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**Women's Economic Empowerment in the Upstream
Petroleum Sector: Assessment of the Right to Access
Equal Economic Opportunities in Kenya**

Arrumm Christina Achieng

Submitted in partial fulfilment of the requirements of the Degree of Master
of Laws at Strathmore University

Strathmore Law School
Strathmore University
Nairobi, Kenya

2021

Declaration

I declare that this work has not been previously submitted and approved for the award of degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Arrumm Christina Achieng

Approval

The thesis of Arrumm Christina Achieng was reviewed and approved by the following:

Dr Constance Gikonyo
Lecturer, Strathmore Law School
Strathmore University

Mr Thomas Mitro
Visiting Lecturer, Strathmore Law School
Strathmore University

Dr Peter Kwenjera
Dean, Strathmore Law School
Strathmore University

Dr Bernard Shibwabo
Director, Office of Graduate Studies
Strathmore University



Abstract

Focus has only recently shifted to upstream petroleum operations in Kenya following the discovery of commercially viable reserves of oil in Turkana County. Like in many other industries, the local communities in and around resource rich areas have a glimmer of hope that their lives will improve with some of these communities being marginalised and languishing in poverty. They anticipate the realization of socio-economic rights including their right to gainful work and employment. Women are no exception to the rule. They too seek to access the available economic opportunities within the sector. Owing to biological differences and traditionally ascribed roles, women have borne the brunt of gender inequality in the economic sphere with their right to employment and access to gainful work being greatly hampered. There has been a persistent cry for gender equality in the realization of rights with non-discrimination clauses being included in laws and policies. Using the socio-legal methodology, this research demonstrates the gendered impact of the oil and gas sector on local women's right to access equal economic opportunities and the existing barriers to women's economic empowerment owing to gender relations. In accordance with the United Nations 'Protect, Respect and Remedy' Framework, an in-depth analysis of the laws and sector specific policies governing upstream oil and gas operations in Kenya was also undertaken to establish the extent to which the State protects and business enterprises respect, women's economic rights as well as highlight the existing gaps. This study argues that a gendered approach must be adopted in law and policy for economic empowerment of women in oil and gas to be realised. It concludes with recommendations to the Government, oil corporations and their relations on affirmative action measures that can be incorporated in law and policy to advance women's economic empowerment.

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Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others (2014) eKLR.



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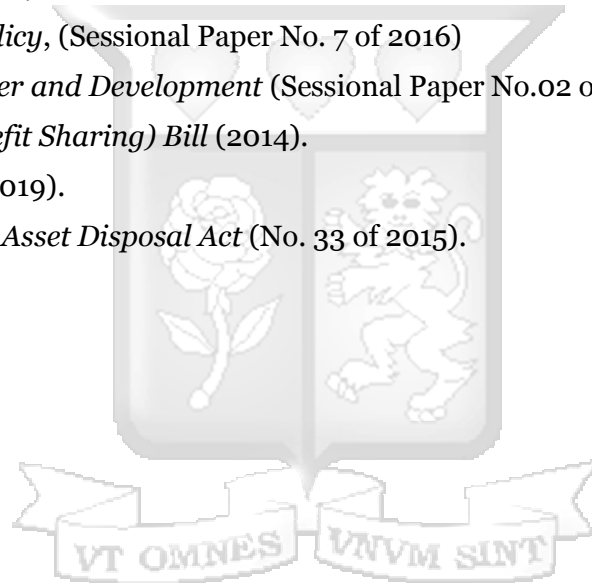


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African Union Commission, *Agenda 2063: The Africa we want*, 2015.

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Discrimination (Employment and Occupation) Convention, 25 June 1958, ILO C111.

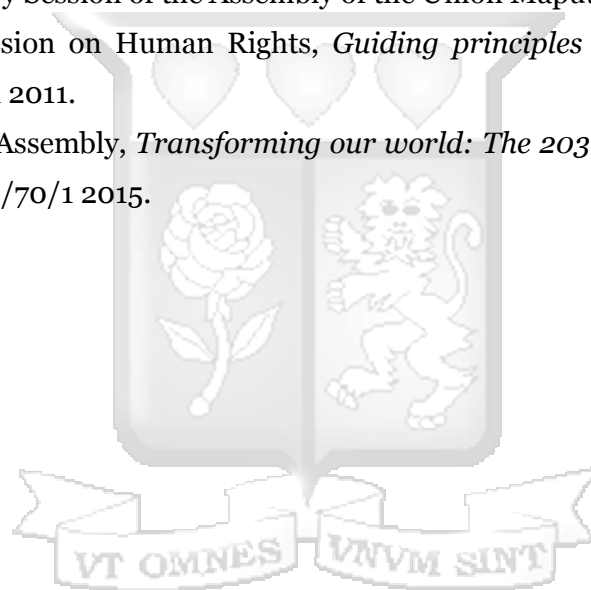
Equal Remuneration Convention, 29 Jun 1951, ILO C100.

