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Pillar I

Kenya's Policy & Legal Framework Relevant to the Extractive Sector



2. Pillar I: Kenya's Policy and Legal Framework Relevant to the Extractive Sector

2.1 Introduction and Link to the UN Guiding Principles on Business and Human Rights

Pillar I of the UNGPs addresses the Government duty to protect against human rights abuses within their territory and/or jurisdiction by non-state actors, including business enterprises, through effective policies, legislation, regulations and adjudication.⁷² This includes the obligation to set clear expectations for business and appropriate policy and legal frameworks to implement the corporate responsibility to respect human rights.

This section examines Kenya's policy and legal framework for the extractive sector. The examination will help the Government to consider whether its framework is fully aligned with its international human rights obligations or whether the current suite of policy and laws need further adjustments. For companies, it is important to understand whether the policy and legal framework reinforces their own responsibilities to respect human rights or leaves gaps or in the worst case scenario, contradicts international human rights standards. Where gaps in the policy and legal framework exist, they present a challenge to a level playing field among companies as they can be filled by good – and bad – practices. The UNGPs set out the clear expectations that where national standards conflict with international human rights standards, companies should seek ways to honour the principles of internationally recognised human rights.⁷³

2.2 Constitutional Analysis

The Kenya Constitution provides for fundamental human, social, and environmental rights and protections as well as the responsibilities of business and Government, all of which underpin the on-going development of Kenya's extractive industry. The Constitution is one of the most progressive on the continent for the protection of human rights and socio-economic rights. It creates a number of important protections for groups at risk of harm from extractive sector activities as well as covering cross-cutting issues.

The 2010 Constitution lays a crucial but unusual foundation in establishing a constitutional obligation on businesses to respect human rights. Article 20 of the Constitution states that the Bill of Rights "*binds all State organs and all persons.*"⁷⁴ "Persons" are defined to include "*a company, association, or other body of persons whether incorporated or unincorporated (emphasis added).*"⁷⁵ This is a departure from the traditional perspective that only States have obligations to respect human rights.⁷⁶

Notably, the Constitution recognises the separation of powers between the three branches of Government – executive, judicial, and legislative – and created two levels of government – national level and county level – thus ushering in the devolved government.⁷⁷ The Constitution also establishes a Supreme Court of Kenya.⁷⁸ Since the adoption of the Kenya Constitution in August 2010, the national and county level governments have been working to develop policies and laws, as well as amend existing laws, and create new governing bodies to uphold the Constitutional rights of the people and the environment. Accordingly, a contextual analysis of the Kenya Constitution is a key starting point in understanding the current state of play in Kenya's extractive industry.

2.2.1 Protection of Groups at Risk in the Extractive Sector

The Kenyan Constitution prescribes that any decisions made or action taken by State agents must consider the protection of the marginalised.⁷⁹

Women

The role of women as equal members of society is necessary for the sustainable development of Kenya as well as the extractive sector. The Constitution provides that “[e]very person is equal before the law and has the right to equal protection and equal benefit of the law.”⁸⁰ It further provides that gender equality includes the “right to equal opportunities in political, economic, cultural and social spheres”⁸¹ as well as the right to be free from discrimination.⁸² Constitutional protections underlying land policy in Kenya explicitly require elimination of gender discrimination around the customs and practices related to land.⁸³

Implementation has not yet caught up with these constitutional protections. The prevention of discrimination against women with respect to land and property ownership, access, and inheritance rights still lack effective implementation.⁸⁴ For example, a woman's average monthly income is approximately two-thirds that of men, and women have difficulty moving into non-traditional fields, are promoted more slowly, are more likely to be dismissed, and more commonly face sexual harassment.⁸⁵ Accordingly, women still face much discrimination related to economic opportunities and are still disproportionately impacted by land matters related to the extractive sector, in which they have little, if any, say.⁸⁶ Some estimates indicate that only 1% of land in Kenya is held in the name of women, and 5-6% is jointly held by men and women.⁸⁷

The courts have an important role to play in strengthening the rights of women and girls in Kenya. A number of cases decided since the adoption of the new Constitution have raised the effective bar of protection of women's rights.⁸⁸ In the “160 Girls Case⁸⁹” the High Court of Kenya acknowledged the constitutional obligation of the Police Service to conduct proper investigations in the case of defilement of women or girls. It based its decision on the rights to freedom from violence, the right to dignity, non-discrimination and enjoyment of the equal protection of the law.⁹⁰ In a country where it is estimated that 45 percent of women between the ages of 15 and 49 have experienced physical or sexual violence⁹¹, ensuring reliable investigations is crucial for the relative safety of women.

In the context of on-going inequality to the right to land and inherent financial vulnerability of women, the High Court of Kitale contributed to an important evolution of jurisprudence. In *JOA v NA*, the High Court confirmed the equal rights of men and women during and after the dissolution of marriage based on constitutional and international rights to equality and non-discrimination.⁹² This decision can play an important role for example when families are compensated for the loss of land for extractive operations.

At the same time, the first Supreme Court decision on gender parity in political representation held that the state had no obligation to take specific measures to advance gender equity.⁹³

Children

The Kenya Constitution provides several foundational protections for children. The Constitution explicitly states that “[a] child’s best interests are of paramount importance in every matter concerning the child.”⁹⁴ “Child” is defined as a person who is under the age of 18 years.⁹⁵ Notably, the Constitution provides that all children shall be “protected from...hazardous or exploitive labour.”⁹⁶ The Constitution further provides that children are entitled to free and compulsory basic education⁹⁷ as well as “basic nutrition, shelter and health care.”⁹⁸

Youth

Youth in Kenya, who are constitutionally defined as those individuals who are between the ages of 18-34 years,⁹⁹ comprise nearly 60% of the population, and accordingly their contribution to the economic production base of the country is seen as an essential component of sustainable development and growth of the extractive industry.¹⁰⁰ The importance of this group is evidenced by the Constitutional provision that requires measures to be taken to ensure that youth are sustainably incorporated into Kenya’s development, even if this requires the implementation of affirmative action programmes.¹⁰¹ In fact, the Constitution explicitly provides that youth must have access to “relevant education and training,”¹⁰² access to employment,¹⁰³ and protection from exploitation.¹⁰⁴ Accordingly, the extractive sector can play a role in contributing to the fulfilment of these Constitutional commitments through working with the Government to develop vocational education and training to provide relevant skills to qualify for employment in the sector.

