Violent struggle, ruling party cohesion, and authoritarian durability' (2012) 10:4 *Perspectives on Politics* 869-89.
[912] Susanne D Mueller 'The political economy of Kenya's crisis' (2008) 2:2 *Journal of Eastern African Studies* 185-210.
[913] Kanyinga Karuti & James D Long 'The political economy of reforms in Kenya: The post-2007 election violence and a new Constitution' (2012) 55:1 *African Studies Review* 31-51.
[914] Society for International Development *Devolution in Kenya's new Constitution* (Constitution Working Paper No. 4 2011); Yash Ghai 'Devolution: Restructuring the Kenyan State' (2008) 2:2 *Journal of Eastern African Studies* 211-226; Karuti Kanyinga & Sophie Walker 'Building a political settlement: The international approach to Kenya's 2008 post-election crisis' (2013) 2:2 *Stability: International Journal of Security & Development* 1-21.
[915] *Speaker of the Senate* supra note 734 at para 164.
[916] Bosire & Gikonyo op cit note 908 at 4-5.
[917] Ngala Chome 'Devolution is only for development? Decentralization and elite vulnerability on the Kenyan Coast' (2015) 7:3 *Critical African Studies* 299–316 at 305-6.
[918] Republic of Kenya *Final Report of the Taskforce on Devolved Government* (2011) 13.
[919] *Constitution* supra note 12 art 255(1)*(i).*
[920] Contrast with recentralisation in Uganda. See, Janet I Lewis 'When decentralization leads to recentralization: Subnational State transformation in Uganda' (2014) 24:5 *Regional & Federal Studies* 571-588.
[921] *County Governments Act* supra note 830 sec 26.
[922] *Constitution* supra note 12 art 176(2).

in decision making, and ensure equitable sharing of resources.[923] Devolution is also designed to enhance proximate delivery of services to citizens,[924] and facilitate communities' involvement in the management of their affairs.[925]

Although devolution generally strengthens transparency and accountability by reducing the spatial and cultural distance between voters and politicians,[926] accountability is not specified as an objective of devolution in the Constitution. The Constitution instead proposes to achieve accountability through the application of checks and balances and separation of powers.[927] This approach can however be limiting as separation of powers is a jurisdictional concept that divides labour among different branches of government and legitimates authority exercised within their purview.[928] Checks and balances emanates from oversight power granted to different branches of government over the performance of their respective functions and may give rise to horizontal accountability.[929] In this arrangement, the government's executive, legislative, and judicial arms keep each in check.[930]

While positive, horizontal accountability alone does not require governments to justify its exercise of power to citizens.[931] The omission of citizen oversight otherwise known as downward accountability undermines devolution's attainment of its grand objectives such as efficient service delivery.[932] Downward accountability mandates the existence of mechanisms by which newly created or empowered actors and institutions in devolved systems are held accountable by their constituents.[933] It is downward accountability that broadens participation and transparency.[934] Its omission, unless redressed elsewhere, is therefore bound to undermine devolution's ability to facilitate equitable implementation of laws. This challenge is

[923] Ibid art 174(c)(g).
[924] Ibid art 174(b).
[925] Ibid art 174(d).
[926] Robert P Inman & Daniel L Rubinfeld 'Rethinking federalism' (1997) 11:4 *Journal of Economic Perspectives* 43-64.
[927] *Constitution* supra note 12 art 174(i).
[928] Bruce Ackerman 'The new separation of powers' (2000) 113:3 *Harvard Law Review* 633-729.
[929] Ibid.
[930] Susan Rose-Ackerman 'Democracy and "grand" corruption' (1996) 48:149 *International Social Science Journal* 365-380.
[931] Andreas Schedler 'Conceptualizing accountability' in Marc F Plattner et al (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (1999) 17.
[932] Arun Agrawal & Jesse Ribot 'Accountability in decentralization: A framework with South Asian and West African cases' (1999) 33:4 *The Journal of Developing Areas* 473-502.
[933] Ibid at 478.
[934] Ibid.

particularly acute in resource governance, where the lack of downward accountability drives mistrust in revenue management.[935]

Despite the weak constitutional language on accountability at the level of devolved units, the implementing legislation – the County Government Act – contains strong accountability safeguards.[936] The law provides for the right of recall,[937] citizen petition,[938] and county referenda.[939] Therefore, a civic-conscious resident of a county has a substantial legal basis to ground accountability demands, including in resource governance and benefit sharing. Citizens' knowledge gaps regarding governmental responsibilities and endowments might, however, undermine citizen monitoring.[940] Accountability is thus supported by the legal requirement for timely information on policy formulation and implementation.[941] The seriousness of public engagement at the county level is evident by the obligation on the County Governor to report annually to the County Assembly on the state of public participation in the county.[942]

Based on the foregoing, the substantive objective of Kenya's devolution is fiscal resource redistribution.[943] The rest of the constitutional objectives of devolution are process-oriented designed to ensure that the fiscal resources transferred to or raised by counties are prudently managed in the service of locally relevant development priorities. In sum, devolution's objective in Kenya is about the accountable, participatory, and inclusive governance of resources. It must therefore follow that since resources from extractive industries constitute an important source of revenue for the national government,[944] how these resources are managed and redistributed must interest devolved units.

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[935] David W. Orr 'Renegotiating the periphery: Oil discovery, devolution, and political contestation in Kenya' (2019) 6:1 *The Extractive Industries and Society* 136-144 at 138.
[936] *County Governments Act* supra note 830.
[937] Ibid s 27. However, Petition for recall must be supported by no less than 30 per cent of voters within the ward, making its attainment onerous. Ibid s 28(2)*(b).*
[938] Ibid sec 88, 89.
[939] Ibid sec 90(1)*(a)(b).* See generally, Anne Marie Goetz & Rob Jenkins 'Hybrid forms of accountability: citizen engagement in institutions of public-sector oversight in India' (2001) 3:3 *Public Management Review* 63-383; Guillermo O'Donnell 'Horizontal accountability in new democracies' (1998) 9:3 *Journal of Democracy* 112-126.
[940] Mark Bovens, Thomas Schillemans & Paul Hart 'Does public accountability work? An assessment tool' (2008) 86:1 *Public Administration* 225-242.
[941] *County Governments Act* supra note 830 sec 87.
[942] Ibid sec 92(2).
[943] Fombad op cit note 2 at 183 (for a discussion on fiscal decentralisation). See also, African Charter on Decentralization supra note 44.
[944] Yash Ghai op cit note 908 at 28.

6.2.2 Devolved Functions and Powers

The Constitution adopts a comprehensive list of functions vested in each level of government. The national government has 35 enumerated functions, while county governments have 14.[945] Kenya's national government carries the bulk of all the core state functions, including security, defence, foreign policy, economic and monetary policy, and environmental protection.[946] Even where counties are mandated to deliver services, such as in health and agriculture, the Constitution assigns Kenya's national government the mandate to develop standards and policies concerning these functions.[947] The Constitution recognises the non-conclusiveness of enumerated functions and reserves all residual functions to the national level.[948] Equally, it appreciates that some of the functions require joint initiative and hence recognises their concurrent nature.[949]

Counties' 14 enumerated functions[950] straddle all the major sectors of public service delivery.[951] While none of these functions speak directly to natural resource management, counties are specifically mandated to implement national government policies on natural resources.[952] Arguably, effective implementation can only occur if counties have incentives to co-participate in ensuring the success of the natural resource governance regime. This co-participation means that in tailoring natural resource policies and legislation at the national level, counties' buy-in of legislative proposals is necessary. Based on the principle of subsidiarity, such legislative proposals can embody provisions allowing counties to play a role in how a specific element of natural resource is governed. Strengthening the role of counties in regulating construction minerals is a trite example.[953] Additionally, counties could use their constitutional function to regulate commercial activities by requiring extractives operators within their jurisdiction[954] to pay taxes and fees on certain extractive development activities.[955] This approach is justifiable by the taxation competence of county governments extending to

[945] *Constitution* supra note 12 Fourth Schedule.
[946] Ibid Fourth Schedule Part I.
[947] Ibid Fourth Schedule Part II.
[948] Ibid art 186(2).
[949] Ibid art 186(3).
[950] *Constitution* supra note 12 Schedule 4 part II.
[951] They include health, agriculture, county transport, ferries and harbours, and regulating and facilitating trade, among others. Ibid.
[952] *Constitution* supra note 12 Schedule 4(10).
[953] *The Mining Act* supra note 65 sec 6, 7. See also, Kenya Law Reform Commission & Council of Governors *Report on Audit of National and County Policy and Legislation in Natural Resource Management Sector* (2018) 26.
[954] *Constitution* supra note 12 Schedule 4(7).
[955] See, judicial dispute between Base Titanium and Kwale and Mombasa Counties, chapter 7.4.2.

property taxes.[956] This implies that land, the subject matter of extractive activities, could attract the county's imposition of property taxes based on specific county legislation. When county mandate on county planning[957] is juxtaposed against County Assembly's role to approve plans and policies for the exploitation of county resources,[958] it is possible to interpret the Constitution as granting counties some residual regulatory authority over natural resources.

The principle of subsidiarity which encourages the transfer of a function to the level of government most suited to effectively implement the assigned role is recognised in the Constitution.[959] Theoretically, this means a county can discharge more than the functions allotted to counties by the Constitution. However, the Constitution contemplates the application of subsidiarity only based on bilateral agreement between the level transferring the function and the recipient county or vice versa.[960] In such circumstances, the Constitution contemplates that funds earmarked for the transferred function are transmitted to the implementing level.[961] As such, subsidiarity under the Constitution is not an organising logic of devolved governance as ordinarily anticipated in more advanced devolved systems.[962] Its application is contingent to future bilateral negotiations. An unwillingness by any level of government to entertain such negotiation implies the limited applicability of subsidiarity.

6.3 Devolution Institutions at National and County Level

In identifying institutions of devolved governance, it is easy to default to those discussed in the constitutional chapter that deals with devolution, namely Chapter 11. The Supreme Court has, however, cautioned that the success of devolution will require the eschewing of a 'Chapter 11-Only' approach in favour of an expansive interpretation. This approach recognises the interlocking nature of devolution with other aspects and institutions of the Constitution.[963] From this understanding, two types of devolution institutions are discernible. The first is a set of institutions at the national level whose mandates theoretically protect or facilitate the realisation of the objects of devolution. These set of institutions are charecterised here as devolution-safeguarding. The second set of institutions are those specifically situated at county

[956] *Constitution* supra note 12 art 209(3)*(a).*
[957] Ibid Schedule 4 function 2(8).
[958] Ibid art 185(4)*(a).*
[959] Ibid art 187(1)*(a).*
[960] Ibid art 187(1)*(a).*
[961] Ibid art 187(2).
[962] WG Vause 'The subsidiarity principle in European Union law-American federalism compared' (1995) 27:1 *Case Western Reserve Journal of International Law* 61-81 at 65.
[963] *Speaker of the Senate* supra note 734 at para 183.

level established under Chapter 11 of the Constitution. These are referred to as devolution implementation institutions in this dissertation.

6.3.1 Devolution-Safeguarding Institutions

Devolution-safeguarding institutions at the national level include the Judiciary, Treasury, the Senate, and Independent Commissions, notably, the National Land Commission, the Commission on Revenue Allocation, and the Office of Auditor General.[964] Apart from the judiciary, whose role in interpreting the law could either enable or weaken county and community resource governance function which is explored further in part , the first part of this section is dedicated to a brief discussion on each of the devolution-safeguarding institutions.

6.3.1.1 Treasury

The National Treasury is established by the Constitution and the Public Finance Management Act.[965] Among its many functions, the National Treasury is responsible for the mobilisation of domestic revenue for financing national and county government budgetary requirements and the maintenance of an efficient and transparent fiscal system for the national and county governments.[966] The role of mobilising domestic resources to underwrite budgetary demands, as read together with the role of national government in taxation,[967] necessarily includes maximising rents from extractive industries. The requirement that counties must receive approval from the National Treasury and Commission on Revenue Allocation before implementing any revenue raising measures within the county speaks to the dominant role of the Treasury in revenue raising.[968]

Not only is the National Treasury the institution charged with overall revenue raising responsibility, but it is also mandated to ensure prudent use of these resources and their fair distribution between the national and county government. It does this by preparing the Division of Revenue Bill and County Allocation of Revenue Bill on an annual basis,[969] for ratification by the Intergovernmental Budget and Economic Council (IBEC) before submission to

[964] Ibid.
[965] Public Finance Management Act (No. 18 of 2012) art 225 s 11.
[966] Ibid sec 12(1)*(d)(e)*.
[967] *Constitution* supra note 12 art 209(1)(2).
[968] Public Finance supra note 965 sec 161.
[969] Ibid sec 12(1)*(h)*.

Parliament. IBEC, whose secretariat seats at the National Treasury,[970] is the forum for consultation and cooperation between the national and county governments on various public finance matters, including sharing of revenue raised nationally.[971] The Minister in charge of the National Treasury also establishes Public Funds[972] and the Regulations governing the use of these funds. Thus, the lack of regulations for the establishment of the Public Finance Management (Mineral Royalty Fund) Regulations discussed in the previous chapter,[973] largely represent the failure of the National Treasury to discharge its obligations to ensure resource counties receive their due entitlement of benefits as constitutionally envisioned. This failure also fosters opacity in the management of resource benefits. The Treasury's proposal that the community and county share of benefits under the Mining Act be managed through a national fund is a claw back on devolving resource decision making.[974] This is because rather than grant beneficiaries' autonomy to determine the governance regime for their entitlement, the proposed Regulations prescribe a straitjacket institutional mode in charge of the disbursement of benefits.

6.3.1.2 Senate

By virtue of limited taxation authority to counties,[975] fiscal transfers from the national government, in the form of sharable revenue, remains the surest means of revenue for counties.[976] Thus, financial allocations from nationally collected revenue, including taxes and royalties from extractive resources, are a high-stakes engagement. This contest goes to demonstrate the challenge of fiscal commons discussed previously.[977]

In bicameral systems, a second chamber's existence is justified on the need to represent interests that the majoritarian first chamber might lack the balance to address,[978] including the territorial interests of different units that constitute the state.[979] Second chambers also serve as

[970] Ibid sec 187(4).
[971] Ibid sec 187. IBEC is chaired by the Deputy President of Kenya and brings together all branches of national government and county executives in charge of finance to dialogue over fiscal issues affecting the republic.
[972] Ibid sec 24(4).
[973] See chapter 5.4.2.
[974] *Royalty Fund Regulations* supra note 793 reg 3.
[975] *Constitution* supra note 12 art 209(3)*(a)*.
[976] Bosire & Gikonyo op cit note 908 at 27; See also, Paul Smoke & Kathy Whimp 'The evolution of fiscal decentralization under Kenya's new Constitution: Opportunities and challenges' (2017-19) 104 *Proceedings of Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association* 109-115.
[977] *Constitution* supra note 12 Schedule 4 Part 4(1).
[978] Meg Russel 'What are second chambers for?' (2001) 54 *Parliamentary Affairs* 442-458 at 443.
[979] Meg Russell 'The territorial role of second chambers' (2001) 7:1 *The Journal of Legislative Studies* 105-118.

important sites for intergovernmental relations.[980] Kenya's bicameral system conceptualised the Senate[981] to represent counties in the legislative process,[982] while National Assembly deliberates on issues of concern to the people.[983] As such, Senate participates in all law-making processes at the national level touching on matters that 'concern counties'.[984] What 'concerns counties' has been controversial, with the National Assembly adopting a narrow view that precludes the Senate from all legislative issues save those touching specifically on counties' functional areas stipulated in Schedule Four of the Constitution.[985] Unfortunately, the non-involvement of the Senate in some legislative processes discourages the internalisation of the cost of implementation at the point of legislative formulation leading to the transfer of such costs to the subnational unit.[986]

The disagreements between the Senate and National Assembly are best illustrated in relation to revenue sharing, where the Senate enacts the County Allocation of Revenue Bill responsible for the division of revenue horizontally among the 47 counties.[987] This division is based on a formula proposed by the independent Commission on Revenue Allocation and adopted by the Senate every five years.[988] The amount of funds available for horizontal sharing, however, only becomes known upon completion of the vertical process of sharing revenue between the two levels of government through the Division of Revenue Bill (DRB).[989] The National Assembly views the process of vertical allocation as its exclusive jurisdiction, a position the Senate has contested. The question of whether the Senate has a role in the legislative process on the DRB[990] was resolved by the Supreme Court in the Senate's favour with reference to the impact of the DRB on the county's capacity to fulfil its constitutional functions.[991] Despite this judicial determination, controversy has persisted to the extent that the

[980] Yonatan T Fessha 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' (2019) *Regional & Federal Studies* 1-23.
[981] *Constitution* supra note 12 art 98(1).
[982] Ibid art 96(1).
[983] Ibid art 95(2).
[984] Ibid art 96(2).
[985] *Speaker of the Senate* supra note 734.
[986] Daniel Treisman *The Architecture of Government: Rethinking Political Decentralization* (2007).
[987] *Constitution* supra note 12 art 218(1)*(b).*
[988] Ibid art 217(1).
[989] Ibid art 218(1)*(a).*
[990] *Public Finance Management* Act supra note 965 sec 42.
[991] *Speaker of the Senate*s supra note 734. The Supreme Court observed that to the extent DRB deals with equitable allocation of funds to the counties 'any improper design in its scheme will certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.' Ibid para 114.

DRB, for the 2019-2020 period, became the subject of collapsed mediation[992] followed by litigation.[993] The DRB was only passed after a 139-day delay.[994]

The contestation between the National Assembly and Senate in law-making and fiscal allocation, highlighted above, fails to align with the constitutional vision of mutual respect and cooperative government.[995] Equally, the Constitution's preference for negotiated and mediated means of resolving intergovernmental disputes rather than judicialisation has been ignored.[996] The lack of trust among the actors along with the fairly undeveloped intergovernmental relations between institutions is responsible for this state of affairs.[997]

Having successfully resisted the National Assembly's effort to restrict its legislative competence to matters strictly touching on counties, as stipulated in Schedule Four, the Senate has played an important role in seeking the regulation of natural resource issues. In its legislative efforts, the Senate has drawn its authority from the Constitution's obligation on the state to ensure sustainable exploitation, utilisation, and management of natural resources for the benefit of its people and to facilitate equitable sharing of the accrued benefits.[998] It has also sought the aid of the Constitution's call for the enactment of a law ensuring investments in property benefit local communities and their economies.[999] Thus, the Senate has proposed a law establishing a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments, and local communities.[1000] A law to govern local content in the extractive sector has also been proposed by the Senate.[1001] These laws have yet to be enacted primarily due to political disagreements between the Senate and National Assembly, especially in relation to who should originate these laws. Moreover, the national executive has shown no appetite for the regulation of these natural resource

[992] Daily Nation 'Counties in financial limbo as deadlock on revenue bill persists' 14 July 2019, available at *https://mobile.nation.co.ke/news/politics*>, accessed on 19 July 2020.
[993] Business Daily 'Senate make U-turn, agrees to Sh316bn for counties' 5 September 2019, available at *https://www.businessdailyafrica.com/economy*>, accessed on 19 July 2020.
[994] Speaker of the Senate Statement on Division on Revenue Bill (5 September 2019) online at *http://www.parliament.go.ke* accessed 19 July 2020
[995] *Constitution* supra note 12 art 189(1)*(a)*.
[996] Ibid art 189(3). Also, Intergovernmental Relations Act (No. 2 of 2012) sec 31.
[997] Intergovernmental Relations Act ibid sec 33 provides for dispute resolution through the National and County Government Coordinating Summit established under section 7 of the Act.
[998] *Constitution* supra note 12 art 69(1)*(a)*.
[999] Ibid art 66(2).
[1000] *Benefit Sharing Bill* supra note 67 Objects clause.
[1001] *Local Content Bill* supra note 68.

governance concerns of counties and communities, hence signaling to the National Assembly to slow down the finalisation of the legislative process.

Despite the lack of success, the Senate's constant efforts to legislate cannot be impugned, as it has served to enable counties to sustain pressure on the national government to address gaps in natural resource governance, generally and benefit-sharing regulation, specifically. The enactment of the Mining Act 2016[1002] and the Petroleum Act 2019[1003] was negotiated by both chambers of Parliament and have dramatically impacted resource governance since the advent of devolution.

6.3.1.3 National Land Commission and Environment and Land Court

As previously discussed in this thesis,[1004] land in Kenya has a tortured history marked by violent dispossession, the grabbing of public land post-independence, and the commodification of commons to the detriment of communities.[1005] The decentralisation and democratisation of control of land is, therefore, an avowed intention of the Constitution.[1006]

Extractive activities, from prospecting to development, require vast lands.[1007] Yet, land governance does not feature in the Fourth Schedule of the Constitution, which allocates roles to the two levels of government. Consequently, the assessment of national and county governments' roles regarding land, especially as the substratum on which extractive resources sit, is bound to fall through the cracks. However, a holistic reading of the Constitution reveals the governance of land must, of necessity, be a shared function with the national and county governments, the National Land Commission, and communities all playing key roles in land and resource governance.[1008]

Land in Kenya is either public, private, or community land.[1009] It is important to point out that land under the control of counties includes public land not yet privatised and previously regulated under the repealed Government Land Act.[1010] On the other hand, trust lands,

[1002] *The Mining Act* supra note 65. See chapter 5.4.2
[1003] *Petroleum Act* supra note 66. See chapter 5.4.2
[1004] Chapter 5.2.
[1005] *In the Matter of the National Land Commission* (2015) eKLR para 110-112.
[1006] Ambreena Manji *The Struggle for Land and Justice in Kenya* (2019) 99.
[1007] International Institute for Environment and Development and World Business Council for Sustainable Development *Breaking New Ground: mining, minerals and sustainable development. The report of the MMSD project* (2013) 146; See also, Gilbert op cit note 125 at 53.
[1008] *Constitution* supra note 12 ch 5.
[1009] Ibid art 61, 62, 63.
[1010] Government Land Act 1948 (Chapter 280, repealed).

previously governed under the repealed Trust Lands Act, belong to the species of lands known as community land.[1011] In total, these land tenure systems constitute nearly half the territory of Kenya.[1012]

The National Land Commission (NLC) exists to 'administer and manage' public land on behalf of national and county governments, who are trustees over the land for the public.[1013] The administrative and managerial role of the NLC over public land remains a contested site, clarity on which has yet to be achieved.[1014] The Constitution defines land to include subsurface resources and designates it as part of public land vested in the national government,[1015] and, therefore, presumably falls within the administrative and managerial competence of the NLC. Because geological information on the location of extractive resources remains inconclusive, these resources may be discovered in land currently under county, private, or community ownership.[1016] Recognising this reality, the mining legislation requires that a computerised mining cadastre and registry system must be in place and a copy thereof must be in the custody of the NLC.[1017] The NLC's place on the Mineral Rights Board, whose function is to recommend the granting or rejection of mineral rights as well as the royalty rate chargeable on a given mining agreement,[1018] theoretically enables the NLC to bring forward any concerns of counties and communities.

The exercise of the state's eminent domain power, including for extractive development purposes, is circumscribed until the payment of full, prompt, and just compensation.[1019] The NLC has the legal mandate to compulsorily acquire land for public purposes.[1020] It thus manages the entire process of compulsory acquisition including granting consent for the acquisition, consulting owners of and parties interested in the land sought to be acquired, and assessing compensation payable.[1021] It must follow that in undertaking any compulsory acquisition, the NLC must determine the tenure and ownership of the land. This fact should

[1011] Trust Lands Act 1939 (ch 288, repealed).
[1012] By 1990, FAO estimated that trust land tenure was the most extensive tenure occupying 60 per cent of the country. Knight op cit note 51 at 5.
[1013] *Constitution* supra note 12 art 67(2)*(a)*.
[1014] Manji op cit note 1006 at 119.
[1015] *Constitution* supra note 12 art 62(1)*(f)* read with 62(3) & art 260 para 14*(d)*.
[1016] Kenya Civil Society Platform on Oil and Gas *Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society* (2014) 42. See also, Cordaid *Oil Exploration in Kenya: Success Requires Consultation* (2015) 15.
[1017] *Mining Act* supra note 65 sec 192(3)(5).
[1018] Ibid sec 30(2)*(e)* & 31(1)*(a)(f)*.
[1019] *Constitution* supra note 12 art 40(3)*(b)(i)*.
[1020] Land Act (No. 6 of 2012) sec 107(1).
[1021] Ibid sec 107-113.

ordinarily mean that counties and communities, as landowners, are major participants in extractive development processes even if control of mineral resources inheres in the national government.

National level bureaucrats view county and community enjoyment of compensatory benefits of extractive processes as a threat to their resource capture enterprise and have adopted a two-pronged approach to secure the recentralisation agenda. First, a six-year delay in enacting legislation touching on community land has been witnessed.[1022] During the transition period, the Constitution recognises that community land is held in trust for communities by the county governments.[1023] Despite these transitional arrangements, counties have not been engaged in the allocative processes touching on such unregistered community land.[1024] Further, when the community land legislation was finally enacted, it was not accompanied by the adoption of regulations needed to provide operational implementation guidelines to the law. Additionally, specific institutions to enable proper regulation of community land have yet to be put in place nine years later.

The second technique employed in denying communities and counties compensatory justice is to treat the land within the competence of counties and communities as *de facto* within national government jurisdiction due to the complexity of the Constitution's provisions on land. In furtherance of this approach, the national government has continued to issue concessions on such land with little or no regard to either counties or communities.[1025] This conduct disregards the obligation that counties have towards communities in so far as they are required to hold in trust for a community any monies paid as compensation for compulsory acquisition of unregistered community lands.[1026] The law obliges counties to release such sums of money to affected communities upon registration of their community land.[1027]

Disconcertingly, given that both unregistered community land and unallocated public land is within counties' functional competence, the NLC's oversight should have been triggered. This oversight over county or community land has, however, not happened.[1028]

[1022] *Community Lands Act* supra note 65.
[1023] *Constitution* supra note 12 art 63(3).
[1024] *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others* (2018) eKLR.
[1025] GG No. CXXI-No. 16 (1157) 'Upstream development, South Lokichar Basin Oil Development' (2019) (Gazette Notice published by the NLC seeking to acquire 6,348 hectares of land for oil developments).
[1026] *Community Lands Act* supra note 65 sec 6(2).
[1027] Ibid s 6(3).
[1028] *Mohamud Iltarakwa Kochale* supra note 1024.

Neither has any County Assembly seen it fit to summon the NLC to establish how it is administering public or community land on behalf of counties.

Related to the NLC in the new architecture for land and resource governance in Kenya is the Land and Environment Court. This Court, with the stature of a High Court, is one of two specialised courts established by the Constitution[1029] and statute[1030] dedicated to the adjudication of land disputes. The Court's jurisdiction is to determine land and environmental disputes of various kinds including those relating to 'mining, minerals, and other natural resources.'[1031] The existence of this Court, if harnessed, can serve to provide content on the scope of current law on land and resource governance,[1032] while clarifying the relationships of different participants in resource development, including benefit sharing. Some of this court's decisions shall be reviewed in part 6.4.3 of this chapter.

6.3.1.4 Commission on Revenue Allocation

The Commission on Revenue Allocation (CRA) is one of 12 independent Commissions and Offices set up by the Constitution.[1033] The CRA is an advisory Commission whose principal function is to provide technical recommendations to guide the process of sharing revenue, raised nationally, between the two levels of government and among the 47 different counties.[1034] Additionally, any legislative proposal touching on revenue sharing with counties is expected to be informed by the Commission's input.[1035] The CRA is also constitutionally obliged to conceptualise a formula every five years to enable the Senate to horizontally allocate county share of revenue among the 47 counties.[1036] The CRA revenue-sharing formula is based on specific parameters, namely population, poverty, land area, equal share, fiscal responsibility or revenue raising effort, level of development, expenditure needs, and service pressure.[1037]

[1029] *Constitution* supra note 12 art 162(2)*(b)*.
[1030] Environment and Land Court Act (No 19 of 2011).
[1031] Ibid s 13(2)*(a)*; See also, *Equatorial Land Holdings Limited & another v Cheseret arap Korir* (2019) eKLR (dispute over land in Nandi County on which gold mining was ongoing).
[1032] See generally, Caiphas B Soyapi 'Environmental protection in Kenya's Environment and Land Court' (2019) 31:1 *Journal of Environmental Law* 151-161.
[1033] *Constitution* supra note 12 ch 15. Independent Commissions and Offices exist to protect the sovereignty of the people, secure democratic observance by the state, and promote constitutionalism. See, ibid art 249(1).
[1034] Ibid art 216.
[1035] Ibid art 205.
[1036] Ibid art 217(2)*(b)*. See also, CRA *The Third Basis for Revenue Sharing among County Governments* (2019) available at *https://cra.go.ke*, accessed on 20 July 2021. The conversation on capping resource revenue against annual county allocation would be mediated by the CRA. See chapter 5.4.3.
[1037] Kenya Extractives Policy Dialogue Paper No. 1: *Revenue Sharing and Management in Kenya's Petroleum Sector* (The Extractives Working Group, 2018) 10.