International covenant on economic, social and cultural rights, 16 December 1966, 993 UNTS 3.

Protocol to the African charter on human and people's rights on the rights of women in Africa, 11 July 2003, 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique.

United Nations Commission on Human Rights, *Guiding principles on business and human rights*, UN A/HRC/17/31 2011.

United Nations General Assembly, *Transforming our world: The 2030 Agenda for sustainable development*, UN A/RES/70/1 2015.



List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AfDB	African Development Bank
CEDAW	Convention on the Elimination of All Forms of Discrimination against women
EIA	Environmental impact assessment
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
ILO	International Labour Organisation
MNCs	Multinational corporations
NAP	National Action Plan on Business and Human Rights
O&G	Oil and gas
OECD	Organisation for Economic Co-operation and Development
SDGS	Sustainable Development Goals
UNCHR	United Nations Commission on Human Rights
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles
WEE	Women's economic empowerment

Key Terms and Definitions

The following terms are defined as below for the purpose of this thesis-

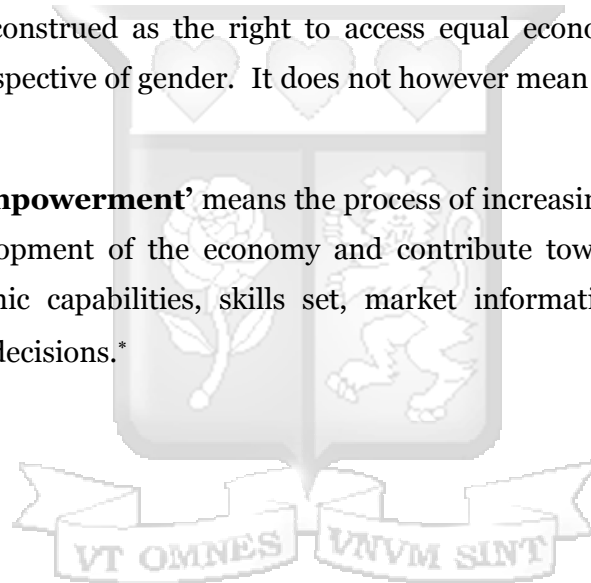
‘Affirmative action’ means the deliberate measures put in place by the state and businesses to advance women’s right to access economic opportunities in the upstream oil and gas sector including gainful work and employment.

‘Business enterprises’ means multinational corporations, companies and related businesses.

‘Gender’ means the socially ascribed differences in roles and responsibilities between men and women and how this affects their enjoyment of rights.

‘Gender equality’ is construed as the right to access equal economic, social and political opportunities by all, irrespective of gender. It does not however mean treating men and women the same.

‘Women economic empowerment’ means the process of increasing the ability of women to participate in the development of the economy and contribute towards valuable change by increasing their economic capabilities, skills set, market information and ability to make financially independent decisions.*



* Adapted from the definition by UN Women in UN Women and ILO, *Decent work and women’s economic empowerment: good policy and practice*, UN Women Policy Brief, 2012.

Acknowledgments

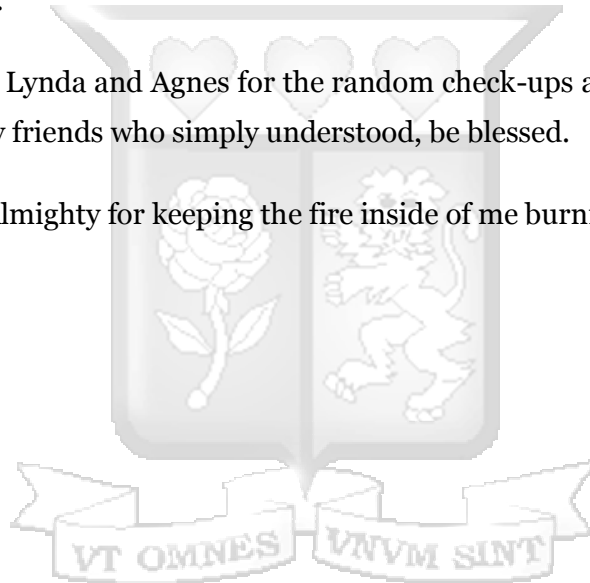
To my supervisors' Dr Constance Gikonyo and Mr Tom Mitro, for the invaluable insights on industry practice, the dedication and time taken to guide me through this thesis, I cannot thank you enough. Thank you, Dr Melba Wasunna, for the lessons and experiences shared on gender mainstreaming in oil and gas.