Persons with Disabilities

In a report to the UN Human Rights Council, KNCHR estimated there are seven million persons living with a disability in Kenya.¹⁰⁵ Persons with a disability have historically faced significant stigma and high levels of abuse and discrimination, which largely goes unreported for fear of reprisal,¹⁰⁶ as well as limited opportunities to obtain education and job training¹⁰⁷ and inaccessible government buildings that hinder those with a disability from meaningfully engaging in public life.¹⁰⁸

Accordingly, the Constitution requires that any person with a disability – including any physical, sensory, mental, psychological, or other impairment or illness – ¹⁰⁹ be treated with dignity and respect.¹¹⁰ The Constitution further requires “access to educational

institutions and facilities,"¹¹¹ "reasonable access to all places, public transport and information,"¹¹² and access to the necessary "materials and devices to overcome constraints arising from the person's disability."¹¹³

While there has been increased focus on employment of women in the extractive sector from companies and different programmes, there has been little movement or guidance to date on incorporating disabled workers into the sector.

Minorities and Marginalised Groups

Kenya is a country with over 40 different ethnic groups, none of which make up a majority of the population.¹¹⁴ Accordingly, the Kenya Constitution provides that members of minority and marginalised groups must be provided "*special opportunities in educational and economic fields*,"¹¹⁵ "*access to employment*,"¹¹⁶ "*[ability to] develop their cultural values, languages and practices*,"¹¹⁷ and "*access to water, health services and infrastructure*."¹¹⁸ The Constitution in Article 260 goes on to recognise that the marginalised can be communities or groups. The Constitution defines "marginalised community" to include a community of relatively small population that has been unable to fully participate in the integrated social and economic life of Kenya, including traditional, indigenous, and pastoral communities.¹¹⁹

Marginalised groups are defined as "*a group of people who because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).*" Article 27 (4) lists the following grounds of discrimination: "*race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*"¹²⁰ Despite this encompassing definition, only time will tell which groups are actually protected under this Article. For example, the Constitution does not explicitly protect LGBT persons from discrimination on the basis of sexual orientation or gender identity and the penal code criminalises "*carnal knowledge against the order of nature,*" which is interpreted to prohibit consensual same-sex sexual activity and specifies a maximum penalty of 14 years' imprisonment.¹²¹ The Constitution does not refer to "minority" groups or rights.

Older Members of Society

Older members of society, defined as a person who has attained the age of 60 years¹²², is another group that is at risk of being excluded from developments in the extractive sector. The Constitution explicitly protects the rights of this group to "*fully participate in the affairs of society*,"¹²³ "*pursue their personal development*,"¹²⁴ and "*receive reasonable care and assistance from their family and the State*."¹²⁵ It will be particularly interesting to see how the 'right to receive care from family' will be impacted by the development of work conditions and the integration of other at risk groups into the extractive sector work force.

2.2.2 Thematic Issues Relevant to the Extractive Industry

Community Participation / Engagement, Information & Transparency

Community participation in the management of land and the environment is not merely an aspirational goal, but a constitutional right in Kenya. Article 69 of the Constitution places the onus on the Government to *"encourage public participation in the management, protection and conservation of the environment."*¹²⁶ In fact, public participation, access to information and transparency are enshrined as national values and principles of governance in Article 10 of the Constitution and serve as guiding principles for any state action. However, the right to participation does not guarantee that each individual's views will have a controlling impact. In fact, the public duty does not exceed the obligation to consider all views offered in good faith as part of public participation.

However, the Constitution does not elaborate on the nature of public participation or the balancing act between right to access of information held by the state and the right to privacy of private actors. A growing body of jurisprudence is dealing with the nuances of public participation, access to information and transparency in the context of stakeholder engagement in extractive industries.¹²⁷ The Constitutional Court¹²⁸ has defined the minimum threshold for public participation in environmental governance through important elements that must be included: due consideration of the nature of the subject matter, mechanisms for quantitative and qualitative input from the public, access to and dissemination of relevant information, inclusivity and diversity. The Court made clear that no litmus test exists to assess the appropriateness of public participation since it needs to be tailored to the respective circumstances.

Persons and communities seeking to enforce their right to public participation through the courts have to substantiate how their rights have been infringed upon and what type of remedy they are seeking.¹²⁹ Educating communities about their rights and how to substantiate claims of violations of their rights will be an important prerequisite to meaningful realisation of these Constitutional rights.

Article 35 specifically provides that every citizen has the right of access to information held by the State¹³⁰ and any person that is required for the exercise or protection of any right or fundamental freedom.¹³¹ The Constitution further places the burden on the State to publish and publicise any important information affecting the nation.¹³² Further, the Constitution provides that land shall be managed in a way that provides *"transparent and cost effective administration of land."*¹³³

The Environment and Land Court in Nairobi reasoned that *"[s]uch public participation can only be possible where the public has access to relevant information...."*¹³⁴ The Court determined that the right to access to information reaches as far as to include memoranda of understandings (MOU) with foreign governments. In a case that involved the import of electricity from Ethiopia, the applicants were granted the right to access the information contained in an MOU between the Government of Kenya and the Government of Ethiopia to ensure public participation and the assessment of environmental risks.¹³⁵

Labour Rights

Under the Constitution, every worker has a right to fair labour practices.¹³⁶ This requires at a minimum that every worker has the right to fair compensation,¹³⁷ reasonable working conditions,¹³⁸ and the right to form or join trade unions.¹³⁹ Any group of seven or more workers has the right to form a union of their choice, and if the registrar denies registration, then the union can appeal to the courts.¹⁴⁰ Further, as discussed under the "Groups at Risk" Section, the Constitution prohibits discrimination in employment based on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status, or HIV status.