Seizing upon its powers to make recommendations on revenue sharing, the CRA engaged robustly with the legislative process leading to the enactment of the Mining Act. For instance, the CRA proposed that the Act adopts a differentiated regime for assessing royalties applicable to each mineral resource. To enable the country to maximise on rents, the rate of royalties should be informed by internationally competitive levels rather than on a flat rate.[1038] The CRA advocated for the revenue share of 5 per cent for local communities from which the mineral is produced, 20 per cent for the county government from which the mineral is produced, and 75 per cent to the national government.[1039] While the committee appears to have adopted the CRA's tripartite division of revenue, it enhanced the community share to 10 per cent, retained the county share at 20 per cent, and reduced the share to national government to 70 per cent.[1040] The CRA proposed further that 15 per cent of the local and county share of royalties and 30 per cent of national government share of royalties be earmarked for infrastructure projects such as health, education, and water.[1041] Additionally, the CRA called for the involvement of county governments in regulating the mining sector by issuing mineral holders, who have obtained licenses or permits from the national government, with business operation licenses. Such levies will positively impact the county governments' own source of revenue.[1042] The CRA also envisioned that host counties acutely aware of the cost of extractive activities were in better positions to monitor mineral rights holders in matters such as the protection of the environment as well as socio-economic impact assessments.[1043]

Although many of the CRA's proposals did not receive endorsement by the legislature, it was nevertheless a clear demonstration by the CRA of their pursuit of pro-devolution resource-sharing policy. The CRA's approach goes to demonstrate the viability of the proposition that a national institution can serve to safeguard devolution's objectives and aid in ensuring equitable benefit sharing.

6.3.1.5 Office of Auditor-General

The Office of Auditor-General (OAG) is constitutionally vested with the power to audit accounts of all funds of the national and county governments to ensure that the public obtains

[1038] National Assembly Departmental Committee on Environment and Natural Resources *Report on the Consideration of the Mining Bill 2014* (2014) 18.
[1039] Ibid.
[1040] Mining Act supra note 65 sec 183(5).
[1041] *Committee on Environment and Natural Resources* supra note1038 at 19
[1042] Ibid.
[1043] Ibid.

value for funds expended.[1044] Aside from a financial audit, the OAG is empowered to conduct performance audits on public institutions at national and county level to examine the economy, efficiency, and effectiveness with which resources have been applied.[1045] It is pursuant to the later mandate that the role of the OAG in supporting county and community aspiration to resource benefit emerges.

In response to outcry by the host community in Turkana on inadequate information on land compensation, weak sensitisation on the effects of oil exploration, and local content opportunities, the OAG conducted a social and economic audit.[1046] The audit aimed at determining the implementation and monitoring by the Ministry of local content obligations of petroleum development activities in Turkana County between June 2011 to June 2014.[1047]

Aside from demonstrating the inadequacy of local content measures and weak monitoring, the OAG audit, which preceded the enactment of the Petroleum Act of 2019, called for the strengthening of the regulatory regime governing extractive development with a view to enhance the devolution of resource benefits to communities.[1048] The audit called attention to the lack of institutions to implement local content provisions of the law which undermined the accountability of resource operators on the extent of their compliance.[1049]

6.3.2 Devolution-Implementation Institutions

As highlighted in the preceding section, the scheme of devolved governance comprises an assemblage of institutions at both national and county level. This part will examine Chapter 11 institutions whose existence is designed to facilitate the right of self-governance through the management and regulation of a substantial share of public functions assigned to them by law.[1050]

County institutions are the vehicles by which self-governance and oversight are exercised. Similar to the national level, county power is divided into legislative and executive authority, vested in the County Executive Committee (CEC) and the County Assembly (CA),

[1044] *Constitution* supra note 12 art 229(4)*(c)*.
[1045] Public Audit Act (No. 34 of 2015) sec 36(1).
[1046] Office of Auditor General *Implementation and Monitoring of Provisions on Local Content in the Petroleum Extraction and Production Industry in Kenya* (2016) 2.
[1047] Ibid at v.
[1048] Ibid at 11.
[1049] Ibid at 10.
[1050] Council of Europe 'European Charter of Local Self-Government' *Council of Europe Treaty Series* 122, 1985.

respectively.[1051] All 47 counties have chief executives known as Governors elected directly by county residents by a simple majority vote.[1052] The Governors chair the CECs.[1053] The CEC is composed of persons nominated by the Governor and approved by the CA.[1054] The CEC implements national and county legislation, manages and coordinates the county administration functions, and performs other functions vested on it by law.[1055] The CEC may also propose legislation for debate and adoption by the CA.[1056]

The Constitution establishes CAs as the legislative arm of the county governments.[1057] The CAs are composed of elected representatives elected directly by the people from single-member wards at the county level.[1058] The Constitution provides that counties can exercise their legislative power on all matters listed as county matters under the Fourth Schedule and thus a preserve of the CAs.[1059] National law can also donate a specific legislative competence to CAs, as was done by the Petroleum Act, requiring relevant CAs to legislate on the Trust Fund to hold and govern community share of oil benefits.[1060] As the county government's alternate arm, the CA also oversights the CEC.[1061] As part of its oversight exercise, the Assembly can summon any person to appear before it for purposes of providing information.[1062] This authority additionally empowers the Assembly to compel the production of documents.[1063]

Viewed together, the CEC and CA exercise significant powers of decision making. They create or modify rules, make decisions about using particular resources, and implement and ensure compliance with new or modified regulations.[1064] Rulemaking or modification enables the legislation of principles that determine beneficiaries of resources and opportunities

[1051] *Constitution* supra note 12 art 176(1).
[1052] Ibid art 179(4) & 180. See also, Hannah Waddilove 'Support or subvert? Assessing devolution's effect on central power during Kenya's 2017 presidential rerun' (2019) 13:2 *Journal of Eastern African Studies* 334-352 (discussing the political roles of county governors).
[1053] *County Government* Act supra note 830 sec 30(2)*(h).*
[1054] *Constitution* supra note 12 art 179(2)*(b).*
[1055] Ibid art 183(1).
[1056] Ibid art 183(2).
[1057] Ibid art 185(1).
[1058] Ibid art 177(1)*(a)*. Special seats to ensure compliance with the constitutional rule that not more than two-thirds of the membership of any elective body shall be of the same gender are also provided for by the Constitution. Ibid art 177(1)*(b)*.
[1059] Ibid art 185(2).
[1060] *Petroleum Act* supra note 66, sec 58(4).
[1061] *Constitution* supra note 12 art 185(3).
[1062] Ibid art 195.
[1063] Ibid art 195(2)*(b).*
[1064] Agrawal & Ribot op cit 932 at 477.

and the scope of such benefits.[1065] Facilitation of implementation and compliance includes the power to execute and monitor devolved functions and formulate sanctions for non-compliance.[1066]

The last five years of devolved governance have witnessed an emerging trend of the capture of devolution benefits and corruption involving local elites within devolved units.[1067] The Office of Controller and Auditor General[1068] has documented a colossal loss of funds transferred to counties.[1069] The CAs have also used their power in budget approval to manipulate governors and increase their salaries and prerequisites.[1070] Some of these extras are leveraged by coercing County Governors through threats of impeachment.[1071]

The failure of downward accountability is mostly to blame for the lack of a strong citizen voice that would enable local actors to counteract the danger of elite capture.[1072] This trend's impact on the devolution of extractive resource benefits is yet to be assessed but should be of sufficient concern.

The most remarkable impact of county institutions' existence in the context of extractives has been the political ability of governors to challenge the central government or resource operators in defence of county and community interests.[1073] The case of the Governor of Turkana challenging the President in the contestation regarding revenue sharing is one key example.[1074] The fact that the Governor stood up to the head of state but marshalled the support of county leadership, forcing the national government to amend the proposed revenue-sharing formula, would have been unlikely without devolution.[1075] Similarly, the Governor of Kajiado

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[1065] Edella Schlager & Elinor Ostrom 'Property-rights regimes and natural resources: A conceptual analysis' (1992) 68:3 *Land Economics* 249-62; also, Agrawal & Ribot ibid at 477.
[1066] Schlager & Ostrom ibid at 249-62.
[1067] Nairobi Star 'Audit reveals massive waste by assemblies' 26 October 2018, available at *https://www.the-star.co.ke/news*, accessed on 12 Jan 2020.
[1068] *Constitution* supra note 12 art 229. The Constitution establishes the Office of Auditor and Controller General and mandates it to audit and report, in respect of that financial year, on among others 'the accounts of the national and county governments.' Ibid art 229(4)*(a)*.
[1069] See, Office of the Auditor General *Report of the Auditor General on the Financial Statements of the County Executive of Turkana County for the Year Ended 30 June 2017* available at *https://www.oagkenya.go.ke*, accessed on 12 Jan 2020.
[1070] Jeffrey Steeves 'Devolution in Kenya: Derailed or on track?' 53:4 *Commonwealth & Comparative Politics* (2015) 457-474 at 459.
[1071] Peter Wanyande 'Devolution, politics and judiciary in Kenya' in Bosire & Gikonyo op cit note 908 at 6.
[1072] John F McCarthy 'Changing to gray: Decentralization and the emergence of volatile socio-legal configurations in Central Kalimantan, Indonesia' (2004) 32:7 *World Development* 1199-1223 at 1216.
[1073] Orr op cit note 56 at 136-144; Nicholas Cheeseman, Gabrielle Lynch & Justin Willis 'Decentralisation in Kenya: The governance of governors' (2016) 54:1 *The Journal of Modern African Studies* 1-35.
[1074] Orr ibid. See also, chapter 7.3.1.
[1075] Ibid at 139.

County mobilised residents to storm Tata Chemicals Limited, Africa's largest soda ash manufacturer, over unpaid land rates amounting to 17 billion Kenya shillings (US$170 million).[1076] Kwale County, the host to rare earth minerals, including titanium, has adopted a similar position imposing millions of dollars in mining levy on the mining company.[1077]

The accountability deficit alluded to earlier has progressively materialised in counties. Despite various tools for oversight at their disposal, CAs have chosen to deploy this power to manipulate the County Executive, especially towards ensuring the adoption of budgetary decisions favourable to the Assemblies.[1078] This focus has effectively detracted assemblies from using its oversight role to enhance downward accountability. For instance, despite possessing power to summon and compel document production,[1079] the Turkana Assembly has failed to compel the submission of production-sharing agreements between the national government and Tullow Oil Corporation concerning the development of oil fields located within the county.[1080] The Assembly has equally failed to compel the production of a Memorandum of Understanding signed between the national government and Tullow Corporation, by which the Corporation pledged to double its local content budget.[1081] The risk of not using institutional means for addressing emerging challenges between the county and Corporation means citizens' concerns are politicised, triggering community-led resistance to resource development activities.[1082]

6.4 Counties and Resource Governance

A brief review of scholarship on subnational involvement in natural resource rent sharing is considered necessary in the search for better understanding of the role of counties in resource governance in Kenya. This review is the task of the first part of this section. The second part examines the legal situation in Kenya relative to counties' role in resource management.

[1076] The Standard 'Governor Lenku sustains attack on Magadi Soda over Sh17b land rate' 1 April 2019 online at *https://www.standardmedia.co.ke/article*, accessed on 12 Feb 2020. See also, 'Speech by H.E. Joseph Ole Lenku, Governor, Kajiado County, during the opening of the first sitting of the third session of the County Assembly' 12 February 2019 available at *https://www.kajiado.go.ke*, accessed on 12 Feb 2020.
[1077] Business Daily 'Kwale slaps Base Titanium with Sh378m tax bill' 1 February 2015 available at *https://www.businessdailyafrica.com/corporate*, accessed on 12 Feb 2020.
[1078] See, Commission of the Implementation of the Constitution *Sustaining the Momentum - Assessment of Implementation of the Transferred Functions to the County Governments' 2nd Devolution Assessment Report* (2015) 58.
[1079] *Constitution* supra note 12 art 195(2)*(b).*
[1080] Orr op cit note 56 at 137.
[1081] Ibid at 140.
[1082] Ibid.

6.4.1 Literature Review of Subnational Units and Resource Governance

The devolution of resource rents is premised on at least three reasons. Because extractive processes impose onerous environmental and social burdens on host regions and communities, compensatory justification is advanced as the first reason.[1083] The second justification is based on equity considerations. Here, the argument is posited that while natural resources may vest in the state for the benefit of all the nation's citizens, it is recognised that equal treatment does not always yield fair outcomes.[1084] Thirdly, devolving resource rents is justified on the grounds that devolution inherently reduces rent-seeking behaviour because it democratises access to information on resource management to resource-rich communities.[1085] A strong ideological link between the core at the central government and peripheries at devolved levels is likely to be established through such information sharing.[1086] Decentralising benefits is thus viewed to be a strategic imperative that mitigates struggles at central and local levels, which unresolved are responsible for political instability.[1087] Moreover, when extractive resources are located within lands that are the territory of an indigenous community, an emerging right to free, prior, informed consent (FPIC) could give rise to resource devolution beyond the local unit.[1088]

The positive correlation between devolution and the stabilisation of a resource-host region or community does not always hold true.[1089] Some scholars doubt the effectiveness of subnational units to manage resource rents effectively,[1090] especially given the volatility of resource revenues.[1091] The ability of subnational units to forecast, plan budget for, and absorb resource revenues is particularly acute on account of the moneys involved.[1092] The lack of capacity on the part of local businesses also means that actors from beyond the local level may

[1083] Chapter 3.3.
[1084] Chapter 3.2.
[1085] Paul Francis & Robert James 'Balancing rural poverty reduction and citizen participation: the contradictions of Uganda's decentralization program' (2003) 31:2 *World Dev*. 325-337.
[1086] Arellano-Yanguas op cit note 11 at 617-638; also, Jeremy Lind 'Devolution, shifting centre-periphery relationships and conflict in northern Kenya' (2018) 63 *Political Geography* 135-147.
[1087] Anne Larson & Jesse Ribot 'Democratic decentralisation through a natural resource lens: an introduction' (2004) 16:1 *European Journal of Development Research* 1-25; also, Ken O Opalo 'Citizen political knowledge and accountability: panel survey evidence on devolved government in Kenya' (2020) 33 *Governance* 849-869.
[1088] Chapter 2.1.2.
[1089] Generally, Arellano-Yanguas op cit note 11 at 617-638; Lotte Hughes & Daniel Rogei 'Feeling the heat: responses to geothermal development in Kenya's Rift Valley' (2020) *Journal of Eastern African Studies* 1-20 at 2 (for the view that devolution has reinforced ethno-politics as well as territorialised the politics of belonging).
[1090] Arellano-Yanguas op cit note 11, 617-638; World Bank *Devolution without Disruption: Pathways to a successful new Kenya* (2012, Research Report) 58-68.
[1091] Andrew Bauer *Subnational Oil, Gas and Mineral Revenue Management* (NRGI Briefing, July 2013) at 2, available at *https://resourcegovernance.org*, accessed on 15 May 2020.
[1092] Natural Resource Governance Institute 'Subnational Revenue Management Improving Local Development Through Resource Wealth' (2018) available at *https://resourcegovernance.org*, accessed on 15 May 2020.

capture local content opportunities.[1093] The devolution of resource benefits is thus no magic bullet, and its success is rather highly contextual.

One of the factors that bears on the success of devolution is the extent to which central government elites support the devolution project. Evidence shows that central governments are often reluctant to relinquish their gate keeping role for those seeking access to resource revenues.[1094] Consequently, the central government's elite reluctance to follow through with implementing devolution is likely to frustrate the goals of resource devolution and trigger national versus local conflict.[1095] Central governments can also resist the impact of devolution through the piecemeal implementation of policies, the net effect of which delays devolving resource governance.[1096] Such efforts are designed to protect the interests of national elites which will stand compromised by the effective and speedy devolution of resources.[1097] Thus, even when genuine local-level polycentric institutions are created, implementation will be deliberately slowed down for national elites to regroup and capture these nascent institutions to further their private interests.[1098]

Nigeria typifies an African country where fiscal autonomy to subnational units has failed to mitigate resource-induced instability and conflicts.[1099] Even though the country has devolved considerable decision-making to states through the 1999 Constitution, it has continued to experience violence in resource regions due to extensive patronage and elite capture of the oil industry.[1100] Accountability deficit is deemed the main culprit responsible for the continued underperformance of the country's resource sector.[1101]

[1093] Nwapi op cit note 71 at187; Ovadia op cit note 446 at 417.
[1094] Michele D'Arcy & Agnes Cornell 'Devolution and corruption in Kenya: Everyone's turn to eat?' (2016) 115:459 *African Affairs* 246-273.
[1095] Lind op cit note 1086 at 139.
[1096] Phil Renee Oyono 'One step forward, two steps back? Paradoxes of natural resources management decentralisation in Cameroon' (2004) 42:1 *Journal of Modern African* 91-111 at 92; Also, Steeves op cit note 1070 at 463.
[1097] Christopher Béné, Emma Belal & Malloum Ousman Baba et al 'Power struggle, dispute and alliance over local resources: Analyzing 'democratic' decentralization of natural resources through the lenses of Africa Inland Fisheries' (2009) 37:12 *World Development* 1935-1950.
[1098] Orr op cit note 56.
[1099] Omorogbe op cit note 85 at 264.
[1100] Rutemi T Suberu 'Lessons in fiscal federalism for Africa's new oil exporters' in Carl LeVan et al (eds) *African State Governance: Sub-national Politics and National Power* (2015) 31-57.
[1101] Omolade Adunbi 'Extractive practices, oil corporations and contested spaces in Nigeria' (2020) 7:3 *The Extractive Industries & Society Journal* 804-811. See also, Hazel M.McFerson 'Governance and hyper-corruption in resource-rich African countries' (2009) 30:8 *Third World Quarterly* 1529-1547.

Another factor that may impair the effectiveness of the devolution policy is the inherent possibility that devolution may stalemate implementation by locking two 'levels' of government in a power struggle over resource development activities.[1102] Moreover, the sequence between the introduction of devolution-related reforms and the discovery of extractive resources determines devolution's capability to undermine conflicts. Where devolution is introduced after years of central government's sole control over natural resources, as in Nigeria and the Democratic Republic of the Congo,[1103] such devolution is unlikely to reduce resource conflicts.[1104] Conversely, where implementation of devolved governance coincides with resource discovery and development, such as in the Kenyan case with oil and titanium minerals, devolution could serve to reduce the chances of conflict.[1105]

While devolution may be unsuccessful in resolving conflicts within resource regions, the existence of multiple levels of decision making facilitates debates and contestations which amplify resource concerns rather than suppress the grievances of subnational units.[1106] However, devolution's capacity to internalise such challenges depends on the robustness of the devolved system's architecture. In particular, it has been established that devolution is more likely to deliver on the promise of equity and efficiency if it facilitates downward accountability of empowered local actors and institutions.[1107] Furthermore, if devolution can aid in the formulation and implementation of effective laws on resource governance, as proposed by this dissertation, it arguably serves to mitigate resource conflicts.

6.4.2 The Constitutional Role of Counties in Resource Governance

As discussed in the previous chapter, the Constitution defines public land to include extractive resources.[1108] The national government holds these resources in trust for the people.[1109] Despite the national government's trusteeship over extractives, the state's constitutional obligation to sustainably use, develop, and manage natural resources can only be rationally construed as a shared function of both national and county governments.[1110] Several reasons support this view.

[1102] Orr op cit note 56 at 136-144.
[1103] Stephanie Matti 'Resources and rent seeking in the Democratic Republic of the Congo' (2010) 31:3 *Third World Quarterly* 401-413.
[1104] Orr op cit note 56 at 137.
[1105] Ibid.
[1106] Lind op cit note 1086 at 139; See Chapter 7 generally.
[1107] Orr op cit note 56 at 139.
[1108] *Constitution* supra note 12 art 62(1)*(f)*. See, Chapter 5.3.
[1109] Ibid art 62(3).
[1110] Ibid art 69(1)*(a)*.

First, the Constitution emphasises the centrality of sustainable development, including resource exploitation.[1111] The principle of sustainable development necessarily requires effective citizen participation, access to information, and justice in environmental decision making.[1112] Counties' essential function is strengthening communities' capacity to participate in governance processes, including by assisting them in developing administrative competency to carry out devolved tasks at the local level.[1113] The county is thus a key enabler of sustainable resource governance whose place cannot be wished away.

Secondly, under Kenyan law, any exercise of power by the national government on natural resource development immediately overlaps with various exclusive or concurrent functions of counties. For instance, the Constitution vests counties exclusive jurisdiction over agricultural production, water development, spatial planning, and pollution control.[1114] To the extent that extractive activities affect these functions, it is reasonable to infer the requirement for significant county involvement.[1115]

Thirdly, the spatial concentration of adverse effects of extractive activities in resource-host regions obligates subnational units to participate in shaping any frameworks seeking to distribute benefits and costs.[1116] The right to a healthy environment entitled to every person is a relevant example.[1117] These rights need to be safeguarded at both national and county levels irrespective of the government's level assigned the environmental protection function.[1118]

[1111] Ibid art 10(2)*(d)*, art 69(1)*(a)*.
[1112] *Rio Declaration* supra note 177, principle 10.
[1113] *Constitution* supra note 12 Schedule 4 Part 2(14).
[1114] Ibid Schedule 4 Part 2.
[1115] *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR, para 33.
[1116] In Columbia as in Kenya, subnational governments have no direct constitutional control over extractives but can intervene indirectly using their environmental protection function. Courts have determined that a limitation on local authorities' role to decide whether an activity that has great impact on many different aspects on the lives of its inhabitants can take place is incompatible with the principle of territorial autonomy. See, Milton Fernando Montoya 'Participation of Territorial Authorities in mining activities in Colombia' in Lila Barrera-Hernández et al op cit note 6, 355-369 at 360.
[1117] *Constitution* supra note 12 at 42.
[1118] *Constitution* ibid Schedule 4 Part 1(22); See also, Kangu op cit note 1 at 215; *Speaker of the Senate* supra note 734 para 193 (Supreme Court determined that some of the second generation rights, such as the right to food, environment, and health, fall within the mandate of counties and resources and must be availed to counties to fulfil these obligations). See also, Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill 2018 GG No. 116 (Senate Bills No. 27) (which seeks to establish a framework for the promotion, monitoring, and enforcement of economic and social rights, including the right to health, as well as monitor and promote adherence by county governments to Article 43 of the Constitution). The Bill requires, among others, that the national and each county government submit an annual report to the Senate on the progress made on the realisation of economic and social rights. Ibid clause 14.

While the above reasons justify the involvement and participation of counties in extractives' development, their authority's exact scope still requires clarity. The only mandate specified by the Constitution is that counties are implementers of national government policies on natural resource development.[1119] This provision is open-ended. It fails to indicate where the national government's role of policy making ends and where that of policy implementation on the part of counties begins.[1120] When viewed in isolation, this provision accords counties with no substantive function except facilitating the national government's resource governance intentions. This approach denies citizens in counties their self-governance. Such an interpretation is out of touch with the cooperative government principle built into the Constitution, the application of which will not admit the subordination of counties by the national government.[1121] By this provision's open-textured drafting, the Constitution assumes that further elaboration will be provided in a statute.[1122] Alternatively, the drafters may have intended to defer to the institutions vested with the function to grapple with developing coherent content through its rulemaking power, if any.[1123] The consequence of applying the cooperative government principle is that both national and county governments have a responsibility in the management of natural resources.[1124] Adherence to the principles of cooperative government encourages intergovernmental consultation. It also supports the enhancement of capacity for implementation at the level of government charged to do such implementation.[1125]

In attempting to delimit the content of counties' implementation function, it has been suggested that implementation be either reactive or proactive.[1126] A reactive perspective adopts a narrow view of implementation and considers it a post-formulation process.[1127] In contrast, a proactive view of implementation encompasses all steps geared towards the execution of

[1119] *Constitution* supra note 12 Schedule 4.
[1120] Conrad Bosire 'The emerging approach of Kenyan courts in interpretation of national and county powers and functions' in Bosire & Gikonyo op cit note 908 at 112-3.
[1121] Counties are mandated to develop Environmental Action Plans. These plans are developed every five years to coordinate and harmonise the environmental policies, plans, programmes, and decisions of the national and county government. See, Environmental Management & Coordination (Amendment) Act 2015 sec 41A(1).
[1122] Bosire op cit note 1120
[1123] Kangu op cit note 1 at 75.
[1124] *Constitution* supra note 12 Schedule 4 Part 1(22) & 2(10). See also, *Mui Coal Basin Local Community* supra note 1115 para 104.
[1125] *Constitution* supra note 12 art 189(1)*(a-b).*
[1126] William H Clune 'A political model of implementation and implications of the model for public policy, research, and the changing roles of law and lawyers' (1983) 69:1 *Iowa Law Rev* 47-126 at 51, 78.
[1127] Thomas O Hueglin & Alan Fenna *Comparative Federalism: A Systematic Inquiry* (2015) 258-9 (for the view that, whereas *Länders* in Germany are in charge of policy implementation, the federal government needs their expertise in policy formulation so that the details required to ensure seamless execution is built into legislation. This justifies this study's adoption of reactive and proactive perspectives to implementation).

constitutional, statutory, or policy objectives.[1128] Whether reactive or proactive, implementation is not a single event but an iterative process involving multiple semi-autonomous centres of decision making.[1129] Arising from this view, both the efforts targeted at administering a policy and evaluating substantive impacts of such a policy on beneficiaries are a part of the implementation process.[1130]

Guided by the preceding reasoning, a county entrusted with implementing any policy will choose to be either a reactive or proactive implementer. A county can hold back from initiating any sector-specific action until legislative or policy making by the national government crystallises in the form of a law or policy.[1131] In this case, if what is handed down in the form of policy is ambiguous, or its practical implications not clearly enumerated, a reactive approach will hold in abeyance any implementation-related action.[1132] On the other hand, a proactive subnational unit will conceptualise its role in implementation more broadly to include engagement with law-making processes at the national level with an eye on enhancing acceptability and mitigating implementation-related obstacles.[1133] On its initiative, such a county government will monitor, advocate, and mobilise its views on policy or legislative proposals ahead of the final adoption of such a policy.[1134]

By design, it is apparent that counties are uniquely suited to foster the implementation of constitutional and legislative intent.[1135] The existence of offices and institutions at the county level to aid the implementation exercise suggests that counties were intended to be the proper site for implementation. For example, the Constitution mandates the CEC to implement national legislation and policies to the extent required.[1136] An annual performance report detailing implementation progress is expected from the County Executive, who is obliged to

[1128] Daniel A Mazmanian, Paul A Sabatier & Scott Forresman *Implementation & Public Policy* (1983) 5; William H Clune & R E Lindquist 'What implementation isn't: Toward a general framework for implementation research' (1981) 5 *Wisconsin Law Review* 1044-1116 at 1059.
[1129] Stefan Carpenter, Elizabeth Baldwin & Daniel H Cole 'The polycentric turn: A Case study of Kenya's evolving legal regime for water wars' (2017) 57 *Natural Resources Journal* 101-136 at 103.
[1130] Mazmanian et al op cit note 1128 at 11; Narendra Raj Paudel 'A critical account of policy implementation theories: Status and reconsideration' (2009) 25:2 *Nepalese Journal of Public Policy and Governance* 38.
[1131] See chapter 7.4.1.
[1132] Heather C Hill 'Understanding implementation: Street-level bureaucrats' resources for reform' (2003) 13:3 *Journal of Public Administration Research and Theory* 265-282 at 268.
[1133] Robert McGrath 'Implementation theory revisited again: Lessons from the state children's health insurance program' (2009) 37:2 *Politics & Policy* 309-336 at 310.
[1134] Opalo Ken Ochieng 'Citizen political knowledge and accountability: Survey evidence on devolution in Kenya' (2020) 33 *Governance* 849-869.
[1135] *Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill 2018* supra note 1118.
[1136] *Constitution* supra note 12 art 183(1)*(b).*

table the report before the county's legislative arm for debate and adoption.[1137] Similarly, the County Government Act establishes the offices of the Ward administrator,[1138] Village Administrator,[1139] and Village Council.[1140] As the capacities of these nascent local institutions evolve and create further citizen involvement in development choices, it follows that the legitimacy of negotiated processes between resource operators, counties, and communities will be strengthened.[1141] Such structured community participation has the potential to enhance the assessment of burdens and benefits of resource exploitation in a manner that aligns better with stakeholders' conceptions of justice.[1142]

The law also contemplates that implementing investment decisions, including those presumably relating to extractive development affecting a county, may be contentious. To resolve such a disagreement, the law proposes the holding of a county referendum.[1143] Such a referendum is triggered by way of a petition supported by at least 25 per cent of registered voters within the county concerned.[1144] To succeed, such a referendum must meet the thresholds set down in the Elections Act.[1145] While a last resort in the possible means for addressing disagreements, a county referendum is an important tool for communities who may be aggrieved that their FPIC has not been adequately procured.[1146] The existence of this provision highlights how seriously Kenyan law considers the significance of addressing investment-related conflicts through democratic and pacific means.