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Above all, I thank GOD Almighty for keeping the fire inside of me burning!



CHAPTER ONE

INTRODUCTION

1.0 Background

Upstream oil and gas sector is an emerging area in the petroleum value chain and the larger extractive industry in Kenya with the discovery of resources in Turkana, Lamu and Mandera Counties. Focus has been on the Ngamia 1 well in the South Lokichar basin in Turkana County, which is the only county that has been found to have commercially viable reserves.¹ The local communities where these reserves have been discovered suffer high levels of poverty and for this reason, they remain optimistic that their lives will be enriched in one way or another.² The impact of the discoveries is yet to be felt.³ In Turkana and Lamu counties for example, locals are largely unaware of what the exercise would entail and the impact it would have on them. The arguments have been that the oil and gas sector will *inter alia* bring about development in the historically marginalised areas in terms of infrastructure such as roads, schools, health facilities and most importantly economic empowerment through employment, increase in trade owing to increased demand for goods and services, and compensation for land use.⁴

However, with every industry comes its challenges and these may have a negative impact on rights such as loss of land which in some cases results in loss of livelihood, environmental pollution which may ultimately result in health issues and limited access to water.⁵ In extreme cases, an increase in income within the home, more often than not by the male partner, may result in excessive alcohol consumption, domestic and sexual violence and ultimately breakup of the family unit.

¹ National Oil, 'Upstream – National Oil Corporation of Kenya' - <https://nationaloil.co.ke/upstream/> on 31 January 2020.

² Cordaid, *Oil exploration in Kenya: Success requires consultation*, August 2015, 10.

³ Lind J, 'Governing black gold: lessons from oil finds in Turkana, Kenya' Institute of Development Studies and Safeworld, Research briefing, October 2017, 3--< <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/13279>> on 18 September 2021.

⁴ Götzmann N, Kristiansson L and Hillenbrand J, *Towards gender responsive implementation of extractive industries projects*, The Danish Institute for Human Rights, 2019. See also International Financial Corporation, *The art and science of benefit sharing*, 2015, 7; Lind J, 'Governing black gold: Lessons from oil finds in Turkana, Kenya', 3.

⁵ Onwuazombe II, 'Human rights abuse and violations in Nigeria: A case study of the oil-producing communities in the Niger Delta Region' *22 Annual Survey of International and Comparative Law*, 2017,115.

Studies carried out in resource rich countries with developed oil sectors like Nigeria⁶ and Peru⁷ as well as developing sectors like Ghana⁸ and Uganda⁹ have shown that there is a gender gap in the oil and gas sector. The impact of the oil and gas sector is gender differentiated and men stand to benefit more from economic opportunities with women taking on the risks of loss of livelihood.¹⁰ To ensure sustainable use and management of the natural resource towards development, men and women alike ought to benefit from the available economic opportunities.¹¹ To avoid women falling deeper into poverty, the oil and gas sector ought to promote women's economic empowerment (WEE) which entails access to, control of and effective use of resources to improve women's economic status. It is not limited only to financial resources but also includes physical and human resources necessary for the full enjoyment of economic rights. Access to land allows one to use it as a source of income, for food and to secure credit to improve their livelihood. Human resource includes labour, education and health while financial resource is capital, credit and wages. The oil and gas sector can positively or adversely affect all three categories of resources and a gendered approach must be adopted in law and policy for WEE in oil and gas to be realised.