In a landmark decision in 2013, the Labour Court held that an employee or prospective employee may not be considered medically unfit simply by virtue of being infected by HIV, and to do so was a "gross violation" of the employee's human dignity, thereby awarding the employee 6.97 million shillings.¹⁴¹

Land Ownership

Land is and will remain a complex issue for the extractive sector and other sectors with a land footprint. It is also one of the most emotive subjects in Kenya, having been the cause of many conflicts over the years. This is also not a new issue for the extractive sector but is nonetheless complicated in Kenya by a number of factors.

In 2012 the legal framework for the land sector was revised to bring it in line with the Constitution.¹⁴² These changes included the creation of the National Lands Commission.¹⁴³ However, gaps in the land laws have necessitated amendments-see the Land Laws (Amendment) Act, 2016.¹⁴⁴ Likewise is the enactment of the Community Land Act 2016 that aims to provide communities as a collective with rights over their collective land as recognised under Article 63 of the Constitution.¹⁴⁵

The Constitution provides for three categories of land ownership in Kenya: (1) public land, (2) community land, and (3) private land.¹⁴⁶ Public land is any land lawfully used, held or occupied by the State at the time the Constitution entered into effect.¹⁴⁷ However, this also encompasses land transferred to the State "by way of sale, reversion, or surrender," land declared public by an Act of Parliament,¹⁴⁸ and land where no individual or community ownership can be established and no heir identified.¹⁴⁹ Further, all mineral¹⁵⁰ and natural resources, i.e. forests,¹⁵¹ freshwater bodies,¹⁵² and territorial sea, is public land.¹⁵³ The Constitution requires that public land is vested in the Government in trust for the people,¹⁵⁴ thereby imposing a duty on the Government to use the property in a way that, minimally, does not harm the interests of Kenyan citizens.

Community land is one of the most complex types of landownership under the Constitution. Community land may be held by communities that are identified on the basis of ethnicity, culture or similar community interest,¹⁵⁵ and which includes land "lawfully held, managed or used by specific communities as community forests, grazing areas or shrines,"¹⁵⁶ ancestral lands and lands traditionally occupied by hunter-gatherer communities,¹⁵⁷ and lands held in trust for the community by the county government.¹⁵⁸

Finally, private land is that which is held by any person as a freehold tenure,¹⁵⁹ leasehold tenure,¹⁶⁰ or otherwise declared private land by an Act of Parliament.¹⁶¹

The Constitution provides that every person has the right to acquire and own land, either individually or in association with others.¹⁶² The law further protects against the arbitrary deprivation of a person's interest in or right over any property,¹⁶³ or the limitation or restriction of the right to enjoy the land. However, there is still much work to be done in implementing these Constitutional protections because, as the Report highlights, in practice women are not uniformly afforded these protections.

Livelihoods

Kenya's Constitution protects a number of important aspects that impact livelihoods. Under the Constitution, every person has a right to accessible and adequate housing, and reasonable standards of sanitation.¹⁶⁴ It further protects the right to be free from hunger and to have adequate food of acceptable quality,¹⁶⁵ adequate amounts of clean and safe water,¹⁶⁶ access to health care services,¹⁶⁷ and education.¹⁶⁸ While these create an important baseline for the protection of livelihoods, it has yet to be seen how the Government will be able to make progress in fulfilling these rights and protections. To date these constitutional rights are proving to be more aspirational than enforceable.

Moreover, the interpretation by the courts has been conflicting thus making it difficult to establish sound jurisprudence. For example, in 2011 a community in Moroto Mombasa challenged its forced eviction invoking its constitutional right to adequate housing. The High Court in Mombasa rejected the request and made clear that the right to housing, which is part of the right to livelihood, is an aspirational right, which can only be realised progressively.¹⁶⁹ However, the High Court of Kenya sitting in Nairobi, in another case involving the right to housing, decided on a more robust interpretation of the justiciability of the right: it stopped a forced eviction that was meant to vacate space needed for the development of modern housing. Despite the recognised private rights to the land held by the respondents, the judge acknowledged that the applicants' constitutional right to accessible and adequate housing overruled the private land titles.¹⁷⁰

Environment

The Constitution focuses on many aspects of sustainable development and protection of the environment. For starters, the Constitution clearly provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations.¹⁷¹ The Constitution further requires that land be "*held, used and managed in a manner that is equitable, efficient, productive and sustainable,*"¹⁷² including equitable access to land,¹⁷³ sustainable and productive management of land resources,¹⁷⁴ and sound conservation and protection of ecologically sensitive areas.¹⁷⁵

Further, the State is required to ensure that the exploitation, utilisation, management and conservation of the environment and natural resources is done in a sustainable manner.¹⁷⁶ This includes establishing a system of environmental impact assessment, audit, and monitoring.¹⁷⁷ The Constitution additionally requires that all processes and activities that

endanger the environment be eliminated¹⁷⁸ and utilise the environment and natural resources for the benefit of the people of Kenya.¹⁷⁹