The significant challenge facing counties in facilitating implementation is the question of capacity and resources. The idea that resources must follow the assignment of function has not always been complied with by the national government. The lack of capacity and political

[1137] *County Government Act* supra note 830 sec 47(3).
[1138] Ibid sec 51.
[1139] Ibid sec 52.
[1140] Ibid sec 53.
[1141] Rachel Wynberg & Maria Hauck 'People, power, and the Coast: A conceptual framework for understanding and implementing benefit sharing' 19:1 *Ecology and Society* (2014) 1-16 at 8.
[1142] Gross op cit note 327 at 27.
[1143] *County Government Act* supra note 830 sec 90(1)*(b)*.
[1144] Ibid.
[1145] Ibid sec 90(2).
[1146] Brant McGee 'The community referendum: Participatory democracy and the right to free, prior and informed consent to development' (2009) 27:2 *Berkeley Journal of International Law* 570-635.

goodwill is likely to influence policy outcomes.[1147] Under such circumstances, willing actors may be constrained by an inability to implement policy.[1148]

6.4.3 Judicial Interpretation of County Roles in Resource Governance

The Supreme Court sees itself as bearing the responsibility of facilitating devolution and its institutions.[1149] This image of a vanguard in arbitrating specific disputes, but also evolving norms that hold governments and private actors accountable, is consistent with the judicial function.[1150] This expansive approach is also compatible with the Constitution's vision that courts must embrace an interpretation of the Constitution that develops the law and promotes good governance.[1151]

Resource development decisions by the national government have led to disagreements, inevitably inviting judicial adjudication. As a result, the judiciary has been effectively thrust into the arena of policy elaboration and norm clarification.[1152] In *Mui Coal Basin Local Community*, the Ministry of Energy's decision to grant a mining lease for coal development in Kitui County was challenged for breaches of various environmental rights and lack of benefit-sharing mechanisms.[1153] Although the county was not a party to the suit, the court invited its submissions because the county government's position was relevant to the case's effective determination.[1154]

In its judgement, the court affirmed that the county government was a key actor in mineral development, viewing it as the local community's legal personification whose participation in negotiating a mining contract generally and benefit sharing is desirable.[1155] The reasoning here is that the national government's obligation to ensure a fair balance of costs and benefits of extractive processes cannot be properly contextualised without the substantial

[1147] Sarah E Dahill-Brown & Lesley Lavery 'Implementing federal policy: Confronting state capacity and political will' (2012) 40:4 *Politics and Policy* 557-592 at 563.
[1148] Clune & Lindquist op cit note 1128 at 1074.
[1149] *Speaker of the Senate* supra note 734 at para 53.
[1150] Caiphas B Soyapi 'Environmental protection in Kenya's Environment and Land Court' (2019) 31:1 *Journal of Environmental Law* 307-308.
[1151] *Constitution* supra note 12 art 259(1)*(c)(d)*.
[1152] Colin S Diver 'The Judge as political powerbroker: Superintending structural change in Public institutions' (1979) 65:1 *Virginia Law Review* 43-106 (discussing expansion of judicial participation in the implementation of public policy).
[1153] *Mui Coal Basin Local Community* supra note 1115.
[1154] Ibid para 104.
[1155] Ibid para 33. The court's appreciation of the legal personality of the county is partly informed by the direct manner in which both the County Governor and members of the legislative assembly are elected into office.

involvement of counties in the negotiation of mining agreements.[1156] Further, the involvement of counties was deemed necessary to engender trust in both levels of government in the transaction, whose net effect is to minimise potential disruption of extractive projects.[1157] Failure to adopt this approach may incentivise subnational entities to align with host communities in apportioning any blame over adverse effects of mining activities to the central government.[1158] Lastly, the court opined that counties' involvement is made necessary by the polycentric nature of mineral development, which involves many agencies at different spheres of the state.[1159]

Jackson Mutua Kavila v Government of Makueni County & 2 others adopted the same approach as the court in *Mui Coal Basin* by confirming the national and county governments' shared responsibility to ensure sustainable exploitation of natural resources.[1160] This judicial view was strengthened further in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*. In this case, the Kwale County government opposed the application for a special mining license (SML) concerning niobium and rare earth minerals within Mrima Hills in Kwale County.[1161] The county asserted that the absence of a revenue-sharing framework between the investor, on the one hand, and the national government, the County Government of Kwale, and the local community, on the other hand, rendered the proposed SML constitutionally invalid.[1162] In the *Lamu Port* case, the court reasoned the involvement of the Lamu County Government in natural resource decision making is justified, as the county closely reflects the concerns, preferences, and choices of the local population.[1163] The court

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[1156] Ibid. The court reasoned that:

> An issue involving prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the County Government – even if the primary activity is assigned to the National Government in our scheme of devolution. We believe that this is the logical consequence of the cooperative and collaborative two-tier governance system imposed by our Constitution….Hence, we hope that the National Government will involve the County Governments, as repositories of local priorities and preferences, in public decisions that would affect many of the county citizens….
>
> We fully expect, as expressed above, that the National Government must, as a consequence of the requirement of public participation, involve County Governments when it comes to negotiations for all contracts or partnerships to exploit natural resources.

Ibid para 104, 106.

[1157] Ibid para 73.

[1158] Arellano-Yanguas op cit note 11 at 622.

[1159] *Mui Coal Basin Local Community* supra note 1115 para 104.

[1160] *Jackson Mutua Kavila v Government of Makueni County & 2 others* (2018) eKLR para 24.

[1161] *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* (2015) eKLR.

[1162] Ibid at 12.

[1163] *Mohamed Ali Baadi and others v Attorney General & 11 others* (2018) eKLR para 205. (The case challenged the decision of national government to embark on a major infrastructural project, Lamu Port South Sudan Ethiopia

further considered county consultation to be instrumental in ensuring the views of those most affected by legislation, policy, or administrative decisions are deliberately considered and taken into account.[1164]

In *Jackson Ekaru Nakusa*, the applicants sought to reverse the national government's decision to compulsorily acquire community land in Turkana for upstream oil development without engaging the community and the county government.[1165] The Turkana County government and community submitted that the Cabinet Secretary's failure to consult the county in documenting and mapping the community land transparently and cost-effectively was fatal to any compulsory acquisition.[1166] While the court disclaimed jurisdiction on the matter, referring it to an intergovernmental dispute mechanism,[1167] the case is emblematic of a county whose approach to natural resource implementation is proactive.[1168]

Comparative jurisprudence also favours the approach taken by Kenyan courts. For instance, South African courts have acknowledged the right of local governments to regulate planning processes.[1169] Consequently, the courts have upheld the proposition that a mining license holder under the Mineral and Petroleum Development Act cannot proceed with mining operations on land planned for a non-mining purpose until the relevant local government sanctions change of user.[1170]

Taken in totality, the emerging jurisprudence and statutory law support the conclusion that counties as guardians of local community interest should take a proactive stance in resource governance decision making.[1171] Natural resource development, therefore, ought to

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Transport Corridor (LAPSSET), without comprehensive participation of the Lamu County and communities whose livelihoods and cultural heritage would be adversely impacted by the proposed development).

[1164] Ibid para 205.

[1165] *Jackson Ekaru Nakusa & 32 others v National Land Commission & 2 others* (2019) eKLR.

[1166] Ibid para 7.

[1167] Ibid para 54 (referencing section 8 of the Community Land Act).

[1168] Chapter 7.3.1.

[1169] Planning and land use are an exclusive function of municipalities under South African law. Kenya's devolved system of governance borrows heavily from the South African model. See, Kangu op cit note 1 at 4.

[1170] See, *Swartland v Louw* (2010) JOL 26136 (CC); *City of Capetown v Maccsands* (2010) JOL 25970 (CC). See also, J De Visser & D Singiza 'Undermining local planning?' (2010) 12/1 *Local Government Bulletin* 5-6; Kangu op cit note 1 at 209. This controversy is unlikely in Kenya as relevant county governments and communities are notified of an application for mineral rights ahead and are free to raise objections. See, *Mining Act* supra note 39 s 34(1)*(c)*. The adverse consequence is that the licensing process may be prolonged to the disadvantage of a prospective mining investor seeking to acquire a mineral right for purposes of mobilising financing. See also, Cindy Oraro & Natasha Teyie 'Mineral rights'in Ambani & Wasunna op cit note 215 at 27-62.

[1171] *Mui Coal Basin Local Community* supra note 1115 the court opines 'in light of the provisions of section 107 of the County Government Act, we expect the Kitui County Government to take more seriously its role of representing the local community interests in the next phase of the coal mining project… the environmental impact evaluation stage.' Ibid para 107.

advance collaboration and intergovernmental relations while avoiding conflicts and duplication.[1172] In this scheme of things, a balance must be struck between environmental prerequisites and development objectives so that natural resource exploitation does not compromise environmental sustainability. Similarly, the pursuit of ecological management must enable society to derive benefits from resources within the environment.[1173] Benefit sharing is the adaptive process to negotiate and potentially achieve the balance between resource costs and benefits.[1174] In the Kenyan context, the extent to which benefit sharing serves to allocate costs and benefits is difficult to realise without the effective participation of subnational units in resource governance.

6.5 Conclusion

Kenya's Constitution seeks to promote efficient and transparent resource allocation through a devolved governance system. Yet, tensions have developed between the centre and the counties, in part because devolution challenges powerful interests at the centre.[1175] As this chapter has shown, Kenya's devolved system can enable equitable development and undermine the resource curse by combining self and shared governance. While Kenya's devolution experience is still nascent, the approach of the National Treasury, Senate, and National Land Commission to its work exhibits worrying features indicative of elite capture, recentralisation, and deliberate state undermining of devolution objectives.[1176] Additionally, the chapter has pointed at deficits in citizen engagement with county implementing institutions such as the County Executive and Assemblies. The impact of failed participation is to weaken downward accountability, a facilitator of citizen trust in the context of policy implementation.

In the absence of a clear intergovernmental dispute resolution framework, critical disagreements pitting the two levels, or one level and communities over resource development, have inevitably been litigated. Notwithstanding the high cost of litigation on county

[1172] Council of Governors & Kenya Law Reforms Commission *Report on the Audit of national and county policy and legislation in the natural resource management sector* (2018) 4.
[1173] Ibid at 1.
[1174] Wynberg & Hauck op cit note 1141 at 8.
[1175] Brendon J Cannon & Jacob Haji Ali 'Devolution in Kenya four years on: A review of implementation and effects in Mandera County' (2018) 8:1 *African Conflict & Peacebuilding Review* 1-28 at 5-6; Bosire Conrad 'The "war" between Senators and Governors: What does the law Say?' *Star* 22 February 2014 online at *https://www.the-star.co.ke/news* accessed on 24 Nov 2020.
[1176] See, part 6.3.1.3 for instance.

governments,[1177] which detracts from the design principles,[1178] such litigation has been beneficial for enabling more legal clarity and certainty and undermining resource conflicts.

Despite these limitations, the chapter has demonstrated devolution's resilience, especially in fostering competition over resource sharing between the Senate and National Assembly. This vibrancy of devolution has been buoyed by the judiciary's balanced interpretation of the scope of devolved governance in Kenya. Viewing itself as a defender of constitutionalism by illuminating legal penumbras in legal texts arising from long drawn compromises in constitution-making,[1179] courts have been a consistent protector of devolution. The courts' role will undoubtedly increase as the statutory framework on resource governance and benefit sharing become the subject of judicial interpretation.

While the chapter has highlighted county governments' constitutional place, its role in natural resource management, generally, and benefit sharing, specifically, is still uncertain. The next chapter will demonstrate what counties can do to secure a more stable regime for the realisation of resource benefits by the host regions and communities. It will point counties in the direction they should progress towards in order to provide definitions and content to their role as implementers of natural resource policy.

[1177] A report on costs of litigation has shown that the Council of Governors spent US$1,4 million on litigation in one financial year. This is separate from expenses by individual county governments. See, The Inter-Governmental Technical Committee *Report on Costs of Intra and Inter Government Litigation in Kenya* (2017) 28.
[1178] Ostrom op cit note 498 at 259.
[1179] *Speaker of the Senate* supra note 734 at para 156.

CHAPTER 7: EXPLOITING THE PERIPHERIES: A CASE STUDY OF TURKANA AND KWALE COUNTIES' RESPONSE TO EXTRACTIVE RESOURCE DEVELOPMENT

7.1 Introduction

The convergence of ethnic division, historical inequality, and opaqueness in the management of extractives constitute an unholy trinity that can threaten state stability.[1180] These three ingredients are present in Kenya to varying degrees.[1181] The previous chapter discussed the principles underpinning Kenya's devolution. It demonstrated that devolved governance is the single most crucial reorganisation of the country's social-political order to address inequality and deepen transparency.[1182] The chapter concluded by positing that the consolidation of benefit sharing will be further realised once Kenya's subnational units begin to engage actively in natural resource management functions.

The present chapter assesses the response of two of Kenya's counties – Turkana and Kwale – to resource governance responsibilities vested upon them by law.[1183] It inquires whether, as hypothesised, counties serve to facilitate legal implementation, generally and specifically, on benefit sharing. Using the core-periphery framework discussed in part 7.2,[1184] the rest of the chapter proceeds to analyse the two counties' response to the exploitation of extractive resources within their jurisdictions.

The reasons for the choice of these two case studies are as follows. First, both counties came into force in 2013 and were equally impacted by processes designed to implement the

[1180] Michael L Ross 'How do natural resources influence civil war? Evidence from thirteen cases' (2004) 58:1 *International Organization* 35-67; Mwangi Kimenyi & Zenia Lewis *Managing natural resources for development in East Africa: Examining key issues with the region's oil and natural gas discoveries* (2016) available at *https://www.brookings.edu/wp-content*, accessed on 19 Nov 2020.

[1181] Kenya's ethno-regional inequalities are well documented. See, Society for International Development op cit note 838. Kenya's gini coefficient of 44.540 is above the Sub-Saharan African average of 43.8. See Kenya National Bureau of Statistics *Labour Force Basic Report 2018*. See, Jovia Bogere 'Transparency and accountability in Kenya's extractives sector' (2020) available at *http://www.extractives-baraza.com>*, accessed on 19 April 2021 (decrying the lack of publicly available information on important aspects of extractives despite existing laws). Ibid at 7.

[1182] Kangu op cit note 1 at 119 (where he discusses the notion of developmental devolution as designed to address economic disparities); Ghai op cit note 838; See also, *Constitution* supra note 12 art 174 (on the objectives of devolution).

[1183] *Constitution* ibid art 186 & Schedule 4 part 2.

[1184] Johan Galtung 'Structural theory of imperialism' (1971) 8:2 *Journal of Peace Research* 81-117 (where he elaborates the idea of core and periphery). See also, E Spencer Wellhofer 'Core and periphery: Territorial dimensions in politics' (1989) 26:3 *Urban Studies* 340-355.

Constitution promulgated in 2010.[1185] Further, both counties are socio-economically and politically marginalised.[1186] Additionally, extractive activities that started pre-devolution in both counties are at critical junctures at the time of this thesis, providing a rich set of comparative contexts. Finally, the two counties' engagement with resource governance leads to contrasting outcomes, providing insights into the strategic positioning adopted by the two counties and the extent to which this has impacted implementation processes.

In undertaking the case study assessment, primary literature from the two county governments was collected and analysed. These include mandatory statutory planning documents required of every county government,[1187] government reports,[1188] environmental compliance reports,[1189] county legislation or policies,[1190] and reports by non-governmental institutions.[1191] Corporate information from the operators involved in extractive activities in both Kwale and Turkana was also collected and informed the comparative review. The corporate documents relied on include performance metrics, governance commitments, press releases, and, financial disclosure filings provided to investors as required by regulatory authorities.[1192]

[1185] The Constitution established the Parliamentary Constitutional Implementation Oversight Committee and a Commission for the Implementation of the Constitution to facilitate legislation and administrative developments necessary for implementing the Constitution. See, *Constitution* supra note 12 Schedule 6: 'Transition and Consequential Provisions' sec 4, 5. A dedicated Transitional Authority was also established to facilitate phased transfer of functions to different levels of government. See, Transition to Devolved Government Act No 1 of 2012. The work of these bodies gave rise to most laws governing devolved governance.

[1186] See, part 7.3.

[1187] Counties are mandated to develop strategic, financial, and technical documents to inform their service delivery mandates. The County Integrated Development Plan (CIDP) is a plan prepared by all counties to guide county development over a five-year period (*County Government Act* supra note 830 sec 108); County Sectoral Plans are 10 year programme plans per sector (*County Government Act* supra note 830 sec 109); *County* Fiscal Strategy Papers are annual financial policy documents. See Public Finance Management Act supra note 965 sec 117.

[1188] Reports of Constitutional, Statutory and Parliamentary Commissions and Committees, Parliamentary Proceedings, and Proceedings by County Assemblies (Hansard Reports) are some of the examples.

[1189] Environmental impact assessment reports, strategic environmental and social impact reports, and public participation forum reports are some of the reports reviewed.

[1190] Turkana Public Participation Act, Turkana Village Act, Kwale Public Participation Act, Kwale Finance Act, and Turkana Draft Extractive Policy.

[1191] Haki Jamii *Titanium mining benefit sharing in Kwale County:A comprehensive analysis of the law and practice in the context of Nguluku and Bwiti* (2017); Oxfam *The use of tax havens in the ownership of Kenyan petroleum rights* (2016).

[1192] See e.g., Base Titanium *2021 Mineral Resources and Ore Reserves Statement* online at https://baseresources.com.au/ accessed 24 Feb 2021.

7.2 Core-Periphery Theory in Resource Governance

Modern states exhibit glaring inequality between each other.[1193] Similarly, unequal development among regions of the same state is not uncommon.[1194] The core-periphery theory explains that intra-state inequality results from the unbalanced exchange due to the systematic transfer of surplus from countries mainly in the Global South (periphery) to the industrialised Global North (core).[1195] Under this theory, the core stands in economic, social, political, military, technological, or cultural dominance relative to the periphery.[1196] The same dynamic is replicated within specific countries where local cores may exploit local peripheries.[1197] In such contexts, groups inhabiting geographical regions in the periphery perceive themselves as controlled by the core with little leverage over decisions that affect them.[1198] Core-periphery dynamics sustain social inequities, environmental degradation, and loss of livelihood that may generate grievances.[1199]

While the salience of the core-periphery theory may have waned, this template is a useful framework to examine the global north-south relationship relative to resource development.[1200] The operations of multinational corporations (MNCs) in Africa's mining sector are often considered exploitative of the periphery.[1201] The repatriation of resource profits to industrialised countries at the core of the global economy while saddling host countries with disproportionate environmental and social costs exemplifies the extent of this extractivism.[1202] The other example relates to the MNC's application of less stringent environmental practices within resource-rich but less developed countries, compared to their practices at their countries of origin in the industrial north.[1203]

[1193] Galtung op cit note 1184 at 81.
[1194] Walter L Goldfrank 'Paradigm regained? The rules of Wallerstein's World-System method' (2000) 6:2 *Journal of World-Systems Research* 150-195.
[1195] Jon Hendricks 'Dependency theory' in Edgar F Borgatta et al (eds) *Encyclopedia of Sociology* (1992) 458-466.
[1196] Galtung op cit note 1184 at 81-117.
[1197] Fenda A Akiwumi 'Global incorporation and local conflict: Sierra Leonean mining regions' (2012) 44:3 *Antipode* 581-600 at 582.
[1198] Courtland L Smith & Brent S Steel 'Core-periphery relationships of resource-based communities' (1995) 26:1 *Journal of the Community Development Society* 52-70.
[1199] Akiwumi op cit note 1197 at 583.
[1200] Roger Hayter, Trevor J Barnes & Michael J Bradshaw 'Relocating resource peripheries to the core of economic geography's theorizing: rationale and agenda'(2003) 35:1 *Area* 15-23 at 17.
[1201] Ogunbadejo Oye *The Exploitation of Africa's Strategic Minerals* (2016) 18.
[1202] Ibid. See also, Lynn Field op cit note 45.
[1203] Marcello M Veiga, Malcolm Scoble & Mary Louise McAllister 'Mining with communities' (2001) 25 *Natural Resources Forum* 191-202 at 193.

It is further contended that the core-periphery discourse evidently influenced some of the key imperatives of the Convention on Biological Diversity (CBD), discussed earlier in this thesis.[1204] The CBD views the world through a binary lens between the poor but biodiversity rich countries in the Global South (peripheries) and the technologically advanced but diversity deficient countries of the Global North (cores).[1205] Cognisant that the dominant notions by which ecological diversity were deemed common heritage of humankind had led to massive biopiracy of resources from the South by technologically advanced countries, the CBD proposes a shift in incentives.[1206] The Convention constructs a differentiated regime of rights and responsibilities by mandating benefit sharing, capacity building, and technology transfer in favour of the peripheries while securing predictable access to biological resources to the cores.[1207]

Kenya's immediate post-independence economic policy in the 1960s was arguably influenced by the core-periphery discourse, which was ascendant at the time. Sessional Paper No. 10 of 1965 zoned the country into high and low potential provinces for public investment purposes, reasoning that such prioritisation would accelerate economic growth.[1208] Infrastructure and capacity for cash crop agriculture were markers of high potential, while aridity, poor infrastructure, and low human capital, the bane of nearly two-thirds of the country at the time, were deemed low potential.[1209] Investment in the former was encouraged, while a diminished focus on the latter was permissible under the policy.[1210] The regional disparities

[1204] See Chapter 2.
[1205] R Jayakumar Nayar & David Mohan Ong 'Developing countries, "development" and the conservation of biological diversity' in Catherine Redgwell et al (eds) *International Law and the Conservation of Biological Diversity* (1995) 236-241 at 235.
[1206] Udo Shuklenk & Annita Kleinsmidt 'North-South benefit sharing arrangements in bioprospecting and genetic research: A critical ethical and legal analysis' (2006) 6:3 *Developing World Bioethics* 122-134; Also, Nkhata, Breen & Mosimane op cit note 452 at 56.
[1207] *CBD* supra note 82 preamble (acknowledges financial and technological needs of developing countries); Ibid art 16(2) on technology transfer on most favourable terms basis to developing countries; Ibid art 19(2) mandating contracting parties to share results and benefits from biotechnological development with developing countries on fair and equitable basis; Ibid art 20(4) 'The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.' See also, W Neil Adger, Tor A Benjaminsen & Katrina Brown et al 'Advancing a political ecology of global environmental discourses' (2001) 32 *Development and Change* 681-715.
[1208] Government of Kenya 'Sessional Paper Number 10: African Socialism and its Implications for Planning in Kenya' (1965). See also, Beneah M Mutsotso 'Marginalization of the pastoralist Pokot of northwestern Kenya' (2018) 4:2 *World Journal of Social Sciences and Humanities* 69-74 available at *http://pubs.sciepub.com/wjssh/4/2/1,* accessed on.
[1209] *Sessional Paper Number* ibid at 10.
[1210] Ibid.

resulting from the implementation of this policy continue to define the spatial distribution of well-being in the country.[1211]

Kenya's centre-periphery relationship manifests in the relative affluence and economic dominance of regions around Nairobi, Kenya's capital, over the rest of the country, especially the northern frontier and the Kenyan coast.[1212] The convergence of devolution as a policy measure to counteract inequality, on the one hand, and resource development, on the other, creates a three-dimensional power contest: core (centre) versus periphery, corporate versus periphery, and intra-periphery.[1213]

Despite criticism of the core-periphery theory as reproducing a dichotomised view of the world,[1214] this chapter uses this formulation to aid in analysing the intergovernmental relationship between national and county governments on benefit sharing. This engagement can be conflictual, competitive, or cooperative. The corporate-periphery contestation speaks mainly to the experience of interaction between the corporation involved in extractive activities and the host county, even though other county-based stakeholders may be implicated in the interaction.[1215] In contrast, the intra-periphery challenge focuses on how resource development and devolution trigger internal competition among county stakeholders or within the resource-host community.[1216] These arenas of contestation will provide a framework for analysing the approaches taken by the two counties to their responsibilities on resource governance and benefit sharing. The institutional frameworks which have historically perpetuated patterns of inequality in the country – presumably weakened by devolved governance – are tested in examining the response of Turkana and Kwale below.[1217]

Admittedly, a fourth contestation involving the core or centre versus the corporation could also be triggered by resource development. The national government's decision to revoke a mineral right owned by a resource developer or to nationalise mineral development operations

[1211] Kennedy Mkutu *Guns and Governance in the Rift Valley: Pastoralist Conflict and Small Arms* (2008) 7-9.
[1212] Lind op cit note 1086.
[1213] Orr op cit note 56 at 138. It has been suggested that resource development could also stir up an intra-core contestation by which factions within central state seek to muscle each other out for resource rents. See, Tyce op cit note 841 at 729-737.
[1214] Louisa Parks *Benefit-Sharing in Environmental Governance: Local Experiences of a Global Concept* (2020) at 14.
[1215] Orr op cit note 56 at 138.
[1216] Ibid. In the South African case, an intra-periphery contestation can be illustrated by the dispute pitting traditional leadership and the community in the platinum rich Bakgatla-ba-Kgafela. See, *Pilane and Another v Pilane and Another* (CCT 46/12) (2013) ZACC 3.
[1217] Arie Friebarg 'Reward, law and power: Toward a jurisprudence of the carrot' (1986) 19 *Australian and New Zealand Journal of Criminology* 91-113 at 93.

illustrates this dynamic.[1218] As this thesis focuses on benefit sharing between the national government and its constituent units and communities, the core versus corporate contestation – while important – is beyond the study's scope.

7.3. Turkana County and Oil Development

The discovery of commercially viable oil deposits[1219] in Turkana by Tullow PLC[1220] propelled Turkana County, the vast, arid, and sparsely populated north-western frontier of Kenya, to the limelight.[1221] At 77,000 square kilometres, Turkana is three times Rwanda's size and borders South Sudan, Ethiopia, and Uganda to the north.[1222] All these neighbouring countries (or the regions immediately abutting Turkana) have recently emerged from or are still in a state of conflict.[1223] Turkana also borders Pokot, Baringo, and Keiyo-Marakwet, three counties distinguished for their general semi-aridity and under-development.[1224] The mobile pastoral economy practiced by the dominant ethnic Turkana community requires vast areas for seasonal migration in search of water and grazing grounds.[1225] This traditional livelihood is likely

[1218] See, GG No. 19489 'Revocation of prospecting licenses' (24 December 2012); Also, International Centre for Settlement of Investment Disputes (22 October 2018) *Cortec Mining Kenya Limited, Cortec (PTY) Limited & Stirling Capital Limited v Republic of Kenya* (Case No. ARB/15/29). The claim arose out of a dispute over the legal validity of the decision of the Kenyan State to revoke a special mining license with respect to the development of niobium deposits in Kwale County. The license was issued to the complainant during the political transition from one government to another in 2012. The claimants contended that their investment was nationalised as part of a policy of 'resource nationalism' undertaken during a change in government. Their claim was unsuccessful.

[1219] The oil find is in South Lokichar Basin in Turkana. The three wells discovered so far are estimated to hold at least 560 million barrels, at a combined potential flow of 5,000 barrels per day.