Kenya is a patriarchal state, meaning that in most communities, men have access and control over economic resources as well as the power to make decisions affecting not only themselves but women and children as well.¹² Despite the fact that women represent a large percentage of the population¹³ in most parts of the country, majority of households are headed by men.¹⁴ In some communities, tradition and culture continue to be important factors in determining gendered roles.¹⁵ This means men take up paid work outside the home while women remain disenfranchised

⁶ Nsirim-Worlu HG, 'Gender analysis of oil and gas governance in Nigeria: Nigeria natural resources charter precepts V and VI' SSRN Electronic Journal, 2018, 7, 10.

⁷ Scott J, Dakin R, Katherine H and Eftimie A, 'Extracting lessons on gender in the oil and gas sector' The World Bank, Extractive Industries for Development Series Number 28, 2013 -- <http://hdl.handle.net/10986/16299> on 24 January 2020. See also Ward B and Strongman J, 'Gender-sensitive approaches for the extractive industry in Peru: Improving the Impact on women in poverty and their families' World Bank, Extractive Industries for Development Series Number 24, 2011-- <http://hdl.handle.net/10986/2516> on 24 January 2020.

⁸ Boohene R and Peparah JA, 'Women, livelihood and oil and gas discovery in Ghana: An exploratory study of Cape Three Points and surrounding communities' 4 *Journal of Sustainable Development*, 2011.

⁹ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector*, 2014.

¹⁰ African Commission on Human and Peoples' Rights, 'Background study on the operations of the extractive industries sector in Africa and its impacts on the realisation of human and peoples' rights under the African Charter on Human and Peoples' Rights', draft study for public consultation on October 2019, 23.

¹¹ Shikuku CK, Mburugu E, Nungari S and Kaburu J 'Gender role transformation in the oil mining industry in Kenya: A case study of Lokichar, Turkana' 9(12) *International Journal of Humanities and Social Science*, 2019, 97.

¹² *National Policy on Gender and Development* (Sessional Paper No.02 of 2019); Kameri-Mbote P, 'Constitutions as Pathways to Gender Equality in Plural Legal Contexts' 5(1) *Oslo Law Review*, 2018, 21; Global Alliance for Green and Gender Action, *Impacts of extractives on land, environment and women's rights in East Africa*, June 2018.

¹³ According to Kenya National Bureau of Statistics, *2019 Kenya population and housing census volume III: Distribution of population by age, sex and administrative units*, women comprise 50.5 percent of the total population.

¹⁴ Kenya National Bureau of Statistics, *Kenya demographic and health survey key findings 2014*, December 2015, 21, reports that nationally, one-third (32.2%) of households are headed by women.

¹⁵ Kenya National Bureau of Statistics, *Women and men in Kenya: Facts and figures 2017*, 5.

as they are restricted to household chores and care responsibilities. They depend on land for their livelihood hence are at greater risk of losing their sources of livelihood to the negative impacts of oil and gas operations.¹⁶ Women are also subjected to discriminatory practices perpetuated by customary law around land ownership and compensation, education, paid work, access to information to allow them make informed decisions and participation in consultation engagements even where their rights stand affected.¹⁷ These are barriers to economic empowerment.

According to the Global Gender Gap Report, 2021 Kenya ranks at position 16 out of 35¹⁸ countries in Sub-Saharan Africa and 95 out of 156 globally.¹⁹ In terms of proximity to gender equality in economic participation and opportunity, Kenya ranked at position 84.²⁰ Women's empowerment in Kenya as per Kenya's women empowerment index is based on access to education, paid employment and household decision making. The findings show 29 percent of women in Kenya are empowered with 40 per cent being women in urban areas double the rate of empowered women in rural areas (22%).²¹

Based on evidence from other extractive sectors like mining, men have been the beneficiaries of opportunities with women being exposed to greater risks.²² There are significant gender disparities in uptake of employment opportunities with men dominating job and income opportunities. In the case of large-scale mining worldwide, women occupy approximately 10 per cent of the jobs with even fewer women working directly in the mines.²³ Further they are offered menial jobs 'suited for women' and they too seek out jobs which are aligned with their gender roles as ascribed by patriarchal power structures and discriminatory practices.²⁴ These roles are

¹⁶ Centre for Governance and Development, *Gender dimensions and implications of coal mining in the Mui Basin of Kitui County, Kenya*, May 2015. See also Kimotho W and Ogol D 'Exploring the drivers of gendered grievance mechanisms: examples from the agribusiness, extractive and wind power sectors in Kenya' 39(3) *Impact Assess Project Appraisal*, 2021, 240–250.