Community and Public Security

Along with the right to engage in public participation, the Constitution also protects the right to freedom of expression¹⁸⁰ and freedom to assemble, demonstrate, picket, and present petitions to the public so long as these activities are peaceful and unarmed.¹⁸¹ The research for the Report found that when community engagement with companies in the extractive sector break down, communities turn to their rights of expression and assembly to protect their interests. Sometimes, the exercise of these constitutional rights have been met with force, and even excessive force by police and private security guards. Such a response contravenes Article 29, which protects the right of every person to be free from being "subjected to any form of violence from either public or private sources,"¹⁸² as well as to be free from torture,¹⁸³ corporal punishment,¹⁸⁴ or cruel, inhuman and degrading treatment.¹⁸⁵ Further, the Constitution requires national security protection to be pursued in compliance with the law, and with respect for human rights and fundamental freedoms.¹⁸⁶ It also requires that the national police train staff to respect human rights and fundamental freedoms and dignity.¹⁸⁷

2.3 Kenya's International Human Rights Obligations

Kenya has ratified a number of international human rights treaties and as a result of being a State Party, the Government has the obligation to respect, protect and fulfil the human rights covered by these treaty obligations.

Table 2: Kenya's Ratification Status of International Human Rights Obligations¹⁸⁸

Treaty	Signature Date	Ratification Date: Accession date (a) Succession date (d)
CAT – Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment		21 Feb 1997 (a)
CAT – OP – Optional Protocol of the Convention against Torture		-
CCPR – International Covenant on Civil and Human Rights		01 May 1972 (a)
CCPR – OP2 – 2P Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		-
CED – Convention for the Protection of All Persons from Enforced Disappearance	06 Feb 2007	-

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women		09 March 1984 (a)
CEDR – International Convention on the Elimination of All Forms of Racial Discrimination		13 Sep 2011 (a)
CESCR – International Covenant on Economic, Social and Cultural Rights		01 May 1972 (a)
CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families		-
CRC – Convention on the Rights of the Child	26 Jan 1990	30 Jul 1990
CRC-OP-AC Optional Protocol to the Convention of the Rights of the Child on the involvement of children in Armed Conflict	08 Sep 2000	28 Jan 2002
CRC-OP6SC Optional Protocol to the Convention on the Sale of children child prostitution and child pornography	08 Sep 2000	-
CRPD – Convention on the Rights of Persons with Disabilities	30 March 2007	19 May 2008

Table 3: Kenya's Ratification Status of ILO Fundamental Conventions¹⁸⁹

Convention	Date	Status
C029 - Forced Labour Convention, 1930 (No. 29)	13 Jan 1964	In Force
C100 - Equal Remuneration Convention, 1951 (No. 100)	13 Jan 1964	In Force
C100 - Equal Remuneration Convention, 1951 (No. 100)	07 May 2001	In Force
C105 - Abolition of Forced Labour Convention, 1957 (No. 105)	13 Jan 1964	In Force
C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	07 May 2001	In Force
C138 - Minimum Age Convention, 1973 (No. 138)	09 Apr 1979	In Force
C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)	07 May 2001	In Force

2.3.1 Indigenous People

As noted above, Kenya is a country with over 40 different ethnic groups, none of which make up a majority of the population.¹⁹⁰ The Kenyan Government takes the position that the term “indigenous peoples” is not applicable in Kenya, as all Kenyans of African descent are indigenous to Kenya, while recognising, the vulnerabilities of minorities/marginalised communities.¹⁹¹

Kenya is one of only 11 states that abstained from supporting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁹² UNDRIP is a comprehensive statement addressing the human rights of indigenous peoples. The Declaration emphasises the rights of indigenous peoples to “live in dignity, to maintain and strengthen their own institutions, cultures and traditions and to pursue their self-determined development, in keeping with their own needs and aspirations.”¹⁹³ The Declaration addresses both individual and collective rights, cultural rights and identity, as well as the principle of free, prior and informed consent (FPIC). It requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.¹⁹⁴

The African Commission on Human and People's Rights (ACHPR) in 2003 adopted a report of the Working Group on Indigenous Populations/Communities¹⁹⁵, ‘Indigenous peoples in Africa: the forgotten peoples?’¹⁹⁶ which is the Commission's official conceptualisation of, and framework for, the human rights of indigenous peoples in Africa.¹⁹⁷ The report states that the African Charter on Human and People's Rights:

“expressly recognises and protects collective rights by employing the term ‘peoples’ in its provisions, including in the Preamble, and by its very name, the African Charter on Human and Peoples’ Rights. Such collective rights should be available to sections of populations within nation states, including indigenous peoples and communities. The provisions of the African Charter are thus highly applicable to the promotion and protection of the human rights of indigenous peoples, and the most relevant articles include articles 2, 3, 5, 17, 19, 20, 21, 22 and 60.”¹⁹⁸

The Commission did not give a definition of indigenous people because in their words, they did not think it was necessary or desirable. However, they enumerated the characteristics of groups that self-identified as such and these include:

- their cultures and ways of life differ considerably from the dominant society, and their cultures are under threat, in some cases to the point of extinction;
- for most of them, survival of their particular way of life depends on access and rights to their traditional lands and natural resources;
- they are less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalisation, both politically and socially;
- they are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities

of the national majority. This discrimination, domination and marginalisation violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in decisions regarding their own future and forms of development.¹⁹⁹

The Kenyan Constitution sets out many constitutional protections for minorities and marginalised groups that overlap with the objectives of UNDRIP (see Chapter 2 above), but Kenya has explicitly rejected viewing these protections through the lens of the international human rights framework applicable to indigenous peoples. The key issue for the groups on the ground will be how these constitutional protections are applied through laws, regulations, contracting, jurisprudence and in particular in practical application in protecting their way of life and whether they meet the standards of international human rights law. Given the recent date of the Constitution (2010), much of the jurisprudence is still being developed. For example, from the constitutional protections in Article 56 covering minority and marginalised communities, there is an expectation that there be purposeful community engagement aimed at ensuring participation for extractives sector projects and indeed any other projects taking place in the areas occupied by communities that fall within the definition of marginalised and minorities. From a strict sense, the participation requirement falls short of all the elements comprising the international human rights standard of free, prior and informed consent (FPIC) for indigenous peoples (see below). How these protections will apply will also play out against the wider and very active discussions globally about the impact of the extractive sector on indigenous peoples' rights.