[1220] Tullow PLC is an Anglo-Irish firm. The Kenyan operation owned 100 per cent by Tullow PLC is run by Tullow BV, registered in the Netherlands. In 2010, after signing agreements with Africa Oil and Centric Energy, Tullow BV acquired a 50 per cent interest in the exploration licence blocks 10BA, 10BB, 10A, 12A, and 13T, covering Turkana, Marsabit, and Baringo counties from Africa Oil (a Netherlands registered subsidiary of Canadian company Africa Oil Plc). See Africa Oil Corp *Year End Report 2014*. Two years later, Tullow Oil made the first discovery of crude oil in the South Lokichar Basin at the Ngamia-1 well. See Tullow 'East Africa-Kenya Key Statistics' available at *https://www.tullowoil.com/operations/eastafrica/kenya*, accessed on 1 Jan 2021. In July 2015, Kenya signed a Double Taxation Agreement with the Netherlands, providing for zero or reduced rates on withholding taxes on dividends and interests. This agreement has bearing on how much Tullow BV will be taxed and therefore how much in revenue the government of Kenya receives. See, *Kenya to Strengthen Trade and Investment with Netherlands*, National Treasury, July 2015. See generally, Oxfam *The Use of Tax Havens in the Ownership of Kenyan Petroleum Rights* (2016).

[1221] Jessica Hatcher *Exploiting Turkana: Robbing the Cradle of Mankind* (2014). For a general description of the arid conditions of Turkana see, Edmund GC Barrow 'Customary tree tenure in pastoral lands' in Juma op cit note 578, 259-78.

[1222] Ibid. The county occupies 77,000 square kilometres, 95 per cent of which is arid.

[1223] Patricia Vasquez 'Kenya at a Crossroads: Hopes and fears concerning the development of oil and gas reserves' (2013) 5:2 *International Development Policy* 3-26 at 9 available at *http://dx.doi.org/10.4000/poldev.1646*, accessed on.

[1224] Ibid at 16.

[1225] Charis Ennsa & Brock Bersaglio 'Pastoralism in the time of oil: Youth perspectives on the oil industry and the future of pastoralism in Turkana, Kenya' (2016) 3:1 *The Extractive Industries and Society* 160-170.

threatened by the lease of 86 per cent of the county's total landmass for oil exploration and development activities.[1226]

Before the onset of devolution, Turkana (like the rest of Kenya's arid northern region) was excluded from the country's economic and political mainstream and defined by poor infrastructure, low public sector investment, and conflicts.[1227] This situation was firmly rooted in colonial imperial policies that applied draconian security laws to the Northern Frontier District – as it was then known – presumably to tame war-like, stock-dependent communities.[1228] Four decades of self-rule brought little respite as Turkana was zoned as a low-potential periphery within Kenya's economic logic.[1229] The resulting developmental apartheid created vast ungoverned spaces susceptible to exploitation by tribal mercenaries and terrorists alike.[1230] Here, local and transboundary nomadic communities with illicit small arms are perpetually in conflict over water and grazing grounds.[1231] Due to limited state security, one in three Turkana men is estimated to own a gun, enabling them to provide a semblance of self-defense in a hostile and poorly-policed environment.[1232]

Ten years of devolved governance combined with the value attached to the new oil resources have justified increased state presence in the county.[1233] First, implementation of the constitutional requirement that the national government equitably shares at least 15 per cent of

[1226] Blocks 10BB, 11A, 11B, 12A, and 13T. See, National Oil Corporation of Kenya 'Opportunities for Oil and Gas Exploration in Kenya' available at *http://www.nationaloil.co.ke/site>*, accessed on.
[1227] Office of the Prime Minister *Vision 2030: Development Strategy for Northern Kenya and Other Arid Lands* (2012) 6.
[1228] The Outlying District Ordinance of 1902 effectively declared the Northern Frontier District (NFD) a closed area and proscribed movement in and out of the region without a special pass. The Special Districts (Administration) Ordinance of 1934, together with the Stock Theft and Produce Ordinance of 1933, gave the colonial administrators extensive powers of including seizure of property of 'hostile tribes'. The latter legalised collective punishment of tribes and clans for the offences of their members. The net effect of this early colonial legislation was to turn the NFD, including Turkana, into a closed zone that had no contact or relation with other parts of Kenya. See, Commission on Revenue Allocation 'Historical injustices: A complementary indicator for distributing the equalization fund' CRA Working Paper No. 2012/02 (2012) at 28 available at *https://devolutionhub.or.ke>*, accessed on 23 Feb 2021; Hannah Whitaker 'Frontier security in north-east Africa: Conflict and colonial development on the margins' (2017) 58:3 *Journal of African History* 381-402.
[1229] *Office of the Prime Minister* supra note 1127 at 6. See also, Philip Kipkemboi Chemelil 'Ecology and history as essentials of deprivation in Turkana County Kenya' (2015) 22 *Historical Research Letter* 10-16 at 11.
[1230] Kennedy Mkutu Agade '"Ungoverned space" and the oil find in Turkana, Kenya' (2014) 103:5 *The Round Table* 497-515 at 502. See also, T Risse 'Governance in areas of limited statehood. Introduction and overview' in T Risse (ed) *Governance Without a State? Policies and Politics in Areas of Limited Statehood* 1-35.
[1231] Orr op cit note 56 at 137; Eliza M Johannes, Leo C Zulu & Ezekiel Kalipeni 'Oil discovery in Turkana County, Kenya: A source of conflict or development?' (2015) 34:2 *African Geographical Review* 142-164 at 149.
[1232] Agade op cit note 1230 at 499.
[1233] Timothy Besley & Torsten Persson 'Wars and State capacity' (2008) 6:2/3 *Journal of European Economic Association* 522-530 (for the proposition that policy makers will only expand state capacity to the peripheries if resource booms justify it).

annual revenue with the 47 counties has seen Turkana receive substantial fiscal transfers.[1234] In the 2016/2017 financial year, Turkana received US$97,3 million, an increase of US$10,5 million on the previous year, as equitable revenue transfer from the national government.[1235] As exemplified by the programmes under the County Integrated Development Plans,[1236] these fiscal inflows have begun to improve this hitherto developmental backwater's social-economic development.

On its part, the national government has invested in a massive infrastructural programme, including ongoing road construction and a proposed pipeline to evacuate oil from the oil fields in Turkana to Lamu Port.[1237] Improved security has been prioritised even though entrenched inter-ethnic and cross-border conflicts continue to defy government interventions.[1238] The increase in state capacity has triggered private sector and donor interest in the county, leading to in-migration and an upsurge in the cost of land, especially in the urban centres contiguous to the oil facilities.[1239] Despite these developments, the Turkana indigenous community is suspicious that the current expansion of state presence in the county is only designed to serve extractive purposes.[1240]

7.3.1. Core-Periphery Contests: National Government versus Turkana County

The elevation of oil and gas to flagship programme status within Kenya's development planning heightens the relative importance attached to it by the national government.[1241] While this designation enhances coordinated action within the sector, unanimous national government's support favours unilateral action, which can undermine the peripheries'

[1234] *Constitution* supra note 12 art 202.
[1235] Controller of Budget *Annual County Governments Budget Implementation Review Report* 2016/17 at 17 available at *https://cob.go.ke*>, accessed on.
[1236] Turkana County Government *Turkana County Integrated Development Plan 2018-2022.*
[1237] East African 'Lapsset project adopted by AU in move to boost continent's free trade area' 19 January 2020, available at *https://www.theeastafrican.co.ke*>, accessed on 24 Jan 2021.
[1238] Agade op cit note 1230 at 499.
[1239] Janpeter Schilling, Raphael Locham & Jürgen Scheffran 'A local to global perspective on oil and wind exploitation, resource governance and conflict in Northern Kenya' (2018) 18:6 *Conflict, Security & Development* 571-600; KM Agade 'Oil and emerging conflict dynamics in the Ateker Cluster: The case of Turkana, Kenya' (2017) 21:1 *Nomadic Peoples* 34-62.
[1240] Aukot Ekuru '"It is better to be a refugee than a Turkana in Kakuma": revisiting the relationship between hosts and refugees in Kenya' (2003) 21:3 *Refugee* 73-83 (discusses the problematic historical relationship between the community and national government). See also Ennsa & Bersaglio op cit note 1226 at 162-3.
[1241] Government of Kenya '"Kenya Vision 2030." Second medium-term plan' (2013-2017) available at *http://www.vision2030.go.ke/*, accessed on 5 Jan 2021. Extractives included as the seventh sector of the economic pillar.

interests.[1242] This threat is evident in at least two instances. First, negotiating the petroleum development law dragged on for five years, presenting a glimpse of the power dynamics between the core and periphery post-devolution. Secondly, compensation for land required for resource development and enabling infrastructure provides another contestation site between national and corporate actors, on the one hand, and county and community, on the other.

Discussions on a new legal regime to govern the petroleum sector required by the 2010 Constitution, but made urgent by the Turkana oil find, was long drawn. Consensus on the institutional arrangements for fostering accountability in upstream activities was readily arrived at, but disagreement over revenue sharing delayed the Draft Petroleum Bill's final endorsement.[1243] Acrimony and rancor pitting the national government, on the one hand, and the host county and resource-host community, on the other, raged on for months.[1244] In deference to counties and consistent with the Constitution,[1245] the initial Bill proposed a derivation model of profit sharing so far as it accorded particular preference to oil-producing regions of the state with the rest of the profits from oil equitably distributed.[1246] Under the proposed formula, a threefold split of national government revenue share was apportioned to the national government, host county, and community at the rate of 75, 20, and 5 per cent, respectively.[1247] This Bill was adopted by Parliament but vetoed by the President.[1248]

The President's Memorandum of Refusal urged for reconsideration of both county and community share of benefits based on these entities' limited absorptive capacity.[1249] The Memorandum further proposed the capping of county and community share of revenue against the amount of annual revenue allocated to the county.[1250] The President's proposals were immediately reflected in a new Bill presented to Parliament.[1251]

A strong denouncement by the County Governor of Turkana followed the President's refusal to assent to the Bill. Specifically, the Governor posited that the proposed caps on county

[1242] Albena Azmanova 'Whose development? What hegemony? Tackling the structural dynamics of global social injustice' (2019) 12:4 *Ethics & Global Politics* 32-39.
[1243] Kariuki Muigua 'Promoting open and accountable management of extractives in Kenya: Implementing the Extractives Industries Transparency Initiative' (2019) at 3, available at *kmco.co.ke*, accessed on 6 July 2020.
[1244] Luke Patey 'A belated boom: Uganda, Kenya, South Sudan, and prospects and risks for oil in East Africa' (2018) 10.
[1245] *Constitution* supra note 12 art 66(2), read with 69(1)*(a)*.
[1246] Omorogbe op cit note 85 at 267.
[1247] *Petroleum Bill* supra note 73 clause 58.
[1248] Luke Patey op cit note 1244 at 10.
[1249] *Presidential Memorandum* supra note 73.
[1250] Ibid at clause 85.
[1251] *Petroleum Bill* supra note 73 clause 85.

and community share of revenue intended to sustain the Turkana community's economic marginalisation.[1252] The intergovernmental relations body, the Council of Governors,[1253] also expressed dissatisfaction with the President's reservation urging reconsideration.[1254] Communities weighed in and threatened a blockade of any resource development activities until an acceptable revenue share formula was agreed upon.[1255] Lengthy bilateral negotiation between national and county leadership ended with an agreement to abandon the proposed capping of county and community revenue share while retaining the revenue quotas proposed by the President.[1256] While the community was not a direct participant in this win-win negotiation process involving county and national governments, the county's leadership was obliged to explain the rationale for the agreement to the community.[1257]

Ad hoc and inadequate as the Bill's negotiating process was, it represented the first time a county had conceptualised its role in extractive resource implementation to include the formulation process with some measure of success.[1258] Moreover, this case suggests that devolution institutions can enable political actors at the county level to contest with national actors over equitable resource distribution with little or no reprisal.[1259] By standing between the national government and resource-host communities in policy formulation, county actors can ensure the evolution of less burdensome legal regimes whose implementation will presumably leave communities better off.[1260] Conversely, the empowered role of subnational actors in negotiating or managing resource revenues, if taken to an extreme, can also enable the emergence of local resource nationalism, aggravating the resource curse.[1261] The Turkana County approach to negotiating a benefit-sharing regime, however, represented a balanced and proportionate set of demands. For instance, in its petition to Parliament, the county called for the involvement of resource counties and local communities in land acquisition for upstream

[1252] 'Institute of Law & Environmental Governance 'Give Turkana its Fair Share of Oil Revenues: Voices from the Grassroots' (2018) at 7, available at *http://ilegkenya.org*, accessed on 10 June 2020.
[1253] *Intergovernmental Relations Act* supra note 996 sec 19.
[1254] Nation Governor 'Munya faults President Uhuru Kenyatta move to reject Petroleum Bill' 13 December 2016, available at *https://nation.africa*, accessed on 11 June 2020.
[1255] Schilling, Locham & Scheffran et al op cit note 1239 at 585.
[1256] Nation 'Turkana agrees to oil revenue sharing ratios' 21 May 2018, available at *https://nation.africa*, accessed on 14 Jan 2020. The potential revenues for Turkana County and its communities is based on the fiscal terms contained in Petroleum Service Contracts, estimated recoverable oil reserves, oil prices, and cost of developing the Turkana South Lokichar Basin oil fields (which determine computation of cost oil). See, *Petroleum Act* supra note 66 Second Schedule: Model Production Sharing Contract clauses 36-38. See also, Deloitte 'Kenya's petroleum fiscal regime: Expansive coverage' (2014) available at *https://www2.deloitte.com*>, accessed on.
[1257] *Nation* ibid.
[1258] Chapter 6.7.2.
[1259] Orr op cit note 56 at 139.
[1260] Ibid.
[1261] Arellano-Yanguas op cit note 11 at 617. See chapter 8.2.4.

development processes.[1262] It further urged that a relevant county be consulted prior to granting a permit to a contractor for the carrying out of any upstream development activities.[1263] The county also sought to dissuade Parliament from adopting a narrow definition of 'community' for purposes of benefit sharing from the perspective of an administrative unit, the ward.[1264] It instead urged that a definition that recognises the Turkana community with every resident as a beneficiary was more appropriate.[1265] While some of Turkana's proposals did not carry favour in Parliament, the final statute incorporated strong provisions touching on community participation.[1266]

The second instance demonstrative of centre-periphery contest relevant to benefit sharing has emerged in the dispute over land-related compensation. Land in Turkana is primarily community land.[1267] Under the Constitution, such land vests in ethnic or cultural communities but, in its unregistered status, is held in trust by county governments.[1268] Thus, the county government is the custodian of community land in the county and has the mandate to manage this resource on behalf of the community.[1269] The Community Land Act further recognises that the county shall hold any money paid subsequent to compulsory acquisition of unregistered community land until the land has been registered in the name of a specific community.[1270] Following such registration, the compensation sums and any interest earned is transmitted to the community in question.[1271] Further, the law requires that investment in natural resources situated within community land must be preceded by community consultation and consent processes.[1272] In particular, an agreement for resource investment between community and corporation must be supported by a two-thirds vote of community assembly members.[1273]

Despite these legal provisions, through the NLC, the national government published a notice of intended compulsory acquisition of 6,348 hectares of land to be used in the South

[1262] Parliamentary Report on Petroleum (Exploration, Development and Production) Bill 2017 at 10 online at *https://kcspog.org/kenya-parliamentary-report/* accessed on 12 June 2020
[1263] Ibid at 19.
[1264] Ibid at 20.
[1265] Ibid at 20.
[1266] *Petroleum Act* supra note 66 sec 125.
[1267] Zoe Cormack & Abdikadir Kurewa 'The changing value of land in Northern Kenya: the case of Lake Turkana Wind Power' (2018) 10:1 *Journal Critical African Studies* 89-107.
[1268] *Constitution* supra note 12 art 63.
[1269] Orr op cit note 56 at 137.
[1270] *Community Lands Act* supra note 66 sec 6(2).
[1271] Ibid s 6(5).
[1272] Ibid s 36(1)(2).
[1273] Ibid s 36(3).

Lokichar basin oil project in Turkana County.[1274] The Commission's decision was challenged before the Environment and Land Court by the County Government of Turkana and the community.[1275] The County asserted that the Commission acted unlawfully by seeking to convert indigenous ethnic Turkana community land into public land in contravention of the Constitution and the Community Land Act.[1276] It further averred that the people of Turkana were not meaningfully involved in the planned acquisition through public participation and that the plan to compensate only a handful of people would cause open animosity between communities.[1277] The intended acquisition was also criticised because it interfered with the traditional land-use system and lack of transparency.[1278] The Court declined to adjudicate the matter on jurisdictional grounds characterising the matter as an 'intergovernmental dispute' that should first be arbitrated under the Intergovernmental Relations Act's framework.[1279] Consequently, it stayed the proceedings for a year to permit this engagement to take place.[1280] This non-resolution of land issues is a factor in holding back the finalisation of the financial investment decision (FID) by Tullow BV.[1281]

This instance represents an effort on the part of the county government to secure equitable compensatory benefits concerning the compulsory acquisition of land for resource development. By disrupting the process, whose long-term prejudicial impact on community interests is likely before a final decision is reached, the subnational decision helps stave off future conflicts and stabilise resource development activities. However, this outcome will only be obtained if the land access framework currently under development is considered fair by community stakeholders.[1282] If deemed otherwise, land disagreements and disputes will likely erupt as witnessed in other developing oil contexts in the region.[1283] Given the recorded land purchases by elite actors with information on strategic oil infrastructure, elite capture of

[1274] *Constitution* supra note 12 art 40(3). Compulsory acquisition is the taking of land for public purpose permissible after payment of full, prompt, and fair compensation to the owner.
[1275] *County Government of Turkana v National Land Commission & another* (2019) eKLR.
[1276] Ibid para 7.
[1277] Ibid para 7.
[1278] Ibid.
[1279] Ibid para 52.
[1280] Ibid para 53.
[1281] Daily Nation 'Kenya to wait longer for oil riches over delayed key licence' 30 June 2019, available at *https://www.nation.co.ke*, accessed on 20 June 2020.
[1282] Tullow Kenya BV *Early oil pilot scheme environment and social impact assessment* (2018) at 9.
[1283] Tom Ogwang & Frank Vanclay 'Social impacts of land acquisition for oil and gas development in Uganda' (2019) 8:109 *Land* 1-15.

compensatory benefits is an inevitable result.[1284] The consequential social conflicts that trigger a localised resource curse are undesirable.[1285]

Following the stalled litigation effort, the national government was forced to establish two grievance mechanisms. The Turkana Grievance Management Committee is multi-stakeholder in nature with representatives of national and county governments in addition to the resource contractor, private sector, civil society, and faith communities.[1286] The Committee is tasked with identifying and addressing a wide range of corporate-community disputes that may disrupt Turkana's resource development activities.[1287] The Committee is also mandated to facilitate capacity building for the host community towards addressing local content issues.[1288] An Inter-Ministerial (Escalation and Support) Committee chaired by the Head of Public Service and comprising relevant cabinet ministries, on the one hand, and the County Governor of Turkana and the Managing Director of the Developer, on the other, has also been established.[1289] This high-level Committee is designed to coordinate policy responses concerning more complex grievances referred by the Turkana Grievance Management Committee.[1290]

What is noteworthy is that both grievance committees are chaired by representatives of the national government even though a strong representation of county and county level actors is evident. The intention appears to be two-fold. First, by chairing the committees, the national government is presumably eager to ensure non-suppression of grievances by the corporation or the non-escalation of conflict by the county or community, both necessary for resource development.[1291] Secondly, by internalising disagreements, the national government is able to ensure that the resource-host county is rendered incapable of mobilising any community anger against the corporation and, in the event of anger, channel it away from disrupting resource development activities. Such an outcome is likely if substantive views of counties and communities in the two grievance committees are perceived to be taken seriously.

[1284] Ibid, at 3-4.
[1285] Ibid.
[1286] GG No. CXX (93) 7 August 2018 *Turkana Grievance Management Committee.*
[1287] Ibid para 2.
[1288] Ibid para 2(c).
[1289] GG No. CXX (8047) 7 August 2018 *Inter-Ministerial (Escalation and Support) Committee*
[1290] Ibid para 2.
[1291] Orr op cit note 56 at 139.

The lack of transparency in proceedings of these grievance mechanisms is most concerning, as it is thus likely to evolve into a mechanism for elite negotiation and deal-making. In an environment where the national government retains enormous power over the state's fiscal and coercive instruments, the county will be pressured into making concessions unsupportive of community interests.

7.3.2 Corporate-Periphery Contests

The burgeoning literature on business and human rights in the extractive sector provides indicators on how to structure the relationship between Turkana County and communities and the resource developer.[1292] Although the state has the duty to protect against human rights abuse by third parties, including businesses, corporations have the responsibility to act with due diligence to avoid rights infringement and address adverse impacts.[1293]

The oil operator, Tullow BV, has been in operation in Turkana since 2012,[1294] a year ahead of the country's 2013 general elections which effectively operationalised devolution.[1295] The inland location of the oil find and the anticipated field development infrastructure[1296] dissuades against thin levels of social engagement common among oil developers.[1297] In Turkana, oil development in Lokichar is intertwined with traditional livelihoods, making it impossible to ignore county and community-level impact without attracting an adverse response by the community.[1298] Proactively, Tullow committed itself to the environmental and

[1292] Office of the High Commissioner for Human Rights *Guiding principles on business and human Rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, A/HRC/17/31 (21 March 2011); UN Human Rights Council *Protect, respect and remedy: A framework for business and human rights – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/5 (7 April 2008); African Commission on Human and People's Rights *Resolution on a Human Rights Based Approach to Natural Resource Governance* ACHPR/Res.224(LI)2012; Mihaela Maria Barnes 'The United Nations Guiding Principles on Business and Human Rights, the state duty to protect human rights and the state-business nexus' (2018) 15 *Brazil Journal on International Law* 42; Institute for Human Rights and Business (IHRB) 'Human Rights in Kenya's Extractive Sector: Exploring the Terrain' December 2016, available at *www.ihrb.org*, accessed on 11 Nov 2020.

[1293] Stephanie Lagoutte *The State duty to protect against business related human rights abuses: Unpacking pillar 1 and 3 of the UN Guiding Principles on Human Rights and Business* (2014) 13.

[1294] Tullow Oil Comments on Oxfam Report: 'Complying with Free, Prior and Informed Consent: A Case Study of Tullow Oil in Turkana, Kenya' (2017) available at *https://www.business-humanrights.org*, accessed on 11 Nov 2020.

[1295] World Bank 'Devolution without Disruption: Pathways to a Successful Kenya' (2012) available at *http://documents1.worldbank.org*, accessed on 12 Nov 2020.

[1296] Turkana is more than 900 kilometres from the Port of Mombasa.

[1297] James Fergusson 'Seeing like an oil company: space, security and global capital in neo liberal Africa' (2005) 107:3 *American Anthropologist* 377-382. Fergusson asserts that oil companies and governments try to make petroleum development as off-shore like as possible in order to minimise community engagement. Ibid, at 379.

[1298] Patey op cit note 1244 at 8.

social safeguards of the International Finance Corporation and Equator principles.[1299] Under these standards, Tullow commits to full disclosure of social and environmental impact information, good faith consultation with the host community, and the establishment of a dedicated grievance mechanism.[1300] Tullow's grievance mechanism will only satisfy these standards if it is easily accessible to community members and a formal register, used to track and monitor complaints redress measures taken, is in place.[1301] In effecting these commitments, the corporation hired community liaison officers and a grievance officer at each of its three resource centres.[1302]

Tullow conceptualises benefit sharing based on the shared prosperity philosophy, underpinning its corporate social responsibility and local content programme.[1303] The corporation advocates for local procurement, local employment, and capacity building through skills, knowledge, and technology transfer as the most impactful enablers of shared prosperity.[1304] Local content investment by Tullow is claimed to run in excess of 2 billion Kenyan shillings (US$ 200M). Individuals and companies owned by persons from outside Turkana have been the greatest beneficiaries of local content contracts in drilling services, transport and logistics, and accommodation.[1305] The few local benefits of Tullow's investments appear to have targeted politicians and non-state actors who previously agitated against oil development projects.[1306] Such cooptation is consistent with contexts elsewhere where elite capture of benefits has been disproportionate, limiting local content's impact in mitigating the resource curse.[1307] The elite capture of local content has not attracted many sanctions from either national or county governments.

Tullow claims to have made substantial investments towards community welfare through provisions of scholarships, hospitals, and improvements of vocational institutions in

[1299] Tullow Kenya BV *Early oil pilot scheme environment and social impact assessment* (2018) 5.
[1300] Ibid, 6-14.
[1301] Tullow PLC *Human rights policy* (2017, on file with author); Tullow Kenya BV ibid at 14. The Human rights policy commits the corporation undertake a human rights due diligence before significant investments are made. No report on such due diligence assessment is publicly available.
[1302] Tullow Kenya BV ibid at 7.
[1303] See generally, Michael E Porter & Mark R Kramer *Creating Shared Value: Becoming a Movement* (2014).
[1304] Tullow PLC 'Corporate Social Responsibility Report: Creating Shared Prosperity' 2015 at 9, available at *https://www.tullowoil.com*, accessed on 18 Feb 2021.
[1305] Daily Nation 'Eating season in Turkana as Tullow billions feed business, political elite' 8 Feb 2020 at 10, available at *https://www.nation.co.ke*, accessed on 18 Feb 2021.
[1306] Ibid.
[1307] Ovadia op cit note 446 at 395-417.

the county.[1308] However, the community perceives these efforts to be misaligned with their needs and doubt their sustainability.[1309] Distrust appears mostly based on procedural issues and in particular limited disclosure of information underpinning the operator's investment decisions.[1310] By appearing to outsource community engagement to intermediary political actors, the community's limited confidence in the operator's commitment to meaningful consultation persists.[1311] The lack of information, especially at critical junctures of the exploration and production cycles, has often led to conflicts and disruption.[1312] While unarmed, these conflicts have not only disrupted extractive programmes but have occasioned property destruction and losses.[1313] The capacity of communities in Turkana to engage in armed conflict, alluded to earlier in the chapter, should caution the operator against any casual engagement with the community.[1314] Instead, the exercise of greater diligence to enhance perceptions of community ownership of the extractive development is a prudent approach.

The need for an extensive disclosure regime is further critical in mitigating the asymmetrical appreciation of costs versus benefits of extractive activities. By failing to provide information deemed significant at present to communities, assignment of future responsibility for harm on the corporation increases.[1315] Third-party independent specialists to support communities in understanding issues and monitoring FPIC is a cost the corporation should feel obliged to bear in the present.[1316]

In contrast to the community's negative perception of the operator, the county government sees its role as primarily facilitating Tullow's field operations.[1317] Turkana County government considers Tullow to be a significant investor whose contribution aids in addressing

[1308] Kennedy Mkutu, Tessa Mkutu & Martin Marani et al 'New oil developments in a remote area: Environmental justice and participation in Turkana, Kenya' (2019) 28:3 *Journal of Environment & Development* 223-252 at 240; also, *Tullow Oil plc Sustainability Report* (2019).
[1309] Daily Nation 'Villagers left high and dry as Tullow breaks promise' 23 February 2020) available at *https://www.nation.co.ke*, accessed on 12 Dec 2020.
[1310] John Obiri *Extractive industries for sustainable development in Kenya: Final assessment report* (2014) 13.
[1311] Orr op cit note 56 at 140.
[1312] Obiri op cit note 1310 at 17. Critical junctures are particularly vulnerable to conflicts or disruption. For instance, a few months after the announcement of the oil find, the local Turkana population blocked oil operations to get the attention of the central government. See, Mkutu, Mkutu & Marani op cit note 1308 at 229.
[1313] Felix Otieno Odhiambo 'Implementing an effective benefit-sharing regime in the extractives sector: An appraisal of imperatives for the Turkana oil resources' (2016) 12:1 *Law Society of Kenya Journal* 7-93 at 83.
[1314] Schilling, Locham & Scheffran et al op cit note 1239 at 584-6; Agade op cit note 1239, 34-62.
[1315] Muigua op cit note 1243.
[1316] Oxfam *Testing Community Consent: Tullow Oil Project in Kenya* (2017) 7.
[1317] County Government of Turkana 'County Investment Plan 2016-2020' at 44, available at *https://www.undp.org/content*, accessed 5 Nov 2020.

the social and economic challenges of the county.[1318] This favourable treatment is despite the operator failing to involve the county and community in negotiating a Memorandum of Understanding with the national government on benefit sharing and grievance redress in 2014.[1319] While such an approach would ordinarily have attracted criticism, it has not. Instead, the county has validated Tullow's contribution to backward linkages through job creation and market provision for local goods and services.[1320] County plans also particularly incorporate Tullow's contribution to the education sector.[1321] Turkana County government's involvement with community consultations, agreements, and monitoring of Tullow's field operations have consequently been inadequate.[1322] This is concerning given community leaders and members typically have a limited understanding of the oil industry and little experience in negotiating long-term arrangements with investors.[1323] Distrust of politicians as intermediaries of the community-Tullow relationship makes the role of county institutions all the more significant.[1324] The county government's demand for increased vigilance is further made necessary because, like any other corporation involved in extractives, Tullow comes into its Turkana venture with vast experience based on previous engagements.[1325] The corporation understands the intricate environmental demands at each extractive cycle and is in an advantaged position in negotiating with a community. Moreover, the corporation's financial position places it at a distinct advantage in any formal or informal negotiation process.