¹⁷ Kenya National Bureau of Statistics, *Women and men in Kenya: Facts and figures 2017*, 5. Similar challenges are experienced by women in the mining sector- *Mining and Minerals Policy*, (Sessional Paper No. 7 of 2016), 4. See, Mcquilken J, Rickard S, Treasure W, Mihaylova A and Baxter J 'Women in Mining: Can a mining law unlock the potential of women in mining?' Adam Smith International and International Women in Mining, May 2017--<<https://adamsmithinternational.com/reports/improving-the-potential-of-women-in-the-mining-sector/>>.

¹⁸ World Economic Forum, *Global gender gap report 2021: Insight report*, March 2021, 31.

Economic participation and opportunity and educational attainment are among the key dimensions measured by the Global Gender Gap Index. The report tracks progress towards closing these gaps.

¹⁹ World Economic Forum, *Global gender gap report 2021: Insight report*, March 2021, 239.

²⁰ World Economic Forum, *Global gender gap report 2021: Insight report*, March 2021, 239.

²¹ Kenya National Bureau of Statistics, *Women and men in Kenya: Facts and figures 2017*, 5.

²² Powell A, *Encyclopaedia of gender and mining*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, March 2019; Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 56.

²³Mcquilken J et al, 'Women in Mining: Can a mining law unlock the potential of women in mining?', 15-16.

²⁴ Powell A, *Encyclopaedia of gender and mining*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, March 2019; Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December

more vulnerable to the negative externalities of the industry. Moreover, women employed in the sector earn less than their male counterparts and this impacts investments as men and women have different spending patterns.²⁵ The formal extractives industry requires workers with highly technical skills to take up the limited number of jobs.²⁶ This excludes many women as they do not have the skillset to match the opportunities relegating them to unskilled jobs that pay less and tend to be temporary.²⁷ This has been largely attributed to lower levels of education and skills in comparison to the formal education men possess that allows them to take up more lucrative opportunities as well as gender biased recruitment and employment policies.²⁸

Socio-cultural and gender stereotypes act as a barrier to women's access to land and other productive resources limiting their equal participation in the mining sector.²⁹ Further, women do not participate in community decision making processes and therefore do not add their voice to negotiations on compensation and social investments by companies.³⁰ In Kenya's mining sector, men have been the main beneficiaries and while women are keen on taking part, they have not been empowered to fully exploit and benefit from the sector's economic potential.³¹

Like in mining, the petroleum sector is also perceived as being masculine³² and there is a high likelihood women will experience similar impacts. Women are currently underrepresented in the sector³³ but as it is still developing there is hope that gender equality can be mainstreamed in operations. There is need to ensure an environment is created in which the challenges facing women, fostered by deeply-rooted traditions and beliefs that threaten their equal participation in the development of the sector, are addressed and they are able to leverage on opportunities to

2016, 56; Centre for Governance and Development, *Gender dimensions and implications of coal mining in the Mui basin of Kitui county, Kenya*, 2015, 14-15.

²⁵ Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 56.

²⁶ International Labour Organisation (ILO), 'World of work report 2014: Developing with jobs', 2014, 3. According to ILO approximately six million people are directly employed by the O&G industry and over ten times that number indirectly employed by the industry.

²⁷ Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 56.

²⁸ Mcquillen J et al, 'Women in Mining: Can a mining law unlock the potential of women in mining?', 35; Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 62.

²⁹ Mcquillen J et al, 'Women in Mining: Can a mining law unlock the potential of women in mining?', 32-33.

³⁰ Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 49; Centre for Governance and Development, *Gender dimensions and implications of coal mining in the Mui basin of Kitui county, Kenya*, 2015, 16.

³¹ Mwakumanya MA, Maghenda M and Juma H 'Socio-economic and environmental impact of mining on women in Kasigau mining zone in Taita Taveta county' 15(4) *Journal of Sustainable Mining*, 2016, 197-204; Amutabi M and Lutta-Mukhebi M 'Gender and mining in Kenya: The case of Mukibira mines in Vihiga district' 1(2) *Jenda: A Journal of Culture and African Women's Studies*, 2001, 1-23.