In Focus:

Indigenous Peoples and the Extractive Sector²⁰⁰

There has been a long and often contentious history of interaction between extractive companies, governments and indigenous people around extractive operations. The worldwide drive to extract natural resources, with much of the remaining resources on the lands of indigenous peoples, means there are increasing and ever more widespread effects on indigenous peoples' lives. It is not the case that all extractive resource development is incompatible with indigenous peoples development; the UN Special Rapporteur on Indigenous Peoples draws attention to alternative business models for the sector.²⁰¹

The adoption of international instruments on indigenous peoples rights, increasing sensitivity of governments, private sector companies, extractive sector industry associations, IFIs and CSOs, combined with improved environmental and social management processes, has meant that at least in some operations, impacts of extractive operations have been prevented or minimised. As significant as these developments are in bringing improvements, there remains in many countries signifi-

cant challenges for indigenous peoples in exercising their rights to “*determine priorities and strategies for the development or use of their lands and territories*” and for protection of their wider set of rights.

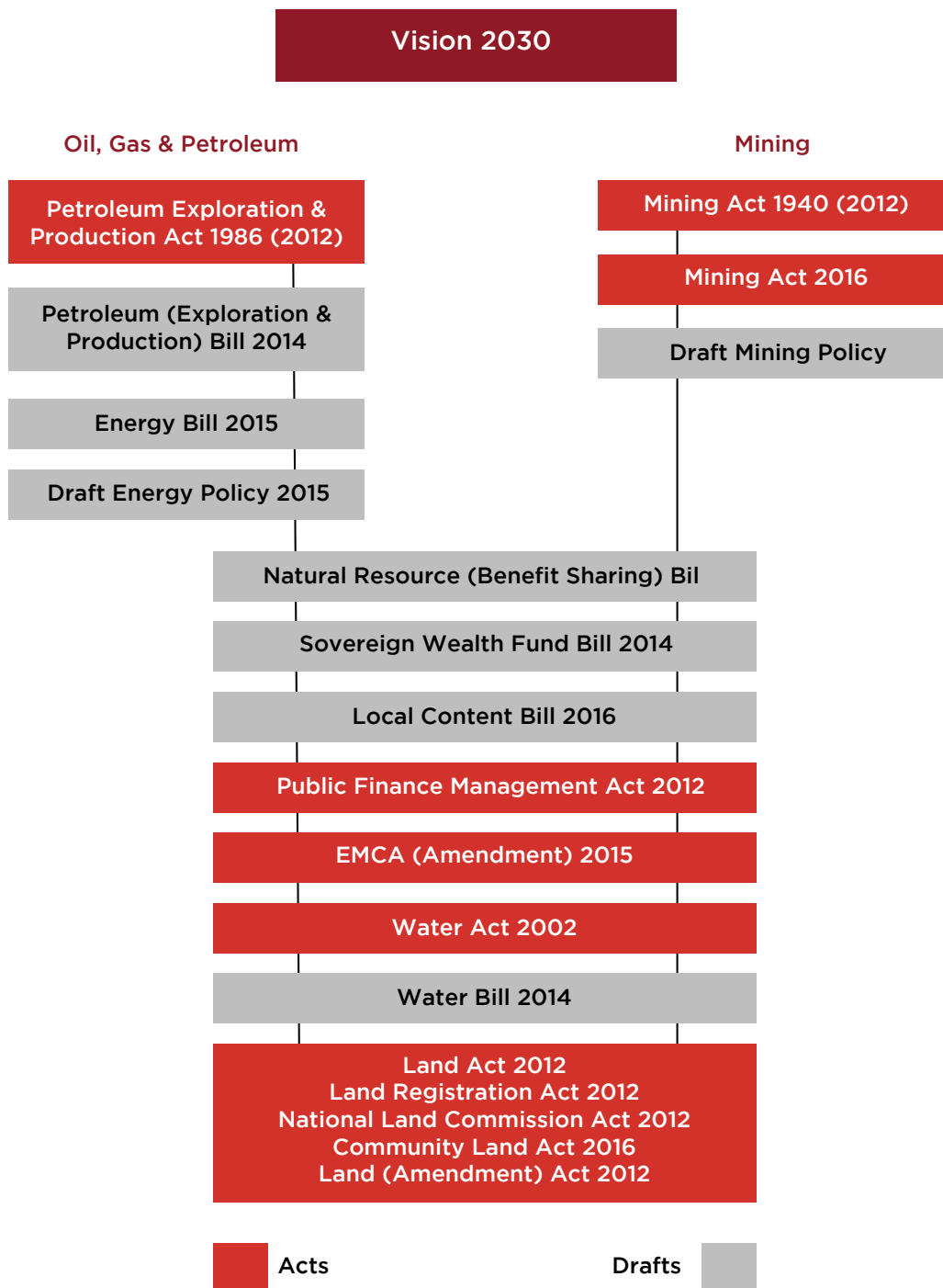
The principles of consultation and free, prior and informed consent (FPIC) are instrumental to rights of participation and self-determination and are part of a wider process of engagement with indigenous peoples on the wider set of rights that may be impacted by extractive operations. FPIC is also part of a wider set of safeguards to protect indigenous peoples rights, including human rights due diligence, the use of impact assessments, prevention and mitigation measures, benefit-sharing and compensation schemes. The FPIC process envisioned between indigenous peoples, the government and companies seeks to provide an important process to enable indigenous peoples to set their own priorities and strategies for development. Where extractive projects will go ahead subject to FPIC (or within limited scope of exceptions to FPIC),⁴² the process can set the terms for sustainable relationships between indigenous peoples and extractive companies based on genuine partnerships.