Thus, while the county has been a strong defender of the community in negotiating petroleum-benefit allocation at the national level, it appears not to view its role to include monitoring accountability to the community by the oil operator. This dissonance between community and county perception of the operator's effectiveness is likely to undermine stable extractive operations, as communities might perceive the county as acting in concert with the

[1318] See generally, *Report of the 2nd Turkana County Oil & Gas Conference* (26-27 May, 2016) (on file with author).
[1319] Orr op cit note 56 at 141.
[1320] County Government of Turkana op cit note 1317.
[1321] Turkana County Government 'County Integrated Plan 2013-2017' at 184-188, available at *https://turkana.go.ke/wp*, accessed on 5 Nov 2020. The plan highlights expected support from Tullow on the county's school feeding programme, equipment of five early childhood centres, and provision of scholarships among others. See also, '5th State of County Report Submitted by the Governor to the Turkana County Assembly' 29 November 2018 at 7-8, available at *https://turkana.go.ke/wp-content*>, accessed on?.
[1322] Oxfam op cit note 1316 at 6, 38.
[1323] Ibid at 6.
[1324] Safer World & Institute of Development Studies 'Governing black gold: lessons from oil finds in Turkana, Kenya' October 2017 at 4, available at *https://core.ac.uk*, accessed on.
[1325] In Africa, Tullow is involved in oil exploration, development, and production projects in Ghana, Equitorial Guinea, Gabon, Namibia, Uganda, and Mauritania, among others. See, *https://www.tullowoil.com/our-operations*> accessed 12 December 2020.

operator to exploit resources in a manner that disadvantages it. Admittedly, the county's involvement in micromanaging corporation-community engagements might be counterproductive. However, the county will acquit itself better by putting in place policy guidelines and protocols to inform participation and accountability processes.[1326] Nothing precludes the county government from formulating local content guidelines based on its mandate to implement national-local content policies or track local content shares for the county or community.[1327] Such procedures could incorporate a reporting and monitoring framework that enables the county to receive more detailed reports touching on specific local content deliverables and assess the extent to which local content programmes enhance local businesses' capacity.[1328]

Local content programmes' transparent delivery is made necessary because local content services are cost elements of some upstream and midstream processes.[1329] Local content as an upfront cost incurred by an operator reduces the eventual revenue pot available for sharing.[1330] For counties to adopt a *laissez-faire* approach to transparency in local content delivery is a dereliction of its obligation to monitor and ensure equitable returns to communities.[1331]

Despite the community's criticism, or perhaps in response to it, Tullow's preference for structured and institutionalised corporate social responsibility approaches is beginning to emerge. This approach becomes evident in the context of its proposed development of an Integrated Support Base (ISB) to provide accommodation for staff involved in exploration, appraisal, and early development work.[1332] Aside from compensating specific families for the

[1326] Oxfam op cit note 1316 at 38.
[1327] Turkana *County Integrated Development Plan 2018-2022*. Under this plan, the county envisions to enact a Petroleum Engagement bill and policy, develop an extractive sector strategy, establish county local content committee and policy, and a county revenue sharing committee and fund. The county further plans a common MOU on physical planning to bring all actors together. The county budgeted for the establishment of extractive sector regulations and strategies. Ibid at 69, available at *https://www.turkanaassembly.go.ke*, accessed on 12 December 2020.
[1328] Chilenye Nwapi 'Corruption vulnerabilities in local content policies in the extractive sector: An examination of the Nigerian Oil and Gas Industry Content Development Act, 2010' (2015) 46:2 *Resources Policy* 92-96.
[1329] *Petroleum Act* supra note 66 Schedule 2: Model Production Sharing Agreement, clause 2, 22.
[1330] Ivar Kolstad & Abel Kinyondo 'Alternatives to local content requirements in resource-rich countries' (2017) 45:4 *Oxford Development Studies* 409-423 at 410.
[1331] Gilbert M Khadiagala 'Global and regional mechanisms for governing the resource curse in Africa' (2015) 42:1 *Politikon* 23-43 at 26 (problematising focus of transparency only on public revenues and not the expenditure of those revenues).
[1332] Tullow 'Kapese Integrated Support Base (ISB) Environment and Social Impact Assessment Report' (Report No. KT/408, 2015) available at *https://www.tullowoil.com/Media*, accessed on 13 Dec 2020. The ISB, covering 426 acres, will incorporate a contractors' work area, runway to accommodate large aircraft, offices, security camp, a 400 persons accommodation, and training facility, among others. Ibid at 6.

land acquired for the ISB facilities,[1333] Tullow and the proposed ISB camp facility managers, Africa Camps Solutions, have established a community trust, Kapese Community Charitable Trust.[1334]

The purpose of the trust is to receive funding on behalf of the community from part of the revenue from bed occupancy of Tullow's ISB in Kapese and land use.[1335] The trust funds will then be channelled to support projects to alleviate poverty and improve the livelihood of the local community within Turkana South and East.[1336] Beneficiary projects shall be identified and monitored by a management committee of 13 members appointed by the trustees from among the community members.[1337] Both the national and county government of Turkana are ex-officio members of the board of trustees who, like the management committee, is dominated by members of the Turkana community.[1338]

Typically, community funds, trusts, or foundations (FTFs) pool and channel funds to earmarked projects identified by a multi-stakeholder committee distinct from actors involved in extractive processes.[1339] The FTFs have been recognised as useful mechanisms to achieve sustainable financing depending on their design and accountability capacity.[1340] Therefore, the adoption of the Kapese Trust represents Tullow's adoption of progressive practice drawn from other extractive contexts.[1341]

7.3.3 Intra-Periphery Contests

The county is the last mile in the distributional chain of monetary resource benefits towards the ultimate beneficiaries, both the county and community. Tremendous responsibility rests upon the county to fashion legal and policy mechanisms for enabling equitable benefit sharing.

[1333] Mkutu, Mkutu & Marani op cit note 1308 at 236.
[1334] Trust Deed Establishing Kapese Community Charitable Trust (4 January 2019, on file with author). See also, Mkutu, Mkutu & Marani op cit note 1308 at 236-7 (for a critical view of Kapese ISD project).
[1335] Trust Deed ibid Annex 1, clause 5.4. The operator will impose a fee of US$5 per occupancy per night and a 5 per cent levy on rent on any sub-lessee within the ISB. These funds will be remitted to the trust.
[1336] Ibid clause 2.
[1337] Ibid Annex 4 clause 9.
[1338] Ibid clause 6.
[1339] Thierry Rodon, Isabel Lemus-Lauzon & Stephen Schott 'Impact and benefit agreement: Revenue allocation strategies for indigenous community development' (2018) 47 *The Northern Review* 9-28 at 13.
[1340] Ondotimi op cit note 397 at 168. The author identifies seven parameters to assess effectiveness of FTFs in local development. These include programmatic and geographic focus, community involvement, governance structure, timing of interventions, and sustainability of financing among others. Ibid at 157.
[1341] Patrik Söderholm & Svahn Nanna *Mining, Regional Development and Benefit-sharing* (2014) 19-21.

The presence of effective mechanisms capable of delivering returns to communities will manage resource host communities' expectations.

The windfall from the exploitation of extractive resources was expected to have an immediate impact on the Turkana people's socio-economic situation.[1342] As the debate took place at the national level on resource benefit mechanisms, two contesting approaches were resonant at the community level. The populist view, advanced by one member of the National Assembly and the majority of the County Assembly members, sought direct cash for oil in favour of the Turkana community.[1343] It was argued, in support of this view, that any other mode of revenue sharing was susceptible to elite capture and transmitting benefits through bureaucratic institutions was inefficient and alienating of communities from their entitlements.[1344] Turkana's poverty level was another reason submitted in support of direct cash transfers, as it is considered capable of yielding immediate benefits to communities, ensuring stable resource development.[1345] However, the national government favoured a more cautious approach that further legislative action at the county level was necessary to guide how benefits would reach communities while ensuring sustainability and mitigating any potential volatility.[1346] As discussed earlier, this latter view is the one that was codified into law through the requirement that the community share of benefits would be remitted to a trust fund.[1347]

Therefore, it fell on the Turkana County government to actualise some of the legislative provisions on benefit sharing touching the county and community. Under national legislation, counties and communities are entitled to 20 and 5 per cent, respectively, of profit oil revenues.[1348] The agreement in revenue distribution settled further centre-periphery conflict with the national government but pushed downwards to county level the arduous task of

[1342] Enns & Bersaglio op cit note 1225 at 160-170.
[1343] Wilfred Ayaga 'Why Turkana residents want oil money in their pockets, not projects' *East African Standard*, 9 June 2018, available at *https://www.standardmedia.co.ke>*, accessed on 1 July 2020. See, Emeka Duruigbo 'Managing oil revenues for socio-economic development in Nigeria: The case for community-based trust funds' (2004) 30 *North Carolina International Law* & *Commercial Regulation* 123-196 at 178 (for the view that direct payments stimulate development of credit markets necessary for development).
[1344] Ayaga ibid. See also, Gaille Scott 'Mitigating the resource curse: proposal for microfinance and educational lending royalty law' (2011) 32:1 *Energy Law Journal* 81-98 at 88-89; Paul Segal 'Resource rents, redistribution, and halving global poverty: The resource dividend' (2011) 39:4 *World Development* at 475-489 (for the proposition that each country taxes the rents due to their natural resources and distributes the proceeds directly and unconditionally back to every adult citizen on an equal basis).
[1345] Ayaga ibid. See generally, Todd Moss 'Oil-to-cash: Fighting the resource curse through cash transfers' (2011) available at *http://www.cgdev.org*, accessed on.
[1346] The Standard 'President Uhuru Kenyatta flags off Kenya's first crude oil export' 26 August 2019, available at *https://www.standardmedia.co.ke*, accessed on 15 Dec 2020.
[1347] *Petroleum Act* supra note 66 sec 58(4).
[1348] Ibid sec 58(1)-(3).

conceptualising operational rules. First, the county must model a management regime regarding its share of the revenue.[1349] Such a regime must ensure the prudent utilisation of revenue and intergenerational equity.[1350] Second, the county, through its Assembly, is obliged to enact a law establishing a trust fund to which community share of revenue will be paid. The allocative principles for this fund must also be outlined.[1351]

In developing the framework to guide revenue disbursement to communities, a key challenge faced by the county relates to how to define the scope of beneficiary communities. Under the Petroleum Act of 2019, the local community for benefit sharing encompasses inhabitants within a resource sub-county affected by petroleum resource exploitation.[1352] This definition of community runs counter to the expectation that oil revenues will benefit the Turkana community as a collective within the county and instead opens up the county to division along potential clan fault lines.[1353] As it stands, the law privileges the Turkana South constituency, where the current oil reserves are situated, over the rest of Turkana.

This normative classification has created new fragmentation pitting the South against the rest of the county. Thus, for the first time, oil development threatens to fracture the relative pan-Turkana identity in favour of promoting the interests of political elites who place a premium on who 'belongs' in Turkana for the sake of capturing resource benefits.[1354] With politicians jostling over resource benefits, the potential for conflict increases with more substantial territorial claims asserted and cross-county mobility discouraged.[1355] For instance, at the height of community agitation for benefits, the parliamentary representative of the Turkana South constituency (the sub-county with the oil resource) warned the Turkana Governor not to step into his constituency.[1356] This radical statement marked an escalation between the resource sub-county and other sub-units of the county represented by the Governor. Equally, opposition to granting employment and procurement opportunities to

[1349] Ibid sec 58(4).
[1350] Ibid.
[1351] Ibid sec 58(3).
[1352] Ibid sec 2.
[1353] The four clans of Turkana community control politics in four of five sub-counties. The Ngikwatela in the north sub-county, Ngilukumong in the west, Ngisonyoke in the south, and Ngibelai in the east. See, Lind op cit note 1086 at 142-3.
[1354] K Mkutu, M Marani & M Ruteere *Securing the Counties: Options for Security after Devolution in Kenya*. (2014) 1-53 at 43.
[1355] Lind op cit note 1086 at143.
[1356] Business Daily 'Top Turkana leaders clash over procurement.' 3 September 2015, available at *http://www.businessdailyafrica.com*, accessed on 12 Dec 2020.

Turkana 'outsiders' has been rising.[1357] The hardening of administrative boundaries is likely to lead to more significant intra-county fragmentation and conflict.[1358]

Mitigating the potential intra-periphery tensions requires creative interpretation of national legislation governing benefit sharing in the context of formulating county and community-share governance models. This thesis suggests that the legislative use of the sub-county as a unit for designating the beneficiary community should be expanded to encompass resource-development-affected communities. Therefore, in framing the benefit-sharing law, the County Assembly could adopt a broader formulation of affected groups to include those living outside the sub-county with the actual oil reserves. This more comprehensive formulation of 'community' is justifiable given that environmental costs or burdens of oil exploitation processes often go beyond the immediate locale where resources are situated.[1359] Such an approach is further supported by the early oil pilot scheme (EOPS), which saw 60,000 barrels of crude oil trucked across various counties all the way to Mombasa.[1360] An oil pipeline is anticipated as part of mid-stream development linking Turkana's oil to Kenya's Lamu Port for export which will equally traverse several counties and sub-counties.[1361] The conceptualisation of the benefit-sharing model adopted by the Turkana County Assembly could take cognisance of these varied issues.[1362]

One of the means for addressing the emerging complexity presented by the legal requirement that monetary benefits under the Petroleum Law target the narrower sub-county as the unit for determining beneficiaries is to optimise the use of local content investments. By discriminating in favour of the local, the reach of local content benefit can cascade beyond the national to local Turkana businesspeople at county and community level.[1363]

Resulting from the preceding context, the County of Turkana has yet to enact a law to facilitate the distribution of benefits to communities. This delay is concerning from the

[1357] Lind op cit note 1086 at 143.
[1358] Hughes & Rogei op cit note 1089 at 11 (for the view that devolution has reinforced ethno-politics as well as territorialised the politics of belonging).
[1359] The exploratory activities by Tullow have, for instance, taken place across the county and beyond its borders. *Turkana County Integrated Plan 2018-2022* supra note 1327. Tullow has drilled over 40 exploratory wells in Turkana. The seismic tests were undertaken across various sub-counties within the county with potential harm to the environment or livelihoods. Ibid at 5
[1360] Patey op cit note 1244 at 9.
[1361] Tullow Kenya BV 'Early Oil Pilot Scheme Phase II: Environmental and Social Impact Assessment: Non-Technical Summary' 2018, available at *https://www.tullowoil.com* accessed on 17 Dec 2020.
[1362] See, Scott Pegg 'Can policy intervention beat the resource curse? Evidence from the Chad-Cameroon Pipeline Project' (2006) 105:418 *African Affairs* 1-25.
[1363] Nwapi op cit note 71 at 204.

perspective of implementation. The uncertainty is a gap in the transparency armour needed in advance of the generation of oil revenues, without which the risk of misappropriating funds earmarked for communities increases.[1364] However, the county is in the process of developing an extractive policy that seeks to implement national government policy.[1365] The draft policy commits to invest the county share of funds in a county wealth fund and a community heritage fund.[1366] The policy intention for creating these funds is to check revenue volatility associated with oil and gas incomes and stabilise the county budget by sanctioning draw-downs based on clear stipulations of county laws.[1367] The policy emphasis on transparency is designed to address the pervasive elite capture of local content opportunities by disclosing ownership interests in local supply companies.[1368]

Further, the enactment of the Turkana Village Act by the County Assembly in 2019 aims to facilitate structured community consultation and participation in development.[1369] The Act establishes 156 village units and a village council.[1370] The Council is designed to monitor the implementation of policies and coordinate public participation, thus giving structure to communities' inclusion in resource governance.[1371]

Taking its conduct in totality, the Turkana County government can be said to have adopted a relatively proactive approach to the implementation of resource governance. The county's anticipatory engagement with the draft petroleum law ahead of enactment exemplifies proactive implementation. Its place in the redress mechanisms established also represents recognition by the national government that the county cannot be ignored in the management of extractive resources. However, Turkana County's proactivity is limited to engagements with the national government. When its performance is examined from the perspective of its obligations to formulate enabling laws and policies to foster equitable benefit sharing, this proactivity is much weaker. This dissonance between its vertical engagement with the national government and its horizontal obligation towards county stakeholders does not bode well for

[1364] Patricia I Vasquez *Oil Sparks in the Amazon. A Look at Local Conflicts, Indigenous Populations, and Natural Resources* (2014).
[1365] County Government of Turkana *Draft County Policy for Extractive Industries in Turkana County* (2018, on file with author).
[1366] Ibid at 9.
[1367] Ibid.
[1368] Ibid at 10.
[1369] Turkana County Village Administration Act 2019 GG No. 13 (Turkana County Acts No. 6 of 28 August 2019).
[1370] Ibid sec 5, 13.
[1371] Ibid sec 14(a)(b).

implementation. The county's schizophrenic attitude is antithetical to sustainable resource governance and is unlikely to weaken resource conflicts as intended by national policy.

In the following section, the Kwale County government's response to resource exploitation within the county will be examined. Kwale's approach provides a useful comparison to the Turkana case study. It further helps to clarify the utility of counties in facilitating the implementation of laws and policies enabling benefit sharing.

7.4 Kwale County and Titanium Mining

Globally, many coastal communities remain politically and ecologically marginalised.[1372] Coastal areas are, therefore, increasingly becoming sites of contestation by different stakeholders.[1373] Kwale epitomises this reality.

Kenya's coastal strip's restive relationship with the mainland, or core Kenya, predates political independence in 1963. Governed initially under the Sultan (ruler) of Zanzibar, the 10-mile coastal strip was managed by the Imperial British East Africa for tax administration purposes on behalf of the Sultan until the end of the First World War.[1374] When Kenya in 1920 became a colony, the coastal strip remained a British protectorate on the implicit recognition of the sovereignty of the Zanzibar sovereign.[1375] The lag in territorial political status would reproduce itself at every stage of Kenya's political evolution, leaving the coastal strip on the margins of social and economic development.

Attempts by the coastal strip to assert independent statehood during Kenya's negotiation for independence failed.[1376] The coast then joined other minorities in agitating for a strong federal state.[1377] Kenya's federal charter collapsed soon after independence marking the beginning of a perceived take-over by 'mainlanders' of coastal resources and public sector

[1372] Wynberg & Hauck op cit note 1027 at 2.
[1373] Ibid at 3.
[1374] An Anglo-German treaty in 1886 had defined the Sultan's territories on the coast as a strip ten-miles in width. See, Justin Willis & George Gona '*Pwani* C Kenya? Memory, documents and secessionist politics in Coastal Kenya' (2013) 112:446 *African Affairs* 48-71 at 52.
[1375] Ibid at 50.
[1376] James R Brennan 'Lowering the Sultan's flag: Sovereignty and decolonization in Coastal Kenya' (2008) 50:4 *Comparative Studies in Society and History* 831-861.
[1377] David M Anderson 'Yours in struggle for *Majimbo*: Nationalism and the party politics of decolonization in Kenya, 1955-64' (2005) 40:3 *Journal of Contemporary History* 547-564.

jobs.[1378] This internal colonialism narrative, evidenced by perceptions that natural resources and job opportunities were disproportionately benefiting non-indigenous communities, led to the emergence of a secessionist peasant movement, the Mombasa Republic Council.[1379]

Kwale, one of six coastal counties,[1380] is located south of Mombasa, bordering the Republic of Tanzania to the southwest and the Indian Ocean to the east. The county's landmass of 8,270.2 square kilometres is dwarfed in comparison to Turkana.[1381] The county is divided into four constituencies, of which there are only three sub-counties that are further divided into 20 wards.[1382]

Kwale exhibits extreme social vulnerability common across all the coastal counties but more acute in Kwale. According to the 2019 census, Kwale has 866,820 inhabitants with high poverty rates estimated at 74 per cent.[1383] Social-economic entitlements, including health, education, and access to water, lag the national average.[1384] Of 1,483.1 kilometres of classified roads in Kwale, only 187.7 kilometres are paved to bitumen standards.[1385]

Despite the foregoing social-economic ills, Kwale is rich in extractive resources.[1386] Mrima Hill in Kwale holds one of the world's largest ores of undeveloped niobium and rare earth deposits.[1387] Base Titanium Corporation currently mines zircon, ilmenite, and rutile used in the production of titanium oxide from Lunga Lunga and Msambweni sub-counties of Kwale.[1388] The worldwide value of titanium dioxide extracted from heavy mineral sands on coastal dunes has been estimated at US$ 7 billion.[1389] By this estimation, Kwale's deposit is

[1378] George Gona 'Changing Political Faces on Kenya's Coast 1992-2007' (2008) 2:2 *Journal of Eastern African Studies* 242-253.
[1379] Willis & Gona op cit note 1374 at 52.
[1380] Other counties are Mombasa, Lamu, Kilifi, Lamu, Taita Taveta, and Tana River. All the counties were previously administered as Coast Province and during the short period of federalism, they were all in one Coast Region.
[1381] Kwale County *Annual Development Plan 2017-2018* at 23.
[1382] Ibid at 30.
[1383] Ibid.
[1384] Kwale County Government *County Integrated Development Plan 2018-2022* (2019) 14-15.
[1385] Ibid at18.
[1386] Ibid at 25.
[1387] Ibid at 26.
[1388] Ibid at 29.
[1389] RM Tyler & RCA Minnitt 'A review of sub-Saharan heavy mineral sand deposits: implications for new projects in southern Africa' (2004) 104:2 *The Journal of South African Institute of Mining and Metallurgy* 89-100.

the third largest in the world.[1390] The discussion that follows is based on the experience with titanium-related mining process.

7.4.1 Centre-Periphery Contestation: National Government versus Kwale County

During the constitutional review process for the 2010 Constitution, representatives from the coast proposed the retention of revenues generated from the exploitation of natural resources by host regions.[1391] The 2010 Constitution rejected this view. Instead, it preferred the control of natural resources by the centre while mandating equitable benefit sharing as a means by which to address the concerns of resource-host counties and communities.[1392]

The Mining Act and Policy were negotiated and enacted in the immediate aftermath of county governments' installation through the general elections of 2013. As the unified regulatory framework for the sustainable and equitable development of mineral resources, including benefit sharing, the importance of the Mining Act 2016 was evident.[1393] Unlike Turkana County, that interpreted its constitutional role in the implementation of natural resource policies as obliging it to engage with the formulation of the Petroleum Law, Kwale adopted a narrower conception of its mandate and did not engage meaningfully.[1394] The county's understanding of its functional roles as rigid goalposts led to a determination that mineral development was the sole prerogative of the national government with little if any functional competence left for the county.[1395] While accurate concerning control of mineral resources, the county was misadvised in not seizing the opportunity to engage, on its own and host communities' behalf, in negotiating a more coherent regime on fair mineral licensing, surface rights, transparency, and equitable benefit sharing.

The failure to participate meaningfully in the formulation process of the mining law created two adverse consequences. First, it denied the county an opportunity to mobilise and manage community expectations and perceptions on the county's role in resource governance

[1390] Ibid.
[1391] F Devereux 'From Majimbo to Mwambao: Kenya's Coastal politics and the threat of secession.' (Unpublished MSc thesis, University of Oxford, 2012).
[1392] Chapter 5.3.1.
[1393] Ayisi op cit note 51 at 28.
[1394] *Committee on Environment and Natural Resources* supra note 1038. Rather than Kwale, it is the Commission on Revenue Allocation, a constitutional commission, that sought to conceptualise the role of counties in mineral development. Ibid at 19.
[1395] See, 'Press statement from the Office of Director of Communications Kwale County on the renewal of special mining license for Base Titanium: Setting the record straight' (7 June 2017, on file with author).

generally and, more pertinently, benefit sharing. Secondly, it led to enacting a piece of legislation that did not fully crystallise counties' and communities' right to benefit sharing.

As asserted, pre-devolution coastal people already felt dominated by Nairobi and other 'mainlanders', especially so far as local resource exploitation was concerned.[1396] Devolution was intended to cure this inequity.[1397] However, Kenya's devolution design left the core of the mandate to coastal peoples' grievances under the national government's control.[1398] Moreover, unless devolved governance institutions and actors are mobilised to aid redress for these grievances, the perception that devolution is aesthetic rather than transformative remains.[1399] However, the law's general design limitations do not detract from a purposive interpretation of the Constitution, which views the county as the 'legal personification of the local community.'[1400] In this capacity, counties are vested with inherent competence to engage on behalf of communities on matters that bear on their enjoyment of socio-economic rights and livelihoods.[1401]

By failing to facilitate any structured input to the legislative process on mining, whether directly or through its lobbying capacity either within the intergovernmental Council of Governors or at the Senate,[1402] Kwale County leadership lost the opportunity to build legitimacy. It further encouraged both the national government and mining operator, Base Titanium, to adopt strategies incompatible with the county's interests. In sum, the national government appears to ignore the county's protestation concerning licensing or benefit sharing. This attitude is evident from the fact that a mining levy approved by Kwale County Assembly, which was meant to be applied to extractive development by Base Titanium, did not receive the sanction of the National Treasury.[1403] As a result, Kwale recorded reduced own source revenue collection due to underperformance of the mining levy,[1404] undermining the county's capacity to further its development agenda.

[1396] Chome Killian Ngala '"The grassroots are very complicated": Marginalization and the emergence of alternative authority in the Kenyan Coast 2013 Elections' (2013) 247:3 *Afrique contemporaine* 87-105 at 88.
[1397] Chapter 6.7.2.
[1398] Chome op cit note 917 at 307.
[1399] Ibid.
[1400] *Rodgers Muema* supra note 685 at 9.
[1401] *Speaker of the Senate* supra note 734 para 193.
[1402] For the role of Senate, see Chapter 6.3.1.2.
[1403] County Government of Kwale *County Fiscal Strategy Paper-2015* at 15.
[1404] Ibid at 37. Mining levy as a Kwale County revenue source has since not featured in its revenue projections.

From the county perspective, the Mining Act has significant weaknesses that hinder implementation. First, the royalty shares for counties and communities pegged at 20 and 10 per cent, respectively,[1405] though reasonable, are dependent on the total royalty rent available for distribution in the first instance. The law grants the Minister in charge of mining the discretion to negotiate royalty terms with a mining entity.[1406] While the Mineral Rights Board advises the Cabinet Secretary on, among others, 'charges and royalties payable for a mineral right',[1407] there is nothing in the law to suggest that the Minister is obliged to adopt the Board's recommendations. Granted, the Council of Governors nominates one person to the Board of the Mineral Rights Board (MRB). Still, nothing in the statute suggests that the Council must consult host counties or communities in making such a nomination.[1408] Furthermore, in the absence of explicit statutory language, once the Cabinet Secretary appoints the nominee to the nine-member MRB for a fixed three-year tenure, the link with counties is likely to become tenuous.[1409]

Based on this state of the law, under the Special Mining License (SML) awarding Base Titanium the mineral rights over the Kwale Sands Project, the corporation is obliged to pay 2,5 per cent of annual gross profits as royalty.[1410] Compared to other mining jurisdictions on the continent, this royalty share is considerably low.[1411] While designed to attract more investment into the mining sector,[1412] such a low percentage of royalty dramatically reduces any monetary benefits flowing to communities and counties. As such, the perception festers that resource host communities and counties continue to bear disproportionate burdens. It increases the potential for the onset of the resource curse.

Worse still is that the law has not prescribed mechanisms on how to transmit the modest royalty shares to beneficiary counties and communities. Unlike the Petroleum Law, which mandates the relevant County Assembly to enact a law to establish a trust fund to hold and

[1405] *Mining Act* supra note 65 sec 183(5).
[1406] Ibid s 183(1)(2); See, Orago & Musangi op cit note 1459 at 40-41.
[1407] *Mining Act* ibid sec 31(1)*(f).*
[1408] Ibid s 31(2)*(d).*
[1409] Ibid s 31(3).
[1410] Special Mining License No. 23 Condition 4. The SML was awarded to Tiomin Resource Inc., a Canadian corporation. It was assigned to Base Titanium, an Australian firm listed in the Australian exchange in 2010. See, Base Titanium '2017 Kwale Mineral Resources and Ore Reserves Statement' October 2017 at 5, available at *http://baseresources.com.au*>, accessed on 20 Dec 2020.
[1411] FT Cawood & RCA Minnitt 'Identification and distribution of mineral rents in Southern Africa' (2002) *The Journal of The South African Institute of Mining and Metallurgy* 289-297. Royalty rates for South Africa, Botswana, and Zambia are pegged at 18, 20, and 15 per cent respectively. Ibid at 293.
[1412] Ayisi op cit note 51 at 28.

manage the community share of oil revenue,[1413] no guidance exists in the current Mining Act. The matter is effectively relegated to Regulation to be formulated by the Cabinet Secretary under the Act.[1414] Regulations are effectively within the remit of the national government's executive branch, making it even more difficult for counties and communities to provide their input on the governance of royalty share devolved to them. The lack of consistent demand from counties, particularly Kwale, for the adoption of Regulations is concerning because, in their absence, monetary benefits due to resource-host communities are in limbo.

The royalties due to counties are similarly inoperative for want of Regulations. While it may be argued that such revenue can be remitted to Kwale as unconditional grants, unconditional grants can only be made from the national government's share of the revenue.[1415] Thus, until a fund is created under the Public Finance Management Act,[1416] the royalty portion allotted to counties cannot be transferred for want of a mechanism. According to the Commission on Revenue Allocation, since 2017, Base Titanium has remitted royalties amounting to Ksh 1.367 billion to the national government.[1417] Based on this amount of accrued royalties, the Kwale County government is entitled to Ksh 273 million with resource-host communities share of Ksh 136 million. Nothing precludes Kwale from pursuing these royalty sums and previous entitlements.[1418]

The lack of confidence on the part of the county government to make a demand for its entitlement contrasts sharply with the Turkana case, where the county leadership and elites are pursuing benefits far in advance of the actual flow of petroleum from the Turkana oil fields.[1419] While the robust response in Turkana is attributed to incentivised elite capture, it has been suggested that Kwale is facing the opposite phenomenon, elite vulnerability.[1420] At the core, elite vulnerability is driven by the inability of County Executives to satisfy the popular expectations of devolution.[1421] Years of domination by the centre appear to have reduced local

[1413] *Petroleum Act* supra note 66 sec 58(4).
[1414] *Mining Act* supra note 65 sec 223(1).
[1415] *Constitution* supra note 12 art 202(2).
[1416] Public Finance Management Act (2012) s 31.
[1417] Commission on Revenue Allocation *Recommendation on the basis for equitable sharing of revenue between national and county governments: Financial Year 2020/2021* (2019) 24-25.
[1418] Condition 4 of the Special Mining License No. 23 provided that the 2,5 per cent royalty would be payable during the first five-year term of the lease. By the Second Deed of Variation, dated 25th March 2009, the commencement of payment of the royalty was pegged to the date of commencement of commercial production. In February 2014, Base Corporation exported the first shipment of 25,000 tonnes of ilmenite to China. Thus, commencing 2014, Kwale County can make a demand for royalties.
[1419] Section 7.3.1.
[1420] Chome op cit note 917 at 301.
[1421] Ibid.

leaders' stature to make credible demands rendering them susceptible to national and localised pressures.[1422]

7.4.2 Corporate-Periphery Contests

Base Titanium acquired the special mining license of the Kwale Sands Project that holds rutile, zircon, and ilmenite deposits via an assignment from Tiomin Corporation in 2010.[1423] The SML is for an initial duration of 13 years from the date of the assignment.[1424] Following the acquisition, the company claims to have invested US$ 310 million to establish the necessary infrastructure required for the commencement of the mining operations and evacuation of mineral deposits to the port of Mombasa for export.[1425] This substantial investment testifies to the corporation's commitment to developing the mineral resources in the Msambweni and Lunga Lunga sub-counties of Kwale County.

By the time of the mineral-right assignment, Base Titanium's predecessor had weathered a decade of disagreement, conflict, and litigation from the communities in Kwale and other non-state stakeholders.[1426] These conflicts revolved around three issues: environmental concerns, land compensation and resettlement, and benefit sharing.[1427] As early as 2001, communities in Kwale commenced judicial proceedings challenging the impending contamination of local soil and aquifers by heavy metals generated by the mining project.[1428] Once the resource operator complied with environmental regulations, the dispute turned to the displacement of indigenous, Digo, and non-indigenous, Kamba, people, the fairness of compensation payable, and the inadequate resettlement measures.[1429] While the corporation asserted that adequate compensation was paid out to the landowners, the community viewed this compensation as unfair and inappropriate.[1430] The compensation was considered unfair as

[1422] Ibid at 302.
[1423] Ayisi op cit note 51 at 42.
[1424] Ibid.
[1425] Between 2012 and 2014, Base invested a total of US$ 310 million (KES 26.4 billion) to construct and equip the mine and build related infrastructure. These projects included the Mukurumudzi Dam and boreholes (US$ 14.5 million; KES 1.2 billion), electrical grid upgrades and expansions (US$ 5.7 million), an access road to the mine (US$ 6.6 million; KES 561 million), and a port and ship loading facility in Likoni, on the south bank of the Mombasa shipping channel (US$ 34.0 million; KES 2.9 billion). See, Ernest & Young *Base Titanium's total economic and tax contributions in Kenya: Report Prepared for Base Titanium* (2016) 3.
[1426] JOZ Abuodha & PO Hayombe 'Protracted environmental issues on a proposed titanium mineral development in Kenya's South Coast' (2006) 24:2 *Marine Georesources & Geotechnology* 63-75.
[1427] Ibid at 63-75.
[1428] *Rodgers Muema v Tiomin* supra note 685 at 10.
[1429] Ibid.
[1430] Base Titanium 'Resettlement' available at *basetitanium.com/community/our-approach/resettlement*, accessed on 9 April 2020 (where the Corporation asserts that in deference to social-cultural norms of the community, 289

it initially focused only on those landowners with title documents.[1431] The inappropriateness of the compensation arose out of the decision to compensate only for the land's market value and disregard social-cultural assets attached to the grounds, such as graveyards and coconut trees.[1432] An approach that appreciates the fragmented character of land ownership in Africa, where both formal and customary notions of ownership operate simultaneously, is necessary for any compensation to be perceived as fair by local communities.[1433] Therefore, the framework used to assess claimants in compensation processes will invariably have to adopt a broader lens beyond the existence of physical title to land.[1434] In the Kwale case, the lack of a common understanding of the nature of land among indigenous and local communities and resource operators delayed project commencement and occasioned financial losses.[1435]

Kwale County inherited this pre-existing adversarial corporate-community relationship from the county's inception in 2013.[1436] This antagonistic relationship arises in at least two instances: first, in connection with the resistance to the Kwale government's attempt to impose a mining levy on the operator; and, secondly, with regard to the corporation's recent efforts to extend its current lease and acquire consent to prospect and mine an adjoining northern dune.

Under the Kwale Public Finance Act of 2014, titanium mining attracts a levy of Ksh 5,000 per tonne.[1437] Under this law, the county government made a demand for Ksh 378 million from the Corporation.[1438] With support from the national government, the operator vigorously resisted the Kwale government's legislation to impose the above mining levy on mining operations in the county. In a suit, enjoining both Kwale and Mombasa Counties, Base Titanium urged the High Court to find the Kwale mining levy in excess of the functions donated

graves were exhumed and reinterred in a specially created cemetery adjacent to the SML). The community concedes that some reburial processes took place but the corporation failed to foot the cost of cultural rituals necessary to ensure closure. See, Willice Abuya & Wilson Akpan 'Titanium mining, graves and spirits in Kenya's Coastal province: Revisiting the compensation problem' in Akpan & Moyo et al op cit note 634 at 172.

[1431] Ojiambo op cit note 687 at 20.

[1432] Abuya & Akpan op cit note 1430 at 173; See also, Margaret Jane Radin 'Compensation and commensurability' (1993) 43:56 *Duke Law Journal* 56-86 (problematising compensation viewed only from a commodification perspective).

[1433] Umejesi & Akpan op cit note 634

[1434] Ibid.

[1435] On 9 February 2007, Tiomin Inc. announced that the increasing delays and costs led sponsors to withdraw US$ 155 million from the project. See, Bloomberg 'Base Resource Limited: Updated Kwale South mineral resources and ore reserves (20 August 2021) online *https://www.bloomberg.com/press-releases*> accessed 24 August 2021.

[1436] Ojiambo op cit note 687.

[1437] The Kwale County Finance Act 2014 GG No. 4(1) 28 March 2014.

[1438] Business Daily 'Kwale slaps Base Titanium with Sh378m tax bill' 1 February 2015, available at *https://www.businessdailyafrica.com*, accessed on 21 Feb 2020.

to the county by the Constitution.[1439] The Court determined that in so far as the management and administration of the mining of titanium falls within the national government mandate, the County of Kwale was constitutionally precluded from levying any taxes or charges on minerals.[1440]

This decision marked the end of Kwale's quest for direct taxes of titanium resources within the county. However, in the view of this thesis, it did not have to end here. Kwale had the opportunity to make a case for an intergovernmental agreement by which the mandate to charge a mining levy, in lieu of its royalty, would be temporarily permissible pending enactment of Regulations alluded to in the previous section.[1441] Such an agreement would allow Kwale to set off the royalty sums due to the county from the national government against the mining levy. This approach is compatible with the principle of subsidiarity, by which Kwale could urge the national government to temporarily cede to the county government limited taxing authority related to mining.[1442] A government motivated by good faith and an appreciation that equitable benefit sharing is the antidote to the resource curse would not find such a request controversial.

The simmering corporate-periphery tension has spilled over to the mining operator's effort to expand its mining area. In 2016, Base Titanium applied for a special license to prospect for titanium and zircon over an area of 135 square kilometres in Kwale.[1443] The law under which this application was made contemplates the granting of a mineral right only after the consent of several actors, including the Governor of the County where the land targeted for mining operations is situated.[1444] The leverage provided by the law should have enabled the county government to seek clarity on benefit-sharing issues and land compensation from both the national government and the corporation. The only action on record appears to be a letter to the corporation from the Land and Natural Resources County Executive advising it to follow up the conclusion of the public participation process with the County Assembly Committee to enable the executive to consider its request consent.[1445] Limited information exists regarding

[1439] *Base Titanium Limited v The County Government of Mombasa & Kwale* (2017) eKLR. The cause of action against Mombasa County arose from the County's decision to tax each truck transporting minerals to the Shimoni shipping yard in Likoni Port for shipment.
[1440] Ibid para 12, 14.
[1441] *Constitution* supra note 12 art 187(1).
[1442] Kangu op cit note 1 at 218.
[1443] Application for Special Mining License No. 6448 in GG No. CXVIII (92) 12 August 2016.
[1444] *Mining Act 2016* supra note 65 s 36(2)*(d).*
[1445] Kwale Press statement op cit note 1278.

specific agreements reached between the operator and county on the implementation of this exploration license. Despite enacting a Public Participation Act in 2016,[1446] the Office of Public Participation charged with facilitating and coordinating public participation in the county[1447] was never called upon to engage the community and the operator on this matter.

What is evident is that community protests have dogged the process of implementing the special exploration license.[1448] Despite a comprehensive CSR programme under its community development management plan that had invested 3.8 billion shillings (US$38 million) by 2019,[1449] perceptions remain that communities were not involved in project identification and priority setting.[1450] Granted that the mining corporation publishes information on its social investment on its website, indicating how much it spends per project,[1451] the level of literacy and poverty limits access by the community to this potentially confidence-building information. Moreover, it is unclear whether the mining operator publishes information on the companies contracted to implement these community infrastructure projects. Without information on the beneficial ownership of implementers of community infrastructure projects, it is unclear whether the company pays due regard to local content requirements.[1452]

More concerning is that the county no longer factors in the corporation's contribution in its county planning document, the CIDP. This decision to exclude the operator's contribution in county planning strategies will pose a sustainability problem because, while the corporation may finance social infrastructure such as hospitals or schools, these facilities may go unused for years. Without additional payroll costs factored into the county's annual budgets, the impact of the operator's investment may not be felt by communities.[1453] Ironically, despite Base Titanium's decade of operation in Kwale and the substantial social investment it claims to have

[1446] The Kwale County Public Participation Act 12 of 2016 (10 March 2017).
[1447] Ibid sec 5.
[1448] The Star 'Kwale residents clash over mineral exploration' 25 May 2019, available at *https://www.the-star.co.ke*, accessed on 20 Jan 2021.
[1449] See, Base Titanium Community Programmes available at *http://basetitanium.com/community*; Also, Haki Jamii op cit note 1192 at 14.
[1450] A key grievance in Kwale is the perception that spontaneous liaison meetings by the mining corporation are manipulated spaces and deny citizens a genuine opportunity to freely articulate corporate injustices for redress. See, Maarifa Ali Mwakumanyaa & Jawa Mwachupa 'Digital mapping as a tool for environmental and social corporate accountability in the extractive sector in Kwale County, Kenya' (2018) 17:3 *Journal of Sustainable Mining* 97-104 at 98, 100.
[1451] Base Titanium community Programmes available at *http://basetitanium.com/community*.
[1452] Muigua op cit note 1243 at 3.
[1453] Natural Resource Governance Institute 'Subnational revenue management improving local development through resource wealth' 2018 at 2, available at *https://resourcegovernance.org*, accessed on.

made, the corporation still experiences challenges in securing the social license to operate.[1454] This consequence is consistent with other contexts where boiler-plate CSR initiatives based on perceived universal needs rather than priorities aligned with specific contexts have been implemented.[1455] The operator's attitude holds that the national government is the only relevant tier of government whose views warrant consideration in the operator's resource development decisions.[1456] Thus, the operator's rollout of community support programmes is perceived to be paternalistic rather than grounded in a spirit of partnership.[1457] Such paternalism manifests whenever companies enforce their own vision of community good in CSR programmes without substantive stakeholder input.[1458]

The Mining Act provides a window of opportunity for the corporation, county, and community to work together and re-examine their engagement framework by entering into a community development agreement (CDA).[1459] Unlike regulations touching on royalty transmission to resource communities and counties, which are yet to come into effect, CDA regulations have been in place since 2017.[1460] The relative speed with which the latter rules have been adopted once again underlines the national government's reluctance to share monetary benefits with host counties and communities. Instead, the state seems to lean in favour of nonmonetary benefits via CDAs. The national government's conduct indicates a preference for relegating benefit-sharing issues to the domain of corporate and community relations in a manner similar to CSRs.

As discussed in Chapter 5, CDAs represent an institutionalisation of CSR by the Mining Act.[1461] The Regulations mandate that a mining operator should invest at least 1 per cent of its gross annual revenue towards social programmes identified under a CDA.[1462] A CDA committee chaired by the county governor brings together the corporation and community, and

[1454] Haki Jamii op cit note 1192 at 22.
[1455] Glenn Banks, Dora Kuir-Ayius, David Kombako et al 'Conceptualizing mining impacts, livelihoods and corporate community development in Melanesia' (2013) 48:3 *Community Development Journal* 484-500 at 493.
[1456] Base Titanium *Response to HakiJamii's Draft Report on Base Titanium's Impact on the Community* (2017) 15.
[1457] R Kunanayagam 'Foundations, trusts and funds: Issues, concerns and a way forward' (2003).
[1458] D Mutti, N Yakovleva & D Vasquez-Brust et al 'Corporate social responsibility in the mining industry: Perspectives from stakeholder groups in Argentina' (2012) 37 *Resource Policy* 212-22 at 221.
[1459] Nicholas Wasonga Orago and Pauline Vata Musangi 'Titanium mining benefit-sharing in Kwale County: A comprehensive analysis of the law and practice' in Ambani & Wasunna op cit note 215, 11-74 at 47.
[1460] *Community Development Regulations* supra note 687.
[1461] Chapter 5.3.1.
[1462] *Community Development Regulations* supra note 687 reg 17.

representatives of the national government, National Environmental Authority, and civil society develop the Community Development Agreement.[1463]

In examining the three CDAs signed by Base Titanium and communities on 25 May 2021, it is evident that commitment to sustainable economic and social development of the community and peaceful resolution of conflicts are the overarching goals.[1464] The CDAs commit to consultative and respectful relations and negotiation marked by openness and sharing of information necessary for engendering trust.[1465] In obliging the community to cooperate with selected implementers of community development projects to mobilise social capital,[1466] the CDAs demonstrate an awareness of the necessity to ensure resource community benefits from mining proceeds as a means for undermining the resource curse.

In compliance with the Mining CDA Regulations and the Act, the mining operator dedicates 1 per cent of its 'aggregate annual expenditure requirement' in each financial year towards community development projects selected by the CDA Committee, as well as administrative costs. It divides this sum among three 'communities': Msambweni sub-county in Kwale, Mrima Biti Resettlement Community in Kwale, and Likoni sub-county in Mombasa.[1467] A separate CDA is signed for each community.[1468] While Msambweni sub-county and the Mrima Biti Community clearly fall within the definition of 'community' under the Mining Act, the inclusion of Likoni sub-county in Mombasa is debatable.[1469] To minimise misuse of the fund on administrative costs, the CDA caps administrative costs at a maximum of 12 per cent.[1470] It is unclear whether this amount includes the cost of community sensitisations nor does the CDA address whether the expense of developing the CDA is part of

[1463] Ibid; See also, Mazera op cit note 707 at 80-81.
[1464] *Community Development Agreement Between Msambweni Sub-County in Kwale County and Base Titanium* (Signed 25 May 2021 and witnessed by the Minister for Mining and Petroleum); *Community Development Agreement between Mrima Biti Resettlement Community in Kwale and Base Titanium* (Signed 25 May 2021 and witnessed by the Minister for Mining and Petroleum), and *Community Development Agreement Between Likoni Sub County in Mombasa and Base Titanium* (Signed 25 May 2021 and witnessed by the Minister for Mining and Petroleum) Clause 3(1)(2), available at *https://www.petroleumandmining.go.ke*, accessed 20 June 2021. The terms of all these agreements are similar except for the percentage of funds allotted to each.
[1465] Ibid clause 3(4)(5).
[1466] Ibid clause 7(1).
[1467] Ibid clause 8(1)(2). The CDA defines annual aggregate expenditure requirement as a minimum of 1 per cent of the Holder's Gross Mineral Sales Revenue from applicable sales occurring during a given financial year.
[1468] Community Development Agreements supra note 1464.
[1469] Mining Act supra note 65 s 4 para 8(a)(b). Community is defined as: 'a) a group of people living around an exploration and mining operations area; or b) a group of people who may be displaced from land intended for exploration and mining operations.'
[1470] CDA supra note 1464 clause 22(3).

this administrative cost. Therefore, it is incumbent that disclosure of cost and source of funding for the process of developing the CDAs is made.

As required under the Mining Act and Regulations, the CDA agreement entrenches the CDA Committees,[1471] which had been appointed by the Minister 15 months prior.[1472] The CDA Committees are the platform for the community to assess the use of revenues earmarked for community development under the agreement and the extent to which these projects conform with the priorities of the community.[1473] The Committees are also charged with the role of grievance redress, monitoring implementation of the CDA agreement, and reporting to the mining company on status of implementation.[1474]

Although a dedicated administrative fund account is established under the CDA,[1475] no similar account is established to hold the bulk of the funds dedicated to finance identified community development projects. This means that the company will run this specific account using its existing infrastructure. Additionally, while national government is involved in approving the setting up of the respective administrative fund accounts[1476] and is also the formal witness to the CDAs between communities and company,[1477] the county government is given neither a symbolic nor substantive role. This demonstrates the attitude of the mining operator and national government – that the county has limited role in the governance of extractive resources even those dedicated to the community. This distrust is not only directed at the county but the community itself. The community is granted no reasonable opportunity to formulate rules for the direct managing of the funds earmarked to it and is rather constrained to use the procurement and financial systems of the operator.[1478] The effect of this approach is to deny the community autonomy in deciding how to administer the fund, with the company superintending every process through the use of its financial and procurement system. Further, on the assumption that a multinational operator such as Base Titanium's procurement system is complex, the consequence will be that very few Kwale based companies will qualify to provide the services earmarked by the CDA. By far, the greatest challenge of the CDA is the

[1471] Ibid clause 9.
[1472] Mining (Community Development Agreement) Regulations 2017 *Appointment* GG CXXII-No. 40 (1626/7/9) 28 February 2020.
[1473] CDA supra note 1464 clause 10(2).
[1474] Ibid clause 10(7)(10).
[1475] Ibid clause 21(4).
[1476] Ibid clause 21(4).
[1477] See attestation clause of the CDA, Ibid.
[1478] Ibid clause 22.

fact that both implementation and monitoring of projects is undertaken by the same actors.[1479] The conflict-of-interest patent in this arrangement will undoubtedly weaken oversight.

What is evident from the above discussion is that the signing of the three CDAs, while a laudable step, fails to align county and community interests in such a manner as to fit the idea of community determined development. Here, as in the legislative process on the Mining Act and Regulations where Kwale failed to engage effectively, it again appears not to have seized the opportunity presented by the CDA agreement negotiation process to ensure greater voice for the community and county. The resulting CDAs thus appear tailored to serve the mining company's interest rather than to empower the community.

It was expected that the process of developing the CDAs would serve to mitigate county and community grievances towards the mining corporation and usher in an era of collaborative engagement and sustainable partnership. To do so, the development of the CDAs needed to draw from best practice, which emphasises the need to engender communities' appreciation of constraints under which mining processes occur.[1480] What is unclear is the extent to which the selection of the CDA Committees and formulation process were sufficiently participatory, thereby leading to community and county ownership. Therefore, it is incumbent that prior disclosure on projected cost and source of funding for the process of developing the CDAs is made.

7.4.3 Intra-Periphery Contests

Intra-periphery tensions manifest in Kwale's extractive context in two ways. First, the distinction made between project affected persons based on whether they held titles or were customary holders to their land for purposes of consultation and compensation is problematic. The second contestation is marked by disaffection over the operator's decision not to process the zircon, ilmenite, and rutile at the coast and its failure to extend equity participation to the community.[1481]

[1479] Ibid clause 15.
[1480] See, World Bank & University of Queensland Centre for Social Responsibility 'World Bank Extractive Industries Sourcebook Good practice notes on community development agreements' 2011, available at *http://documents.worldbank.org/curated/en*>, accessed on 1 Feb 2020.
[1481] Abuya op cit note 48 at 601.

Land ownership inequalities at the coast and elsewhere in the country are part of the unfinished colonial legacy of discrimination.[1482] Arabs, Europeans, and later, Asians were allowed to own land at the Kenyan Coast during the colonial period.[1483] However, indigenous Africans at the coast lived on unalienated land and held informal rights from a positive law standpoint.[1484] State settlement programmes in Kwale, rather than address indigenous communities' problems, granted titles to landless mainlanders.[1485] The legal uncertainty and insecurity of land tenure have persisted, underlining the disempowerment of indigenous Digo, Duruma, and other Mijikenda communities at the coast.[1486]

This state of play has cascaded downward and affected the negotiation between surface rights landowners and the mining corporation for compensation and resettlement to pave the way for extractive processes.[1487] Many affected individuals, whose allodial claim to ownership of land was not recognised, were denied compensation.[1488]

A first-order conflict that remains latent a decade since the mining operation's commencement is the identity of landowners falling within the mining area and therefore entitled to be consulted and compensated. A District Resettlement Committee established in 2007 determined that 400 families numbering about 3,000 persons qualified as project-affected individuals.[1489] The Committee sanctioned a flat rate of Kenya shillings 80,000 per hectare (US$800) as compensation to title holders. While the title holders themselves considered the compensation inadequate,[1490] the greatest challenge has been with the land's customary occupiers. The latter group comprising another 1,000 persons received limited or no compensation and continue to agitate against the corporation's activities, especially an

[1482] Ewout Frankema 'The colonial roots of land inequality: Geography, factor endowments, or institutions?'(2010) 63:2 *The Economic History Review* 418-451.
[1483] Abuya & Akpan op cit note 1430 at 53.
[1484] Ibid.
[1485] Kathleen Klaus 'Contentious land narratives and non-escalation of election violence: Evidence from Kenya's Coast Region' (2017) 60:2 *African Studies Review* 51-72.
[1486] Karuti Kanyinga 'Politics and struggles for access to land: "Grants from above" and "squatters" in Coastal Kenya' (1998) 10:2 *European Journal of Development Research* 50-69.
[1487] The Mining Act places an obligation on the Cabinet Secretary responsible for mining on receipt of an application for a mineral right, to ensure that the landowner, lawful occupier, the local community, county government, and also the general public are provided with notice of the application and the proposed boundaries of the land in relation to the application. Any person or community has 21 days in the case of an application for a prospecting licence or 42 days in the case of a mining licence to approve or object to the grant of the licence. *Mining Act* supra note 65 sec 34.
[1488] Orago & Musangi op cit note 1459 at 49. See also, Kayumba op cit note 37.
[1489] Abuya op cit note 48 at 595.
[1490] Haki Jamii op cit note 1191 at 41-42.

extension of the mining area.[1491] The operator's programme to expand the initial resettlement action plan (RAP) to ensure affected households are not worse off due to resettlement[1492] appears to have been unsuccessful in addressing the adverse impacts of the involuntary displacement.[1493]

The national government's current proposal is that the CDA Committee should address this land-related conflict.[1494] This suggestion is problematic because, under the law, land-related compensation is not one of the CDA committee's functions. By saddling it with land grievance redress, the national government is complicit in delegitimising the CDA committee even before it commences implementing its mandate to facilitate equitable and fair use of funds entrusted to it by the mining corporation towards community development. Furthermore, as land-related grievances are the most intractable among mining-related disputes,[1495] the state is making it nearly impossible for the Kwale CDAs to register substantial success in the eyes of the community and county. That national government would rather encumber the Kwale CDAs with a non-statutory role than establish a grievance mechanism, like was done in Turkana, represents a case of differential treatment. Moreover, it further evidences a condescending attitude and disregard of Kwale by national-level decision makers, feeding the pervasive narrative of disrespect of the coast by Nairobi-based policymakers.[1496]

Embitterment against the corporation's decision to export raw mineral resources is also common at the county level.[1497] The general understanding is that beneficiation expands the range of benefits potentially available to a resource-host community.[1498] Aside from enhancing revenues earned, the range of benefits from beneficiation include job opportunities, skill development, technology transfer, and infrastructural development.[1499] This decision denies the county the multiplier effect of beneficiation and appears to lend an enclave character to current operations.[1500] While this grievance may be misplaced as the decision to export primary

[1491] The Standard 'State orders fresh vetting of settlers on mineral rich Kwale Scheme' 14 August 2018, available at *https://www.standardmedia.co.ke/article>*, accessed on 12 Jan 2020.
[1492] Base Titanium *Kwale Mineral Sands Project: Environment and Social Impact Summary Report* (2012) 45.
[1493] Haki Jamii op cit note 1191.
[1494] The Standard 'State orders fresh vetting of settlers on mineral rich Kwale Scheme' 14 August 2018, available at *https://www.standardmedia.co.ke/article>*, accessed on 12 Jan 2020.
[1495] Akiwumi op cit note 1197 at 581-600.
[1496] Chome op cit note 917 at 301.
[1497] Mwakumanyaa & Mwachupa op cit note 1450 at 100; Nation *'*Are Kwale residents expecting too much?' 11 February 2013, available at *https://nation.africa*, accessed on 12 Jan 2020.
[1498] Turok op cit note 285 at 46-47.
[1499] Kojo Busia & Charles Akong 'The African mining vision: perspectives on mineral resource development in Africa' (2017) 8:1 *Journal of Sustainable Development Law & Policy* 145-192.
[1500] Orago & Musangi op cit note 1459 at 54.

commodities was part of the investment agreement signed with the government and protected by the stabilisation clause,[1501]the communities' criticism evoke the challenges spotlighted by the discourse on extractivism and its variants.[1502]

Communities are further frustrated by the corporation's failure to adopt the equity participation mode of benefit sharing by surrendering part of the company shares to the community.[1503] Where a foreign company is involved in large-scale mining operations, the law obliges it to cede 20 per cent of stakes in the company to the government or list the same shares at the local stock exchange.[1504] No similar obligation is envisaged concerning the community or county.[1505] However, the Community Land Act requires that investment in natural resources situated within community land must be preceded by community consultation and consent processes.[1506] It is feasible that in the context of such consent processes, a resource-host community and mining corporation, with the nudging of both national and county governments, may enter into an equity participation agreement. This model is considered effective in making the community a real stakeholder in the mining processes and dramatically reducing mining-related conflicts.[1507]

7.5 Conclusion

The chapter has assessed the developing role of subnational units in resource governance and, specifically, benefit sharing. The responses by Turkana and Kwale Counties demonstrate that

[1501] Evaristus Oshionebo 'Stabilization clauses in natural resource extraction contracts: Legal, economic and social implications for developing countries' (2010) 10 *Asper Review of Int'l Business & Trade Law* 1-34.
[1502] See Lynn Field op cit note 45, at 73-83. Extractivism describes a form of accumulation that involves the extraction and export of vast quantities of natural resources with little or no value addition from a host country to a technologically advanced country for processing or refining. See, Eduardo Gudynas 'The new extractivism of the 21st century: Ten urgent theses about extractivism in relation to current South American progressivism' (2010) *Americas Program Report* 7. The response to extractivism is the emergence of neo-extractivism which places the state at the centre of resource decision-making while promoting the exponential expansion of extractive activities under the guise of economic progress with limited commitment to internalizing social and environmental burdens of these activities. See, Alberto Acosta 'Post-extractivism: From discourse to practice—Reflections for Action in Gilles Carbonnier, Humberto Campodónico & Sergio Tezanos Vázquez Alternative Pathways to Sustainable Development: Lessons from Latin America (2016) 81-82.
[1503] Mwakumanyaa & Mwachupa op cit note 1450 at 100; Willice O Abuya 'Mining conflicts and corporate social responsibility: Titanium mining in Kwale, Kenya' (2016) 3 *The Extractive Industries and Society* 485-493 at 487.
[1504] *Mining Act* supra note 65 sec 49(2); See also, Rainbow Fields & Gurav Shah 'Local content and participation' in Ambani & Wasunna op cit note 215, 63-76 at 65-6. The law also envisions that a corporation shall surrender 10 per cent of its share capital to the state as free carried interest. *Mining Act* ibid sec 48(1).
[1505] See, Parliament of Kenya (Senate) *Hansard*, 30 November 2016.
[1506] *Community Lands Act* supra note 66 sec 36(1)(2).
[1507] Abuya op cit note 1502 at 487. See also, Umejesi & Thompson 'Fighting elephants, suffering grass: Oil exploitation in Nigeria' (2015) 28:50 *Journal of organizational Change Management* 791-811 at 805. For a discussion on the significance of equity participation in South Africa's platinum mining within Bafokeng Nation's community land, see, Duruigbo op cit note 407 at 131-2.

devolved administration has shifted power to lower units – even in the peripheries – affording them opportunities to impact resource decision making for counties and communities. A dynamic interpretation of each tier of government's functional competence has revealed some areas of interplay. When these structural overlaps have been adequately understood and seized, a correlation has emerged between county involvement and better implementation of laws and policies on benefit sharing.