The path to recognition of FPIC and the broader suite of rights of indigenous peoples by governments and extractive companies had been a long and at times fraught discussion both in principle and in practice, but with some significant improvements in the overall recognition of indigenous peoples rights and in particular examples of laws that seek to provide a consent process and wider recognition in company policy and practice. Application of the concept of FPIC by companies, especially where it is not recognised in national law remains challenging on numerous levels. A continuous, open, and meaningful engagement of governments and indigenous communities constitutes the *sine qua non* for FPIC to fulfill its purpose. The absence of such government-indigenous interaction shifts responsibilities from the government to companies and burdens the FPIC process with demands that often are unrelated to projects impacts or beyond the competencies of companies. Yet there is a worrying trend to unload such responsibilities on companies, weakening the guarantor and arbitration role the government must play. This is an area where continued, collaborative dialogue involving government, the private sector and indigenous peoples is needed to continue to evolve new models that can provide broader benefits to indigenous peoples.

2.4 Policy & Legal Framework for the Extractive Sector

The legal framework for the extractive sector is changing rapidly in Kenya. The Government is amending the principle laws governing the extractive sector and developing a new suite of laws relevant to the sector.

2.4.1 Mining Policy & Legal Framework



The Draft Mining Policy 2015²⁰³

The Draft 2015 Mining Policy is aimed at reforming the mining sector through a strengthened institutional framework to address governance and operational issues, environmental protection, equity, mineral value addition, post-mine closure activities, capacity building and mainstream artisanal and small scale mining. And because the policy has almost been developed concurrently with the new mining law, these aspirations have been integrated into the latter.

However, the following provisions of the draft Mining Policy would undermine its effectiveness if included in the final version. First, while the Policy importantly sets out intergenerational equity and sustainable utilisation of mineral resources as among the Policy's guiding principles, the Policy does not address how these principles will be turned into implemented requirements or even considerations in licensing mining concessions. The draft Policy also lacks provisions on human rights. The value of having explicit human rights concepts and language included in policymaking is that then specifically validates the use of a human rights approach in analysing the issues and addressing identified challenges. Thus despite the mention in the draft document of gender and child labour, environment, and land issues, there is very little on how these the Government will protect these rights – either through specific steps it will take or in the requirements it will impose on mining companies to develop specific steps to address women and children.

The Mining Act 2016

The 2016 Mining Act expressly seeks to give effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution²⁰⁴ in so far as they apply to minerals. The Act repeals a 1940 law by the same title and provides a number of improvements.²⁰⁵

One of the most notable improvements is that it creates a distinction between large-scale and small-scale mining operations²⁰⁶ by setting up a separate regulatory system for each. Large-scale mining operations are governed by the licensing system – prospecting²⁰⁷, retention²⁰⁸, and mining²⁰⁹ – and small scale mining operations are governed by the permitting system – prospecting²¹⁰ and mining²¹¹ – and each system provides different requirements to operation and built-in protections for the environment, communities, and social development. If the Government is able to back up this new permitting system with much needed advice and guidance to ASM operators to assist them in the permitting process, this will be an important step forward.

The new law also provides for increased transparency and access to information, and requires consent for access to land, social investment and opportunities for livelihood, and environmental protection.

Under the Act, the right of communities and even private owners seem to have been strengthened by the fact that the Cabinet Secretary is now obligated to give notice to communities or land owners and to publish a notice with boundaries of the land in relation to applications for a mineral right. The land owners and communities can register their objections and have them heard and determined by the Cabinet Secretary.²¹² Moreover, prospecting and mining rights shall only be issued where there has been express consent with the land owners.²¹³ However, the Act still allows for the compulsory acquisition of

land, if consent is “*unreasonably withheld*” or if withholding of consent is considered to be “*contrary to the national interest.*”²¹⁴ This in effect means that there is no right to veto mining projects but rather open and meaningful dialogue between companies and affected communities must take place as a start in all cases.

The environmental requirements in the Act are significantly better defined than under the repealed law. Moreover, the law requires artisanal miners to pay due regard to the protection of the environment. Other notable improvements include the requirement for the restoration of abandoned mines and quarries,²¹⁵ restoration of land to its original status or an acceptable and reasonable condition after mining or prospecting,²¹⁶ requirements to prevent the seepage of toxic waste from entering into water bodies,²¹⁷ and to ensure that blasting and related activities are kept at reasonable and permissible levels.²¹⁸ It also precludes small-scale miners from using mercury and cyanide,²¹⁹ which carry severe detrimental environmental and health impacts, although it does not preclude large-scale operations from doing so. Additionally, applicants for any license must provide a bond or some other form of financial security sufficient to cover costs associated with the implementation of the environmental and rehabilitation obligations.²²⁰

Finally, and importantly, the Act creates obligations that require investment in the livelihood opportunities of Kenyan citizens. First, only a Kenyan citizen or a corporate body wholly owned by Kenyan citizens can qualify to do business under the small scale mining scheme.²²¹ Large-scale mining companies must create plans to carry out skill transfer and capacity building in Kenya, including the recruitment and training of Kenyan citizens.²²² Second, it requires a hiring preference for Kenyan nationals, laying out several general criteria,²²³ and a plan on the procurement of local goods and services.²²⁴ The Ministry is currently developing regulations to give specificity to these provisions. Third, the Act requires where necessary and applicable that large scale companies in consultation with the affected community come up with a community development agreement—the details of this will be in an upcoming regulation on the same. It will be crucial to develop this regulation in a way that avoids purely philanthropic activities and instead co-develop investment programmes with local communities that focus on longer-term goals such as poverty reduction and skills development.