In the absence of a proactive approach to implementation by county governments, resource benefit sharing can remain a mere paper aspiration. The chapter has contrasted Turkana County's participation in shaping the Petroleum Act's benefit-sharing regime with Kwale's failure to engage in the Mining Act's legislative process. It is apparent that the level to which a county mobilises county stakeholders around a common coherent position influences its ability to negotiate effectively with the national government. However, the case studies have shown that devolved units' mere existence is inadequate to facilitate implementation unless counties stand between disempowered communities and powerful resource operators.[1508]

The contestation between the centre and periphery has been necessary because of the national government's reluctance to share resource monetary benefits with counties consistent with legal requirements. While transparency regimes often focus on demanding that governments disclose to citizens earnings from resource development, it is clear that this is insufficient. Contestation must, therefore, focus beyond revenue sharing at the tail-end and demand greater accountability in the computation of up-front costs on the part of corporations. Especially in oil development where these costs are recoverable, it is feasible for corporations to inflate their up-front charges and reduce, to a pittance, revenue flowing to the state and thus downward to the constituent resource-host county and community.[1509]

However, the likely trigger of the resource curse in the Kenyan context seems to emanate from the corporate versus periphery and intra-periphery contestations. Unless mitigated and robust dispute resolution mechanisms are enacted at these lower levels, intense contestations are likely to disrupt resource development processes or produce actual conflict. This reality emphasises the importance of ensuring that royalty distribution, local content

[1508] Orago & Musangi op cit note 1459 at 50.
[1509] Faruque op cit note 342; Business Daily 'Tullow shocks Government with Sh204bn Turkana oil bill' 11 March 2020 *at https://www.businessdailyafrica.com/* accessed on 16 Jan 2021.

programmes, and Community Development Agreements generate greater inclusion at county and community levels. Properly deployed, these mechanisms can enable greater corporate-community-subnational comity and facilitate sustainable resource development. Conversely, captured by elites and dominated by national government and resource operators, these mechanisms can serve to deepen resource-related resentment and render the resource curse more probable. The regulation of corporate intervention in mining host communities through the Community Development Agreement is an important innovation, whose success, however, hinges on the extent to which the national government does not saddle CDA processes with non-legislative mandates.

This thesis notes that the low-intensity, latent conflicts in Kwale, which have yet to threaten mining development, may be easily ignored in contrast to Turkana's highly visible contestations, which have always received attention from the national government and resource operator. This approach to resource governance creates perverse incentives by signaling to communities in Kwale and elsewhere in the country that active sabotage is what gets policymakers' attention and ensures redress.

To the extent that any judicial clarification on the law as discussed in chapter 6.4.3 might require further legislative action at the national level, enforcement of resource governance decisions effectively swings back to the national government – albeit temporarily. This implies that despite specific constitutional prescription, the site for implementation in practice is not static but is a pendulum that swings between the two levels of government depending on the context. The dynamic nature of implementation could be responsible for the legislature's decision to set a 10-year temporal period within which to revisit the benefit-sharing framework for petroleum.[1510]

[1510] *Petroleum Act* supra note 66 sec 58(5).

CHAPTER 8: CONCLUSIONS AND RECOMMENDATIONS

8.1 Introduction

The absence of legal obligation on most African states to directly share wealth from mineral and oil extraction taking place in their territory with communities or subnational units is highlighted by this study.[1511] Such an approach to the management of resource benefits has been recently challenged as governments, corporate entities, and multilateral institutions realise the constraints of this approach from sustainability and risk perspectives.[1512] In the current context, norms, principles, and laws that favour the participation of resource-rich communities and regions in decision making and as beneficiaries of extractive industries are beginning to emerge.[1513] Kenya is an important site for the emergence of these norms.

Underlying the trend towards increased community participation is the widespread belief that host regions and communities that benefit from resource development will be more amenable to respecting resource rights of investors.[1514] In most contexts, the promise of benefits leads to high expectations amongst many stakeholders including host communities.[1515] Where these expectations are not matched with well-designed benefit sharing schemes, such adverse consequences including conflicts and other forms of collectivised resistance take the place of community cooperation and result in the denial of social license to operate.[1516] Unless these disruptive outcomes are addressed, they may signal the onset of a resource curse situation.[1517]

This thesis hypothesised that a well-planned, equitable benefit-sharing scheme represents an essential legal and policy response to the resource curse. The research set out to

[1511] Regalian systems adopted by most post-independence states in common law systems favoured state ownership of mineral wealth with no role for host regions and communities. Southalan op cit note 339 at 41; Williams op cit note 52 at 37; Williams op cit note 52 at 393.
[1512] *Endorois* supra note 212; Akpan op cit note 52 at 284; Williams ibid at 38, 52; FT Cawood & RCA Minnitt 'Identification and distribution of mineral rents in southern Africa' (2002) *The Journal of The South African Institute of Mining and Metallurgy* 289-295. (Author avers: 'the distribution of benefits is no longer the sole responsibility of the host government….It is in the investor's interest that all stakeholders have fair representation during the distribution process as it will considerably reduce political risk.') ibid at 295.
[1513] *Africa Mining Vision* supra note 43; Omorogbe op cit note 85 at 264; See, Montoya op cit note 1116 at 360; McCarthy op cit note 1072 at 1216; Chapter 6.7.1.
[1514] Mnwana, op cit note 50 at 826-7.
[1515] Tyce op cit note 841 at 729-737 (author elaborates that "the mere anticipation of resource booms can lead to political instability and worsening governance as social groups and actors jostle over expected rent flows". Id, at 728). See also, Ennsa & Bersaglio op cit note 1226 at 160.
[1516] Akpan op cit note 52 at 284.
[1517] Arellano-Yanguas op cit note 11 at 617-638.

assess the implementation of benefit sharing in the context of a newly devolved governance system in Kenya. The research question asked whether Kenya's devolved governance facilitates the emergence of laws and standards on benefit sharing in Kenya's extractive sector and promotes their implementation. The central claim is that institutions and mechanisms situated at multiple spheres of the state promote collaborative policy-making and increase the chance of implementation of benefit sharing.[1518]

This concluding chapter discusses this study's key findings, emerging research gaps, its contributions to scholarship on resource benefits, and policy recommendations. The first section reviews the broad findings of the study and identifies research gaps. The next section analyses the research findings to search for plausible explanations for the current status of benefit-sharing implementation in Kenya. The final section provides policy recommendations for possible application in the Kenyan context and beyond.

8.2. Key Findings and Research Gaps

Kenya's devolved governance takes the form of 47 county governments, the Senate, and a range of other intergovernmental bodies nested at national and county spheres of the state.[1519] Kenya's 2010 Constitution is premised on the idea that devolved units, in the form of counties, will aid legal and policy implementation in several key governance areas, including the natural resource sector.[1520] It is intended that subnational units will serve this role by catalysing a healthy interplay with national institutions by enhancing counties' negotiation with the national government, access to information, citizen participation, accountability, and conflict resolution.[1521] This study assessed this Constitution's vision for counties against the experience of two counties – Turkana and Kwale. The following section describes critical findings on the extent to which devolved governance supports the hypothesis.

8.2.1 Counties and Legal Implementation

The study found that counties are constitutionally empowered to be implementers of national policies on natural resources.[1522] In seeking to apply this broad function to benefit sharing, it was demonstrated that counties' implementation role strengthens when a county engages

[1518] Chapter 4.2.
[1519] Chapter 6.3.
[1520] *Constitution* supra note 12 Schedule 4 Part 2(10).
[1521] Ibid Schedule 4 Part 2(14). See Chapter 6.7.2.
[1522] Chapter 6.7.2.

national-level policy-making institutions and participates in monitoring decisions at the centre.[1523] Of necessity, at this early stage of Kenya's devolution experiment, counties' defining role is active advocacy of the views and aspirations of their resident communities in national policy processes.[1524] However, this position is feasible only when communities and county bureaucrats' interests coincide, such as was evident in Turkana County's advocacy for community share of the revenue from oil proceeds.[1525] Where the interests of the county and its communities diverge, the communities may be worse off.[1526] Moreover, if a county conceptualises its role as a mere administrative agent of the national government bereft of autonomous interests, its capacity to influence legislative processes in furtherance of benefit-sharing implementation is substantially impaired.[1527]

Evidence that counties can advance legal implementation emerges by examining the conduct of Turkana County. It was established that the county facilitated benefit-sharing law in petroleum development by: (1) negotiating with the national government on a revenue-sharing formula; (2) demanding an effective grievance mechanism; and (3) litigating land acquisition processes initiated by the national government.[1528] As much as the outcomes of these engagements are inadequate from the perspective of local communities, it is fair to suggest that these results bear a vital imprimatur of county and community interests.[1529]

In contrast, the ineffectiveness of Kwale County to engage in any meaningful manner with processes that led to the enactment of the Mining Act constitutes evidence that a county that disconnects from national and community opportunity processes may fail to advance implementation.[1530] Even assuming that Kwale County lacked the capacity to exert influence on the legislative process on its own, there is no evidence it sought the aid of the Council of Governors (COG), the intergovernmental relations institution that brings county governors together.[1531] Further, no evidence was discernible from the deliberations of the Senate, the legislative chamber that exists to defend the interests of devolved units, that Kwale submitted

[1523] Chapter 7.3.1.
[1524] Chapter 7.3.1.
[1525] Chapter 7.3.3.
[1526] See, *Mohamud Iltarakwa Kochale* supra note1024 (legal challenge by communities for unlawful acquisition of over 150,000 acres of community land for the establishment of the largest wind power energy project on the continent. Marsabit County joined the national government and the investor in opposing the community's application).
[1527] Chapter 7.4.1.
[1528] Chapter 7.3.
[1529] Chapter 7.3.1.
[1530] Chapter 7.4.1; *Committee on Environment and Natural Resources* supra note 1038 at 19.
[1531] Chapter 7.4.1.

any views on the Mining Bill.[1532] Therefore, it follows that inadequate articulation of the role of counties in the mining regulatory framework may not solely be attributed to the reluctance of national legislators. Instead, the failure by counties, such as Kwale, to ensure the reflection of their input in the law-making process at the national level may be responsible for the state of the law.[1533]

8.2.2 Counties and Local Benefit-Sharing Frameworks

Translating national legislative entitlements into operational benefit-sharing regimes accessible to communities as individuals or as collectivities depends largely on counties' further action. However, it was evident from the study that limited progress was registered in formulating county legislation, policies, and administrative procedures to enable the benefits of national legislation to be accessed by communities.[1534] Despite advocating for an increased share of petroleum revenue, both for host counties and for local communities, Turkana County has failed to translate this opportunity into law by creating the necessary trust fund for managing community benefit revenue as anticipated in the Petroleum Development Act.[1535] Additionally, there is no evident action on the part of Turkana County in creating a framework to govern the county's own revenue share, save for a draft natural resource policy that is yet to be adopted by the county legislators and leaders.[1536]

Similarly, Kwale County has not adopted legal measures to guide revenue share management due to both the host county and community under the Mining Act. It has also not taken action to challenge the national government's attempt to re-centralise the management of county and community share of revenue via the Mineral Royalty Fund Regulations.[1537]

The factors responsible for the failure of the two counties to legislate are not readily available in the public domain and is, therefore, an area that future empirical research could examine. It is suggested here that the two counties' failure to legislate is informed by weak

[1532] Parliament of Kenya (Senate) *Hansard*, 30 November 2016.
[1533] The need to incorporate counties in the benefit-sharing formula was urged upon the committee by the corporate sector and advocacy NGOs. Ibid at 16.
[1534] *Departmental Committee on Environment and Natural Resources* supra note 1038 at 10.
[1535] Chapter 7.3.3.
[1536] *Policy for Extractive Industries in Turkana County* supra 1365; Chapter 7.3.3 *Infra.*
[1537] *Mineral Royalty Fund Regulations* supra note 793; chapter 6.3.2. The Regulations propose to create a Funds Committee comprising of national government bureaucrats. This Committee will, in turn, consider and approve proposals from counties and communities to be underwritten from revenue share due to host counties and communities. Ibid.

capacity in legislative development.[1538] The nature of community-enhancement support, extended by resource operators, prioritised building skills directly relevant to the extractive sector and did not focus on enabling counties to develop operational rules to govern resource benefits.[1539]

8.2.3 Counties and Access to Information

Information – particularly scientific information on social and environmental impact– empowers communities to assess extractive activities' costs which determines the viability of benefits offered and the extent to which such benefits exceed environmental burdens. Information as an enabler of 'environmental justice'[1540] and the relationship between environmental justice and benefit sharing requires further exploration.

This research established that devolved governance has partially contributed to enhanced access to information on extractive activities, contracts, revenues, and benefit-sharing allocations. Instructively, this increased access to information has been mediated primarily by extractive operators as part of their corporate risk assessments and not by the national government.[1541] Only during stakeholder meetings in Turkana and Kwale have information on environmental concerns, land compensation, and community development priorities been disseminated by resource operators.[1542] However, the study found limited evidence that national government proactively shares data and other information relevant to resource development with the communities and counties concerned.[1543]

[1538] Office of Auditor General Report for Turkana County July 2015 to June 2016 at *http://oagkenya.oagkenya.go.ke/* accessed 30 Jan 2021.
[1539] Chapter 7.
[1540] David Schlosberg 'Theorising environmental justice: The expanding sphere of a discourse' (2013) 22:1 *Environmental Politics* 37-55.
[1541] Business & Human Rights Resource Centre 'Kenya: Govt. opts to keep oil revenue sharing agreements confidential; Tullow Oil says it is open to disclosure' 2 October 2017, available at *https://www.business-humanrights.org/en/kenya*, accessed on 20 Jan 2021.
[1542] *Report of 2nd Turkana Oil & Gas Conference 2016 Hosted by Turkana County & Tullow* (26-27 May 2016); Faruque op cit note 342 at 68.
[1543] *County Government Act* supra note 751 s 81-82; The Standard 'Turkana leaders want details of Tullow Oil' 29 July 2020, available at *https://www.standardmedia.co.ke*, accessed on 14 Dec 2020; Daily Nation 'Nanok, lawmakers demand audit of Tullow's activities' 30 July 2020, available at *https://www.nation.co.ke/kenya*, accessed on 5 Dec 2020 (asserting that Turkana County Grievance Mechanism had not been informed of Tullow's activities). Government has failed to establish the Online Mining Cadastre (OMC) under the Mining (Licence and Permit) Regulations, 2017 GG No. 81(40) 24 May 2017. All applications or reports relating to mineral rights and dealings in minerals are to be submitted through the OMC which may be accessed through the website of the Ministry (reg 4). The law provides that the 'cadastre shall be a public document and may be inspected by an interested person upon the payment of a prescribed fee.' *Mining Act* supra note 65 s 192(4).

In particular, the study demonstrates that the state has failed to implement provisions of the Mining and Petroleum Acts, which require disclosure of mineral agreements and details of revenues paid to the government from extractives' developers.[1544] Conversely, the study found no evidence of county advocacy demanding the formulation and implementation of the comprehensive transparency regime envisioned in law by the national government.[1545] Contrary to the Constitution, the Senate and National Assembly have not been involved in ratifying agreements on large-scale extractive programmes.[1546] This process was expected to enhance transparency.[1547] The resulting opacity in the sector does not nurture the kind of trust needed to stabilise resource development but instead heightens the potential for future conflicts.[1548]

8.2.4 Counties and Participation

Participation is central to the bottom-up creation of legitimate benefit-sharing norms and practices. The enactment of laws to structure community participation is an indicator of how counties have aspired to enable communities to play an active role in resource decision-making processes.[1549] For instance, the Turkana County case study highlighted that the county enacted both a participation and a village law that organises communities into village units and creates a mechanism for building local actors' capacity to meaningfully engage in development.[1550] Kwale has also enacted a participation law.[1551]

However, this study found no evidence of the impact of these legislative instruments on the quality of community engagement on resource development. The proof that participation laws at the county remain inoperative was apparent in the case of Kwale, when the County government asked the mining operator, Base Titanium, to undertake public participation before considering its application for extension of the special mining lease. While the county participation law has an elaborate framework to guide such engagements, the county did not invoke it to aid the operator's engagement with communities.[1552] As a qualitative study was

[1544] *Mining Act* supra note 39 s 55; *Petroleum Act* supra note 66 s 100.
[1545] *Petroleum Act* ibid s 119.
[1546] *Constitution* supra note 12 art 71.
[1547] Ibid; *Mining Act* supra note 65 s 120(2).
[1548] Orr op cit note 56 at 140; Muigua op cit note 1120; Faruque op cit note 342 at 69; Chapter 7.3.1.
[1549] *Constitution* supra note 12 Schedule 4 Part 2(14).
[1550] Chapter 7.3.3.
[1551] Chapter 7.4.2.
[1552] Chapter 7.4.2.

beyond the scope of the present dissertation, future research could provide additional insight into county laws' impact on the quality of public participation.

The other marker of enhanced participation is increased visibility of community concerns in resource decision-making processes. This thesis noted that pre-devolution, resource-affected communities in Kwale actively resisted environmentally unsound mining developments in courts.[1553] The expectation was that devolved governance would provide mechanisms to amplify and rationalise community resource struggles. Instead, the inverse result was evidenced by the absence of a strong community voice in Kwale's titanium mining development since 2010.[1554] The weakened community voice suggests that – contrary to the literature – devolution may have disrupted community agency rather than facilitated it.[1555]

One plausible explanation for the apparent reduction of community activism in Kwale's titanium development is that, while devolution has led to new laws on public participation, it has also generated a massive new local government bureaucratic structure that requires staffing. These opportunities have attracted active community leaders away from advocacy into county bureaucracy.[1556] Therefore, devolution can contribute to demobilising resource development opponents by co-opting them into the county government system.[1557] On this reading, it can be argued that the moderating influence of the county is equally signaled by Turkana's pragmatic proposals on the profit-sharing formula in the context of the development of the Petroleum Bill.[1558] What follows from this argument is that, whereas a local populist political actor would ordinarily adopt an extreme resource nationalism position, negotiating within the confines of a county imposes constraints by incentivising moderates over those with extremist views.[1559] The result is more accommodative proposals on benefit sharing that eventually generate agreement between the county and national government.

[1553] Abuya op cit note 1371 at 485-493.
[1554] Chapter 7.4.3.
[1555] Nick Cheesman & Gabrielle Lynch 'Decentralisation in Kenya: The governance of governors' (2016) 54:1 *Journal of Modern African Studies* 1-35 at 3; Chome op cit note 917 at 300; See, chapter 7.4.2.
[1556] Chome ibid at 309-10 (for view that counties have hired educated individuals to fill bureaucratic new positions created by the County Government Act).
[1557] Chapter 2.3.2; see, Naito et al op cit note 176 at 91.
[1558] Parliament of Kenya (Senate) *Hansard* Wednesday, 30th November 2016.
[1559] Chome op cit note 917 at 300 (for view that depoliticised approach to devolution weakens county ability to respond to popular expectations).

8.2.5 Counties and Resource Conflict Mitigation

The study found that counties have the potential to mitigate conflicts among stakeholders concerning benefit sharing. For instance, Turkana County's decision to litigate a dispute on land compensation demonstrates the county's commitment to secure compensatory benefits for the community. Additionally, this action served to contain a rapidly evolving community grievance that could have degenerated into violent conflict or blocked access to extractive sites. However, the court's dismissal of the case on jurisdictional grounds created further uncertainty and contributed to the oil operator's decision to delay the significant financial investment decision.[1560]

In another example, the study noted that in response to community and county complaints of non-involvement in the oil operator's decisions, the national government established an intergovernmental grievance mechanism.[1561] However, this dispute mechanism has not only failed to involve the public in its deliberations, but the county, which is represented in the mechanism, continues to be unaware of the committee's work.[1562] Any assessment of the sustainability and effectiveness of such mechanisms is, therefore, impaired. Moreover, the state's failure to establish a redress mechanism for Kwale signals that ad hoc measures could incentivise aggressive community opposition to resource development to attract state attention.[1563] Consequently, it points to the need to establish more universal and permanent dispute management institutions with the capacity to respond to resource conflicts wherever they may be triggered in the country.

8.3 Analytical Reach of the Issues

This study's central focus is the legal approaches by which extractives' burdens and benefits in Kenya are distributed and the extent to which these approaches are fair and equitable. In responding to this challenge, the study necessarily examined various dimensions of law and policy whose outcomes, in the view of this research, have enriched the understanding of benefit sharing in extractives. The following section reflects on the key contributions drawn from the thesis.

[1560] *County Government of Turkana v National Land Commission* supra note 1275; Chapter 7.3.1.
[1561] Chapter 7.3.1.
[1562] Chapter 7; *Daily Nation* op cit note 1541.
[1563] Chapter 7.5.

8.3.1 Evolution and Modes of Benefit Sharing

This thesis traced the evolution of benefit sharing in international law for purposes of providing context. While benefit sharing originates in human rights law, it is international environmental law that codifies fundamental principles of benefit sharing through the Convention on Biological Diversity (CBD).[1564] The roots of benefit sharing in self-determination and indigenous peoples' rights help explain the intensity of demands pitting the community, on the one hand, against the state and extractives operators, on the other.[1565] Environmental law's foundation of benefit sharing, in contrast, favours the use of consensual and deliberative models for distributing burdens and benefits of resource development.[1566] Environmentalism thus provides an essential counterbalance to extreme expressions of self-determination associated with benefit sharing. It achieves this approach by constraining parties to submit to participatory processes of impact measurement to assess resource development costs and benefits.[1567] It further emphasises the centrality of ensuring resource-host communities' full engagement in these processes, ideally internalising discontent.[1568]

The study establishes that benefit sharing in the natural resource sector is explicitly recognised under Kenya's law since the adoption of the 2010 Constitution.[1569] The laws enacted to implement the Constitution acknowledge the need to distribute resource benefits beyond the national government and extend their reach vertically to resource-host counties and communities.[1570] The laws are mostly compatible with the standards elaborated by the CBD and the Nagoya Protocol as they adopt both monetary and nonmonetary types of benefits.[1571]

Financial benefits in the form of royalties or revenue share from the disposal of profit oil are disbursed among the national government, resource county, and host community.[1572] As problematised elsewhere, the percentage allocated to the three beneficiaries, whether in petroleum or mining law, is not necessarily informed by any scientific or equity rationale.

[1564] Chapter 2.2. Also, Elisa Morgera 'Dawn of a new day: The evolving relationship between the Convention on Biological Diversity and international human rights law' (2018) 53 *Wake Forest Law Review* 691-712.
[1565] Chapter 2.2.1 & 2.2.2; also, Wolfgang Danspeckgruber (ed) *The self-determination of peoples: community, nation, and State in an interdependent world* (2002) (The author notes thus: 'No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination.') Ibid at 11; *Katangese Peoples' Congress v Zaire* supra note 32.
[1566] Chapter 2.3.
[1567] Ibid.
[1568] Ibid.
[1569] Chapter 5.3.
[1570] Chapter 5.3.
[1571] Chapter 2.4.
[1572] *Constitution* supra note 12 art 69(1)*(a)*.

Instead, it is a function of political expediency and the vagaries of the legislative process.[1573] Kenya's Mining Act further evidences Parliament's clear intention to prescribe a revenue-sharing formula.[1574] However, its plan breaks down in failing to frame details of the mechanisms for managing and distributing the county and community share of benefits. Even the Petroleum Act, which goes further to provide additional formulation on the fate of benefits allotted to host communities and county, leaves the mechanism's actual design – a trust fund – to either national government regulations or county legislation.[1575]

Due to the apparent incomplete conceptualisation of benefit-sharing mechanisms in legislative processes,[1576] disbursement of monetary benefits to counties and communities has faced a myriad of challenges. These include lack of enabling regulations,[1577] absence of county-level legislation,[1578] and weak institutions to enforce and monitor the disbursement of entitlements to lower level stakeholders.[1579] The apparent stagnation in actualising monetary benefits is concerning because this is an aspect most impactful to communities at individual and household levels with the greatest potential to counter communal resistance to extractive activities. This failure in disbursing monetary benefits continues to contribute to a climate of dissatisfaction, thus increasing the likelihood of the resource curse if communities were to be mobilised around this issue.

The discussion also demonstrates that nonmonetary modes are the dominant mechanisms of benefit sharing under both Petroleum and Mining regimes.[1580] These modes include (1) local content, (2) local development projects under community development agreements, (3) capacity building, (4) employment opportunities, and (5) equity participation. This thesis determines that nonmonetary benefit-sharing modes are better formulated so far as the law provides a detailed guide to inform access to benefits at subnational and community levels. The fact that the duty bearer in implementing these modes of benefit sharing resides

[1573] Clark op cit note 10 at 550.
[1574] Chapter 5.3.2 & Chapter 7.4.1.
[1575] Chapter 5.3.3 & Chapter 7.3.1.
[1576] Law is incomplete when it fails to address certain actions because of the open ended nature of legal provision. See, Katharina Pistor & Chenggang Xu 'Incomplete law – A conceptual and analytical framework and its application to the evolution of financial market regulation (2003) 35 *New York University Journal of International Law & Politics* 931-1014 at 932.
[1577] Chapter 7.3.1.
[1578] Chapter 7.3.3.
[1579] Chapter 5.3.2 & 5.3.3.
[1580] Ibid.

with resource operators rather than the national government appears to lend impetus to legislative clarity.