The above referenced regulations are among others that the Ministry of Mining has drafted and that are required both for the implementation of the Act and to strengthen the capacity of the ministry to regulate the sector. The regulations have now been published on the Ministry's website for public comments.²²⁵

Current Licensing Information for the Mining Sector

At the present time, there is no way to ascertain the number of prospecting or mining licenses that have been applied for, issued, or are currently in use. The Ministry is in the process of developing a comprehensive registry and cadastre to be available on the Ministry's website for public access. To date, the cadastre is on the Ministry's website but only available to existing mineral rights holders or prospective rights applicants.²²⁶

2.4.2 Oil & Gas Policy and Legal Framework

The Draft Energy Policy 2015²²⁷

The draft Energy Policy is designed to govern petroleum and coal resources. It includes references to a number of socio-economic impacts relating to land, environment, health and safety, resettlement, and the benefit sharing framework.²²⁸ The Policy proposes the establishment of an institutional framework, the National Upstream Petroleum Advisory Committee, which is responsible for upstream petroleum exploration and development matters as well as the National Coal Advisory Committee, which is responsible for coal exploration and development matters. The draft Policy also commits the Government to developing mechanisms for benefits sharing between national and county level governments as well as local communities as well as corporate social responsibility (CSR) programmes, training, employment, and technology transfer. The draft Policy proposes a revenue and profit sharing split of 75% to national government, 20% to county government and 5% to the local community.

With regard to land and socio-economic related rights, the Policy notes that energy development projects have numerous impacts on communities, including economic and physical displacement where the projects are implemented. The Policy recognises that energy production poses various dangers to human life and the environment and that energy sector players face a real challenge in creating affordable, competitive, reliable and sustainable energy whilst upholding people's rights relating to land, the environment, and health and safety. The draft Policy also calls for a Resettlement Action Plan (RAP) Framework for energy related projects in order to address issues of livelihood restoration following physical displacement of communities. A RAP Framework that builds on human rights norms²²⁹ and international standards²³⁰ could provide important protection for local communities while at the same time providing more certainty for companies as well as local governments on the procedures to be followed.

The Petroleum (Exploration and Production) Act 1986 – Updated 2012

The petroleum sector is currently regulated by the Petroleum (Exploration and Production) Act, which was first passed into law in 1984 and later revised in 1986 and 2012. The Act regulates all activities surrounding the production of petroleum from exploration to production.²³¹ However, it has a number of shortcomings. The law fails to provide guidance on criteria for evaluating applications for exploration licenses, petroleum agreements, including gas sharing terms and rules on the transfer of interests in PSCs, or provisions governing corporate social responsibility. Accordingly, the Act has been criticised by various commentaries as inadequate to address human rights issues that may arise with petroleum activities. For example, the law does not require prior consent before entering privately owned land, but instead only requires forty-eight hours of notice to the occupier of the land, "*and if practicable to the owner*".²³²

The Draft Petroleum (Exploration, Development, and Production) Bill 2015

The purpose of this draft Bill is to replace the current Petroleum (Exploration and Production) Act (2012) law on all matters governing upstream petroleum operations.²³³ While the Bill proposes to address several key issues relevant to human rights and environmental protection, such as minimising environmental contamination and protecting the health and safety of workers,²³⁴ there are important points that will have to be fleshed out in subsequent regulations:

Oversight of shared revenue

The Bill provides that upstream petroleum profits shall be shared based on the 75/20/5 ratio, to be paid to the national government, county government, and local community, respectively.²³⁵ While the Bill apportions a share of the profit to the community, which shall be held in trust by a board or trustees established by the county government,²³⁶ it fails to provide any criteria for distributing the funds to impacted communities. In principle, redistributing financial benefits to communities who have experienced the negative impacts of operations is a model to be encouraged, recognising that specific instances of environmental, social or human rights impacts on particular individuals or groups should be addressed and remedied specifically, rather than relying on the distribution of revenue to compensate for damages done. These are two distinct dimensions of managing the impacts of extractive sector operations. However, there could be several factors at play including potential elite capture, corruption, and misguided management that could potentially result in such funds exacerbating inter-communal strife rather than supporting sustainable development. The technical assistance provided through the KEPTAP or Norwegian Oil for Development Programme will presumably include support in establishing a more detailed benefit distribution system. The Government of Kenya has refrained from joining the EITI and has pointed to its forthcoming legislation on revenue sharing, including the accountability and transparency provisions, as a potential substitute for EITI participation. Given the scope and depth of EITI procedures required in country to make the system work effectively, there will be much work to be done to put in place systems to ensure the transparency and effectiveness of such revenue sharing programmes. CSO participation in establishing a revenue management system is a core part of any EITI system; there are no such guarantees under the draft Petroleum Bill.

Compensation for Land

While land compensation is a widely recognised shortcoming of the current law, the proposed Bill also fails to provide guidance on how to calculate adequate compensation packages for land, assets and any injury directly or indirectly related to company activities or to point to appropriate authorities mandated with establishing such guidance. Instead, the Bill only provides that compensation be "*fair and reasonable*".²³⁷ Moreover, compensation alone may not always be adequate: it is important to also include provisions on resettlement of those that may have to be moved from their land voluntarily or involuntarily. This is one area where the National Land Commission can step in and develop compensation guidelines for land required for public purposes.²³⁸

Consent

As an improvement to the current law, the draft Bill requires that an investor seek prior consent of the land owner before accessing land for upstream petroleum related activities.²³⁹ However, immediately following that requirement the Bill states that consent shall not be “unreasonably withheld”²⁴⁰ but fails to clarify what might be considered unreasonable thus lending itself to subjective application. In fact, the draft Bill allows for compulsory acquisition of land if the license holder “reasonably requires [the] land” and “has failed to acquire the land by agreement after making reasonable attempts to do so”.²⁴¹ If there are no subsequent regulations adopted to provide further details and protections for communities, these provisions effectively at best limit, if not negate, the right of communities to withhold consent to exploration and exploitation activities on their land. The proposed Community Land Bill requires that there be a ‘free, open and consultative process’ as a pre-requisite for agreements for investments on community land.²⁴² However, community land may still be subject to compulsory acquisition²⁴³ and thus the free, open and consultation process is not guaranteed.

Transparency

The Bill requires “publication of all petroleum agreements, records, annual accounts and reports of revenues, fees, taxes, royalties and other charges, as well as any other relevant data and information that support payments made...and payments received”.²⁴⁴ The provision is an important step forward and aligned with evolving international norms on natural resource contract transparency involving petroleum.²⁴⁵ Further regulations will be required to make this provision effective in practice so that the general public can easily access – and understand – how national natural resource assets are being managed and how revenues are being used.

Injury and/or Damage

The Bill expressly provides that the owner or occupier of land shall be compensated upon demand for any loss or damage caused by the company,²⁴⁶ environmental damage or pollution,²⁴⁷ and injury and/or illness directly or indirectly related to upstream petroleum operations.²⁴⁸ This is an important principle to establish in the law; the challenge will be in developing regulations, company awareness and accessible remedy mechanisms to be able to bring these claims and obtain redress.

Energy Bill 2015

The draft Energy Bill, which proposes to replace the Energy Act of 2006, focuses on midstream and downstream oil and gas production as well as nuclear energy sources, and the mining of coal. The Bill seeks to consolidate and harmonise current laws relating to energy, as well as complement the Petroleum (Exploration, Development, and Production) Bill 2015 in its governance of oil and gas exploration and production. Similar to the Petroleum (Exploration, Development and Production) Bill 2015, while the draft Energy Bill proposes several improvements on the current legal structure, there are still a number of concerns that are similar to those addressed above under the 2015 Petroleum Bill. These include:

Oversight of Shared Revenue

The Bill lays out a profit sharing scheme for coal revenues to be shared among the national government, county government, and community, but it provides a slightly different breakdown to the sharing of petroleum revenues – with the county government receiving twenty percent of the government share²⁴⁹ and the community to receive one-quarter of the amount due to the county government.²⁵⁰

Compensation for Land

While a few provisions reference the need for compensation where land is injured or acquired, the Bill fails to address how compensation should be calculated. Additionally, the Bill is entirely silent on how issues of compulsory acquisition and resettlement should be addressed. The draft Bill requires that any damage or loss caused to the land must be compensated,²⁵¹ but it fails to provide any guidance regarding how compensation shall be determined.

Consent

The draft Energy Bill presents concerns similar to those in the Petroleum Bill (2015).²⁵²

Information Sharing

While several provisions address the company's duty to provide relevant information²⁵³ there are no requirements about sharing this information with the impacted community.

Human and Environmental Impacts

The Bill does provide some improved protections for workers, the community and the environment by requiring that petroleum and coal license issuing authorities consider all potential impacts on the integrity of the community,²⁵⁴ environment,²⁵⁵ and health and safety standards²⁵⁶ prior to issuing the requested license. Further, it requires that all reasonable and necessary steps be taken to ensure the protections of its workers' welfare, health and safety, as well as to prevent pollution and waste from contaminating the environment.²⁵⁷

A cross section of stakeholders have raised concerns that this Bill is not harmonised with the Mining Bill 2014 and the Natural Resources Sharing Bill 2014. There should be harmonisation of the core protections of the environment, workers and the community. Each sector will have unique dimensions but the protections afforded to those impacted by the sectors should be equivalent.

2.4.3 Environmental Laws Relevant to the Extractive Sector

The Environmental Management and Coordination Act 2015 (EMCA)

The EMCA is the primary environment management law in Kenya. The EMCA provides for the establishment of a legal and institutional framework for the management of the environment and improves the legal and administrative coordination of the diverse environmental initiatives in order to improve national capacity in this area. The law established the National Environment Council (NEMC) to be responsible for policy formulation. It also established NEMA to exercise general supervision and coordination over all matters relating to the environment. The EMCA was amended in October 2015 and among the changes introduced was the establishment of the Standards Enforcement and Review Committee whose principal function is to set standards for water quality, air quality, and waste classification to ensure proper handling, pesticide residues in raw agricultural commodities, noise emissions, noxious smells, and ionising radiation. These standards will provide more specific emissions and effluent limits for the extractive sector.

In addition, the amended Act now includes provisions for strategic environmental assessments for all policies, programmes and plans²⁵⁸ and it is under this provision that the petroleum and mining SESA's are being undertaken. NEMA shall publish on its website the summaries of the EIA reports.²⁵⁹ If this is done, it will represent a significant improvement in access to information as currently, only some reports are available. NEMA maintains a database of EIAs - a quick search during the course of this study revealed that it is very difficult to use as the reports are not categorised or titled in any useful manner and not all the reports are online. However, NEMA maintains that a copy of each of the EIAs is available at their county offices. Some companies have also started posting summaries of the EIAs on their websites.

EIAs are required in all extractive projects and must be carried out before exploration and commencement of extraction. The companies that were interviewed for the Report indicated that they carried out comprehensive EIAs followed by the implementation of Environmental Management Plans (EMP) that guide the day-to-day environmental practices of the extractive operations.

A study commissioned by the UK Department for International Development in 2013 found that the National Environment Agency (NEMA), the body tasked with environmental protection, lacked sufficient resources and training to conduct environmental oversight. During the field research for this Report, many NEMA officers corroborated this point. They noted that despite extractive companies carrying out EIAs, the required monitoring and oversight of company operations is not sufficiently robust. This is, in part, due to the low capacity for enforcement as each NEMA officer has responsibility over a large geographical area and engages with a high number of projects.