For instance, local content flexibility is often preferred because it is implemented by a resource developer with little input or interference from the national government, save for reporting obligations. However, the ease of implementing local content is undermined by the accompanying weak transparency that has made it impossible to assess the uptake of local procurement opportunities by resource-host communities and county actors.[1581] An additional challenge is using citizenship criteria in the definition of 'local' beneficiary of local content opportunities. While this criterion enables equal access to procurement opportunities, it disproportionately burdens citizens from historically peripheral counties, who cannot compete with their compatriots from the more economically dominant regions.[1582]

8.3.2 Nature of Benefit Sharing

The lack of consensus on what constitutes the common core of benefit sharing has given rise to different perspectives on the nature of benefit sharing. These perspectives implicate the treatment of benefit sharing in law and policy.[1583] Benefit sharing has been variously viewed as a right, obligation, safeguard, or mechanism in literature.[1584] None of these conceptions is fully settled.[1585] For instance, the fact that multilateral financial institutions view the lack of benefit sharing as a safeguard necessary to address non-technical risks to resource development has animated the way corporations respond to community demands.[1586] This perspective on benefit sharing has led to the adoption of mechanical and paternalistic models of benefit sharing, including corporate social responsibility.[1587] Indigenous communities, by contrast, are entitled to participate in benefits from the exploitation of natural resources within their traditional lands as a right.[1588] In designing benefit-sharing measures that satisfy indigenous rights conception of benefit sharing, several elements that locate the community at the centre of decision making and emphasise co-ownership is a prerogative.[1589]

[1581] Chapter 7.3.3; Nwapi op cit note 1328 at 92-96.
[1582] Chapter 2.4.3; Chapter 5.3.3; Nwapi ibid at 71.
[1583] Chapter 2.1; also, Morgera op cit note 33 at 354-5.
[1584] Chapter 2.3.
[1585] Ibid.
[1586] Chapter 2.3.1.
[1587] Chapter 5.2.2.
[1588] Chapter 2.1.2.
[1589] Ibid.

This thesis clarifies that benefit sharing is an integral part of mineral development with both procedural and substantive elements.[1590] Procedurally, adaptive and context-specific processes that incorporate free, prior, informed consultation (FPIC) based on mutually agreed terms (MAT) are crucial aspects of a fair regime of benefit sharing.[1591] Top-down models that entrench existing inequalities rather than disrupt the environmental and social harms borne by resource-rich communities and regions are thus inadequate. These procedural elements can be charecterised as preconditions to benefit sharing.

On the substantive side, various models of benefit sharing discussed above are operational. Community Development Agreements (CDAs) as a type of MAT within the meaning of the CBD and Nagoya Protocol must be preceded by good-faith negotiation.[1592] If the development of a CDA does not address information and power asymmetries among participants and communities, it runs the risk of being a command-and-control rather than a cooperative model of benefit sharing.[1593] Benefit-sharing systems that enable unilateral rather than collaborative solutions will not yield the intention of sustainable resource development and may engender conflict. The practise of negotiating CDAs in Kenya is evolving as committees for some of the earliest CDAs have only been recently gazetted.[1594] As such, this is another area where future research could shed light.

8.3.3 Impacts of Theoretical Incoherence on the Structure of Benefit Sharing

In reviewing current literature, it is evident that benefit sharing finds both support and opposition in equal measure.[1595] At the core, support for benefit sharing is grounded in equity and justice notions, be it distributive, procedural, or compensatory justice.[1596] Opposition to benefit sharing, on the other hand, is mainly based on efficiency or institutional capacity grounds.[1597] While these philosophical bases are not explicit in most laws, a more in-depth analysis of laws and policies enacted by the Kenyan government elicit important insights.[1598]

[1590] Chapter 2.3.2.
[1591] Ibid.
[1592] Chapter 2.3.3.
[1593] Chapter 5.3.2; also, Dupuy op cit note 56 at 200-215; Nkhata, Breen & Mosimane op cit note 452 at 57.
[1594] Chapter 7.4.2.
[1595] Chapter 3.
[1596] Chapter 3.2.
[1597] Chapter 3.4.
[1598] Chapter 5.

In the first instance, there is neither sufficient clarity nor consensus on the reasons for adopting benefit sharing. The Kenyan Constitution emphasises equity as the overarching basis for benefit sharing.[1599] This ideal constitutional thought finds incomplete expression in established law.[1600] Neither the laws nor policies discussed to develop the equity basis go beyond the abstract constitutional prescription.[1601] Adjudication of resource disputes before Kenyan courts, an opportunity for reasoned elaboration of law,[1602] has also failed to articulate a clear legal theory to ground benefit sharing.[1603] Aside from emphasising participation and the right to information – all elements of procedural justice – the courts have not displayed a clear legal view upon which to anchor benefit sharing in Kenya.

Secondly, the lack of a coherent definition of the concept of community is highlighted in the thesis as a reflection of the existing anxieties to devolve monetary benefits outside the national government. Turkana County problematised the legislative definition of 'community' with reference to an administrative unit – the ward – as likely to create community division. In the view of the county, a definition that retains the community as an entity sharing cultural, social, and spiritual ties to the resource area is more appropriate.[1604] The Mining Law's definition of community as those 'living around' an exploration or mining development area or a group displaced from the land under mining is equally problematic.[1605] The definition is too broad and arguably postpones the determination of actual beneficiaries to future negotiations. This lack of clarity is unhelpful in locating communities as coherent right holders in the benefit-sharing scheme. When policy provides an indeterminate view of communities, it is unlikely to repose crystallised rights on a beneficiary preferring these rights to be mediated through other juristic entities, such as a trust, as prescribed for instance, under the Petroleum Law.[1606]

Opposition to enhanced devolution of benefits in favour of communities and counties was more explicit in the law-making and implementation processes. In vetoing Parliament's proposal on a petroleum revenue-sharing formula, the President asserted that counties and

[1599] *Constitution* supra note 12 art 69(1)*(a)*.
[1600] Roberto Mangabeira Unger *The Critical Legal Studies Movement: Another Time, A Greater Task* (2015) 6.
[1601] Chapter 5.
[1602] Unger op cit note 1598 at 6.
[1603] Chapter 6.7.3.
[1604] Chapter 7.3.1; Chilenye Nwapi 'Legal and institutional frameworks for community development agreements in the mining sector in Africa' (2017) 4 *Extractive Industries and Society* 204.
[1605] *Mining Act* supra note 65 sec 4(8); see Chapter 6.3.2.
[1606] *Petroleum Act* supra note 66 sec 58(4).

communities lacked the absorptive capacity needed to ensure efficient revenue utilisation.[1607] The view that subnational units cannot manage volatile resource rents also informed the veto.[1608] The President's veto memorandum thus proposed a cap on revenues allocated to counties and communities. Although later dropped, this objection represents a clear ideological position that monetary benefit sharing to counties and communities will lead to inefficient use of resource revenue and not serve the national interest. The cap on benefits due to counties and communities, retained for geothermal resources under the Energy Act, confirms the efficiency objection's persistence to devolving monetary benefits.[1609] The President's efficiency argument favours bureaucratic rationality while disavowing benefit-sharing schemes based on equity and social justice.[1610] Underpinning this reluctance is the persistent view of a section of national government actors that recentralising monetary benefits advances the interests of the core. However, these actors co-opt bureaucratic and technical terms to conceal this otherwise unacceptable intention. Furthermore, direct cash transfer of community share of resource revenue, though efficient, especially if technologically enabled, was casually disregarded in the negotiation process.[1611]

Another problem with deploying the efficiency and weak capacity argument against devolving resources to counties is that the same case can be employed vertically by counties against resource-rich communities. The efficiency and capacity objections are a slippery slope which if countenanced will undermine the equity goals served by benefit sharing. Instead, the overriding approach should empower beneficiary units to perform the tasks to which they are legally charged.[1612] Rather than deny counties their right to resource benefits, the national government, in furtherance of the principle of subsidiarity, should build the capacity of counties to discharge constitutional obligations.[1613]

[1607] Chapter 7.3.1; also, Oxfam 'Sub-national payments in Kenya's oil Industry: Oxfam Kenya Discussion Paper' 2018, available at *https://oi-files-cng-prod.s3.amazonaws.com/kenya.oxfam.org*, accessed on 20 July 2020.
[1608] See, Clark op cit note 605 at 555.
[1609] Chapter 5.3.3.
[1610] Chome op cit note 917 at 301, 306.
[1611] Sudhanshu Handa, Carolyn Tucker Halpern & Audrey Pettifor et al 'The government of Kenya's cash transfer program reduces the risk of sexual debut among young people age 15-25' (2014) 9:1 *PlOS ONE* 1-9; Kenya's mobile teplehony reach is one the highest on the continent and cash transfer via mobile money eliminates bureaucracy and transaction costs. See, Jack William & Suri Tavneet 'Risk sharing and transactions costs: Evidence from Kenya's mobile money revolution' (2014) 104:1 *The American Economic Review* 183-223.
[1612] See, Clark op cit note 605 at 550.
[1613] Chapter 6.2.4; also, *Constitution* supra note 12 Schedule 4 part 1(32). See also, Clark op cit note 605 at 550 (arguing for allocation of internal resources to resource-rich regions to enable them to prepare communities for participation in mineral development).

The legislature's imposition of a specific mechanism for managing communities' share of petroleum revenue represents another example of the efficiency concerns. As counties and communities may have completely different views on the mechanisms for governing community and county share of revenues, it is presumptuous for the national legislature to impose the trust fund model on them.[1614] Moreover, public trusts are quite susceptible to elite capture, as witnessed in other contexts and throughout Kenya's history.[1615] The nature of trusts as a juristic form, the operations of which are alien to communities, renders it susceptible to privileging community elites and external actors.[1616]

The policy and legislative reluctance to devolve monetary benefits is also evident in the mining sector.[1617] The Mineral Royalty Fund Regulations seeks to retain the national government's control over royalties devolved to counties and communities and constrain host regions and communities from exercising self-determination over resources devolved to them by law.[1618]

Capacity and inefficiency objections also inform the apparent policy preference for nonmonetary forms of benefit sharing, which are essentially mediated through the national government or resource operator. The use of community development agreements, which institutionalise corporate social responsibility (CSR) but still place the corporation at the centre of decision making, is an example.[1619] Likely, community priorities will still fall by the wayside in the context of negotiation for CDAs because of the low level of community representation in the CDA committee and how the committee is structured. Local community benefit-sharing agreements proposed under the Benefit Sharing Bill better conceptualise communities' self-determination as they are produced, negotiated, and monitored by a Local Forum comprising elected representatives of a host community.[1620]

Local content is another example by which the law assumes resource benefits reach communities. However, while this is one area in which policy consensus was evident, the thesis

[1614] This is also the mechanism proposed by the Nagoya Protocol. See Chapter 2.2.1.
[1615] Sonwabile Mnwana 'Custom and fractured "community": mining, property disputes and law on the platinum belt, South Africa' (2016) 1:2 *Third World Thematics: A TWQ Journal* 218-234; Gaille Scott 'Mitigating the resource curse: proposal for microfinance and educational lending royalty law' (2011) 32:1 *Energy Law Journal* 81-98 at 86-87; for abuse of Trust Lands, see, Ambreena Manji op cit note 1006, 467-492 at 473.
[1616] Parks op cit note 1096 at 3.
[1617] Chapter 5.
[1618] Chapter 5.2.3.
[1619] Dupuy op cit note 56 at 200-214; Chapter 5.3.2.
[1620] *Benefit Sharing Bill* supra note 67 clause 31 & 32(1); Chapter 5.3.4.

expresses doubt that local procurement benefits have been advantageous to resource-host communities. It was demonstrated particularly in the case of Turkana that the real beneficiaries of local content allocations were local political elites, well-connected businesses, and national actors.[1621]

8.3.4 Absence of Institutional Anchor for Benefit Sharing

This thesis adopts the view that while monetary benefits are a type of common-pool resource,[1622] in so far as they are appropriated and distributed by the centre, institutions can enhance cooperation across multiple levels. Incorporating Ostrom's design principles[1623] into resource governance institutions, as attempted by Kenya's devolved governance, can address the challenge of misuse of resource revenue. The predominant consensus of scholarship is that weak institutions drive the resource curse.[1624] While highlighting the importance of institutions in addressing the resource curse, the literature fails to prescribe with a measure of specificity the institutional attributes likely to maximise benefits from extractive industries.[1625] The means by which the quality of institutions responsible for resource governance can be strengthened is equally unresolved.[1626] Despite these evident gaps in literature, there is ample support that such institutions must at a minimum enhance transparency and accountability, and clarify jurisdictional questions among institutions with cross-cutting mandates.[1627]

This thesis has highlighted the absence of an overarching institution tasked with enforcing benefit-sharing regimes in Kenya as a critical missing link. As discussed,[1628] it is evident that Kenya's laws and policies do not clarify which institutional actors are mandated to ensure the proper implementation of benefit sharing. The mining regime, for instance, sets down the royalty entitlements for national and county governments, as well as for communities.[1629] While the national government directly collects all the royalties, there is no specific institution outside the national government's Finance Ministry that is empowered to follow through to ensure the transmission of the fiscal rents to beneficiary counties and

[1621] Chapter 7.3.2.
[1622] Chapter 4.1.
[1623] Ibid.
[1624] Ibid; Chapter 6.1.
[1625] Halvor Mehlum, Karl Moene & Ragnar Torvik 'Institutions and the resource curse' (2006) 116 *The Economic Journal* 1-20.
[1626] Ibid.
[1627] O'Faircheallaigh op cit note 282 at 105.
[1628] Chapter 5.3.4.
[1629] Chapter 5.3.2.

communities. The case of outstanding royalty share due to Kwale County and communities, highlighted in this thesis, was brought forward by the Commission on Revenue Allocation.[1630] However, this Commission lacks the legislative mandate to pursue the release of these royalty entitlements by the national treasury to the beneficiary county and communities.

A similar situation exists for the monitoring of the implementation of local content in the petroleum sector. Under the Petroleum Act, the Energy and Petroleum Regulatory Authority is urged to monitor local content plans' performance.[1631] As the central institution responsible for regulating the petroleum and energy sectors, the Authority has 46 distinct functions.[1632] With such expansive mandates under its regulatory remit, it is feasible that local content programmes' monitoring is a peripheral role that could suffer non-execution, thus undermining the legislative intent.[1633] The absence of an institution dedicated to pursuing the implementation of benefit-sharing measures proposed in law leaves counties and communities at the mercy of the national government. Given power asymmetries, the arenas available to counties and communities to claim their resource entitlement become limited to litigation, blockades, or protest. Litigation is lengthy, costly, and outcomes are indeterminate. Equally, blockading resource development activities is an approach that generates the kind of grievances that lead to the resource curse.

Even within the existing institutions, there is no clarity on the level of county or community involvement. Thus, while the Council of Governors (COGs) is required to nominate a representative to the nine-member Mineral Rights Board,[1634] no such requirement is extended to most other institutions under the Mining Act of 2016. Similarly, although the COG's nominee to the Board of the Energy and Petroleum Authority is a County Executive in charge of petroleum, the current nominee is the COG's chief executive.[1635] This clear case of non-compliance indicates that even where counties are expected to nominate a representative, the nominating body could abuse its role unless resource-host counties and communities are vigilant in monitoring the process. Neither counties nor communities are represented explicitly

[1630] Chapter 7.4.1.
[1631] *Petroleum Act* supra note 66 sec 50(1)(2); *Energy Act* supra note 813 sec 10*(ee)*.
[1632] Energy Act ibid; Chapter 5.3.3.
[1633] See, Tyce op cit note 841 at 729-737 (for the proposition that the failure to create a dedicated institution to deal with upstream regulation of petroleum development was a consequence of intense intra-core contestation). Ibid at 735.
[1634] *Mining Act* supra note 65 sec 30(2)*(d)* (providing for the nomination by Council of Governors of one person with experience in mining, geology, geophysics, or engineering).
[1635] See, Board of Directors 'Energy & Petroleum Authority' available at https://www.epra.go.ke/board-of-directors/, accessed on 22 June 2020.

in the Energy and Petroleum Tribunal,[1636] notwithstanding that most of the conflicts involve these actors' interaction with resource governance.

The dilemmas above give credence to the decision by the Senate to propose the enactment of the Natural Resource (Benefit Sharing) Bill, whose core objective is to establish a dedicated institution to advance benefit sharing, namely, the Benefit Sharing Authority.[1637] The legislation's philosophy emerges from the fact that both efficiency and equity are touted as guiding principles under the proposed law.[1638] By incorporating equity into the matrix of decision making, the Bill blunts the sharp demands of efficiency as the only *raison d'être* in resource distribution. To the extent that efficiency is a concept that favours market approaches, equity brings to the forefront the need to encourage legal mechanisms to incorporate methods that can lend justice to host communities.[1639] This need for equity informs the conceptualisation of the Benefit Sharing Authority Board, which envisions deeper participation by communities in the Board's decisions.[1640] The institution proposed can serve to socialise policy actors on international best practices on the different benefit-sharing models.[1641] This way, policy actors need not default to path-dependent, single-track models, such as funds, foundations, and trusts, borrowed from the corporate sector and shown to be susceptible to elite capture.

With the proposed Benefit Sharing Authority in place, it is probable it could serve to engender consensus in favour of benefit sharing and address any policy objections against its implementation. Furthermore, if the Natural Resource (Benefit Sharing) Bill had passed, the establishment of the Natural Resource Royalty Fund administered by the Authority would be plausible.[1642] In such enabling circumstances, royalties due to Kwale County would likely have been remitted to the Authority for transmission to the county with no further need for regulations.[1643] Its weakness notwithstanding,[1644] the failure of this institutional proposal to be enacted into law by the second chamber of Parliament, the National Assembly, corroborates the view that the national government is yet to endorse the idea of devolution of monetary resource benefits fully. However, this approach is disingenuous as the existing institutional

[1636] Chapter 5.3.3.
[1637] Chapter 5.3.4.
[1638] *Benefit Sharing Bill* supra note 67 clause 4(c).
[1639] Nkhata, Breen & Mosimane op cit note 452 at 52-69.
[1640] Chapter 5.3.4.
[1641] *Benefit Sharing Bill* supra note 67 clause 40(1).
[1642] Ibid clause 34(2).
[1643] Chapter 7.4.1.
[1644] Chapter 5.3.4.

arrangement leaves the governance of benefit sharing to multiple institutions. Moreover, these institutions are already burdened with other substantive functions that render implementation less likely and hastens the onset of the resource curse.

8.3.5 Agency in Aid of Implementation

'Equity aids the diligent and not the indolent' is an old maxim of the law of equity.[1645] This maxim expresses the idea that ownership rights are contingent on the conduct of the beneficiary over time. The upshot of this maxim is that benefit sharing cannot be realised by formal recognition alone, being rooted – as it is – in equity. Its implementation rests on beneficiaries' engagement in the political struggle over the content of the law.[1646] In Kenya, these beneficiaries are the resource-host county governments and community. In the end, the empirical impact of legal frameworks on target counties and communities is likely to vary based on these actors' engagement at different stages of the law-making and elaboration processes.[1647]

As host counties hold a more substantial political and institutional basis for effective advocacy than local communities,[1648] it falls upon them to take a more frontline role in unlocking the right to benefit sharing. Similarly, as counties are seized with the role of tutelage over local communities, it behooves them to adopt an attitude supportive of community empowerment.[1649] As was evident in part from the Turkana case study, the potential for realising benefit sharing increases so far as counties mobilise a common approach.[1650] However, this unity of purpose could disintegrate if the normative order fragments communities along administrative units, thus undermining solidarity and creating division.[1651] In contrast, owing to the heterogeneity of community stakeholders and interests, a county may find itself unable to mobilise beneficiaries around a common approach in the pursuit of resource benefits. When this happens, as was seen in the Kwale case study, the chances of benefits accruing to the intended beneficiaries may be undermined.[1652] In circumstances where interests diverge, it becomes likely that a state or corporation may ignore the county, allowing

[1645] Ashraf Ray Ibrahim 'The Doctrine of laches in international law' (1997) 83:3 *Virginia Law Review* 647-692.
[1646] Unger op cit note 1598 at 6.
[1647] Jesse C Ribot & Nancy Lee Peluso op cit note 469 at 153; Wynberg & Hauck op cit note 1027 at 9.
[1648] Dupuy op cit note 56 at 203 (for the view that communities on their own have no capacity to affect national level regulatory changes); Chapter 7.3.1.
[1649] *Cherokee Nations v Georgia*, 30 U.S. (5 Pet.) 1 (1831).
[1650] Chapter 7.3.1.
[1651] Chapter 7.3.3.
[1652] Chapter 7.4.1.

the resource operator to adopt a paternalistic approach to benefit sharing no more significant than the CSR mechanism.[1653]

8.3.6 Devolved Resource Governance Institutions and Polycentricity

The totality of previous discussion evidences constitutional and statutory intention to entrench a polycentric order by creating multiple centres of decision making to promote transparency and constrain resource capture.[1654] The institutions discussed in this dissertation are located in at least four spheres. National institutions that exist to safeguard effective devolution of resources include the National Treasury, Senate, and the Judiciary. Three Commissions, the NLC, the CRA, and the Office of Auditor-General, while existing at national level, do so independently of the national government's direction and, in most instances, have shown capacity to aid devolution of resource governance.[1655] The proposed Benefit Sharing Authority also falls within the national level.

Below the above institutions are county institutions that are implementation-tailored: the County Executive and Assembly respectively. Additionally, the Community Trust Fund,[1656] established by the Petroleum Act to hold and manage community share of monetary benefits, seats within this level. The final set of institutions are established under the Mining Act and the Draft Public Finance Management (Mineral Royalty Fund) Regulations. These institutions, the Mining Community Development Committee, and the Community Development Agreement Committee,[1657] all seat at the lowest level of the polycentric chain.

The panoply of institutions above have interlocking functions and competencies capable of complementing each other in aid of efficient resource governance and benefit sharing. While some of the devolution-safeguarding institutions have affirmed the place of county governments in resource development, others have pursued a determined course in favour of centralisation. Some of the institutions, characterised here as devolution safeguarding, have demonstrated lack of consistency; acting robustly in the defence of devolution in some instances and appearing reticent in others.[1658] This fluid and tentative support for devolution of resource benefits does little to stabilise participatory decision making

[1653] Chapter 7.4.2.
[1654] See Chapter 4.4 for discussion on polycentric governance
[1655] *Constitution* supra note 12 Chapter 15 art 249(2).
[1656] Chapter 5.4.3; *Petroleum Act* supra note 66 sec 58(3).
[1657] See Chapter 5.4.2.
[1658] Compare *Speaker of the Senate* supra note 734 and *In the Matter of the National Land Commission* supra note 1005; Also, Ambreena Manji op cit note 1006, 133-135.

between the two levels of government in resource development. Overall, the existence of these institutions testifies to the effort at creating norms that incentivise collective action.

8.4 Recommendations

That most laws have failed to address the people's micro-level needs within resource-rich countries remains a foremost concern to stable resource development.[1659] Kenya is no exception, as this research demonstrates. The following broad recommendations for law reform and institutional strengthening are proposed to mitigate the gaps identified:

a) Parliament is urged to establish a holistic Extractives Dispute Tribunal to replace the ad hoc gazetted redress mechanism intended to serve only one resource conflict area – Turkana – while leaving disputes in Kwale unaddressed. The Energy and Petroleum Tribunal discussed in Chapter 5 should be transformed into a department within the proposed full-fledged Extractives Tribunal with the other department dedicated to mining-related disputes.
b) Parliament should find merit in enacting the Natural Resource Benefit Sharing Bill proposed by the Senate. Uncertainty and confusion persist about the mandates of different public bodies (institutions) charged with managing the petroleum and mining sectors, despite the enactment of new laws. Of fundamental importance in this confusion is that no institution outside the national executive exists to advance the fair and equitable implementation of benefit-sharing laws. Given the number of institutions involved in the sector, tensions are likely to arise laterally among departments and agencies working at different governmental levels. If such tensions result in adversarial relationships, the outcome is a lack of effective coordination and synergy among various institutions responsible for benefit sharing. The lack of an institution to monitor and supervise the execution of local content and community infrastructure projects by resource entities could further undermine resource development. The proposal to establish a Benefit Sharing Authority contained in the Bill is thus of crucial importance.
c) The Ministry of Petroleum and Mining will be well advised to formulate and implement a transparency framework for oil and gas as well as the mining sector. While the Petroleum Act prescribes the development of a transparency and accountability framework,[1660] limited steps to enforce this imperative are apparent. Despite Article 35

[1659] Duruigbo op cit note 407 at 114.
[1660] *Petroleum Act* supra note 66 sec 119(1).

of the Constitution, which encapsulates access to information as a human right, government departments citing limitations under the Access to Information Act of 2016, including notions of confidentiality and protection of privacy of a third party (private person), have rendered the right of limited effect. Given the role of the Commission on Revenue Allocation in tracking all revenues collected by the national government,[1661] the mandate of this Commission could be bolstered to enable it to share information on inflows from extractives with county governments.

In the long term, key stakeholders in Kenya's extractives sector should dedicate resources towards building the capacity of counties to fully appreciate and discharge their mandates in resource governance. Such capacity enhancement can take the form of peer to peer learning with resource host subnational entities in other countries.[1662] A significant gap in understanding of the FPIC process still exists denying groups, particularly indigenous communities, an opportunity to effectively wrest benefits from resource operators and the state. Programmes to mitigate this gap to ensure long term stability of various resource development processes is recommended.

8.5 Conclusion

The Kenyan Constitution enshrines a clear intention to share resource benefits equitably among the national and county governments and communities.[1663] The diversity of resource benefits requires that law and policy reflect the Constitution's distributive intention across the range of different resource benefits.

This thesis has demonstrated the various legal efforts to facilitate benefit sharing. It has shown the legal preference for nonmonetary forms of benefit sharing. Here, it has argued that while the law on community development agreements and local content, for instance, is relatively developed, clear disarticulation of the role of counties and communities remains outstanding.

Another failure of the current legal regime where implementation has faltered relates to transparency in delivering nonmonetary benefits. In the absence of clarity and more robust safeguards, even nonmonetary benefits, much preferred under Kenyan law, remain of limited

[1661] *Constitution* supra note 12 art 216; Chapter 7.4.1.
[1662] See, Wilson op cit note 409 at 14.
[1663] Ibid art 69(1)*(a)*.

utility in addressing the expectations of communities, and thus, mitigating against the resource curse. Consequently, the current legal frameworks governing benefit sharing in Kenya do not fully meet the thresholds of international law.[1664]

Regarding monetary benefits, the law has failed to provide detailed institutional and normative means for distributing earmarked financial benefits to counties and communities. Even where it has been shown that benefit-sharing law seeks the empowerment of populations in the periphery, it is instructive that the core has failed to facilitate genuine and full implementation. The failure to provide necessary mechanisms for disbursing benefits indicates unresolved contestations between centre and periphery over whether the national government should devolve aspects of national patrimony to some resource-host regions.[1665] This contestation is likely to continue as it is apparent, based on Turkana and Kwale counties' experience, that counties can only enhance legal implementation under the present circumstances in the country by adopting an insurgent approach to cooperative government.

A more progressive attitude towards benefit sharing will evolve if its utility for communities and counties is equally appreciated by the national government. Not only is benefit sharing likely to undermine the resource curse, but it can also enable the state to re-examine its fiscal regime on extractives with a view to robustly monitoring recoverable costs demanded by operators.[1666] Implicitly, benefit sharing pushes towards transparency and institutional resiliency, which supports the resource sector and could impact the conduct of government affairs across various domains. A more rigorous implementation of benefit sharing also presents the possibility of pushing Kenya's legal framework on extractives away from the grip of neo-extractivism into a more sustainable post-extractivist phase.[1667] As such, benefit sharing should find greater resonance with the national government than the half-hearted treatment evident in the Kenyan case.

The preceding notwithstanding, benefit sharing is unlikely to be the sole instrument for redressing gross social inequities among communities in the peripheries. This effect can only be achieved by structural government action.[1668] However, in concert with devolution, it has

[1664] Chapter 2.4.1.
[1665] Ondotimi op cit note 397 at 151.
[1666] Khadiagala op cit note 1331 at 26.
[1667] Lynn Field op cit note 45 at 77-8 (positing that in post-extractivism, the state is protector and custodian of mining-impacted interests while also aggressively promoting resource development).
[1668] Shuklenk & Kleinsmidt op cit note 1206 at129.

been demonstrated that benefit sharing properly aligned to subnational transfers can have a multiplying effect on community empowerment, especially in hitherto marginalised regions. Thus, it should be of interest to the Kenyan government to invest more in the success of devolution rather than pursue a policy that claws back mandates and seeks to re-centralise.

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