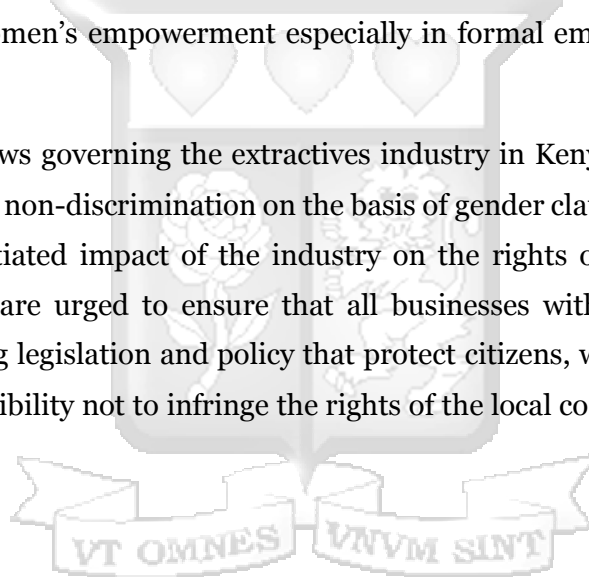
³² Jenkins K 'Women, mining and development: An emerging research agenda' 1(2) *The Extractive Industries and Society*, 2014, 331.

³³ Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 62.

realise their full potential. Hence the need for women's economic empowerment in the O&G sector.

Before the promulgation of the Constitution 2010, there were no express provisions geared towards safeguarding women's rights, not in the repealed constitution or in statutes.³⁴ The law in Kenya now recognises women as belonging to a vulnerable group,³⁵ having historically suffered discrimination on the basis of gender. For this reason, there is to some extent, deliberate efforts to protect women's rights in the laws and policies enacted subsequent to the 2010 Constitution. Although a lot remains to be done, there is a positive move by the State to incorporate gender mainstreaming as part of day-to-day operations.³⁶ The Government recognises the importance of gender equality in all areas of development and seeks to put in place measures to achieve the same.³⁷ Even with this positive step, implementation of equal opportunity laws has been slow,³⁸ posing a challenge to women's empowerment especially in formal employment, education and public participation.

Despite the foregoing, laws governing the extractives industry in Kenya remain gender-neutral and provide for a blanket non-discrimination on the basis of gender clause if at all.³⁹ They are not sensitive to the differentiated impact of the industry on the rights of women and men. That notwithstanding, States are urged to ensure that all businesses within their borders respect human rights by enacting legislation and policy that protect citizens, while business enterprises have a corporate responsibility not to infringe the rights of the local communities in the areas in



³⁴ Udvardy ML, 'Theorising past and present women's organisations in Kenya' 1759 *World Development*, 1998. Ochieng WK, 'Chimera of constitutionally entrenched gender quotas: The case of Kenya' 46 *Zambia Law Journal*, 2015, 55.

³⁵ Article 21(3), Article 27(6), Article 56, *Constitution of Kenya* (2010); Kenya National Bureau of Statistics, *Women and men in Kenya: Facts and figures 2017*, 5.

³⁶ The State has developed the *National Policy on Gender and Development* (Sessional Paper No.02 of 2019) whose goal is to "achieve gender equality and women's empowerment in national development so as to enhance participation of women and men, boys and girls, vulnerable and marginalised groups for the attainment of sustainable development." Gender mainstreaming is also one of the programmes the Government has set out in its development blueprint, Government of the Republic of Kenya, *Kenya's Vision 2030, Third Medium Term Plan 2018-2022*, 2018, to achieve gender equality.

³⁷ Goal 5: Gender Equality- UNGA, *Transforming our world: The 2030 Agenda for sustainable development*, UN A/Res/70/1 (25 September 2015). Also see the social pillar- Government of the Republic of Kenya, *Kenya's Vision 2030, Third Medium Term Plan 2018-2022*, 2018.

³⁸ It has been over ten years since the Constitution of Kenya 2010 came into effect and Parliament is yet to enact legislation giving effect to the two-thirds gender provision envisaged in Article 27(8). It continues to fail to pass a law in total disregard of four court orders. See *In the matter of the principle of gender representation in the National Assembly and the Senate* (2012) eKLR; *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* (2015) eKLR.

³⁹ CEDAW, *Consideration of reports submitted by States parties under article 18 of the Convention*, Eighth periodic report of States parties due in 2015: Kenya, 1 June 2016, CEDAW/C/KEN/8, para 16. See *Energy Act* (No.1 of 2019); *Petroleum Act* (No.2 of 2019); *Mining Act* (No.12 of 2016); and *Environmental Management and Co-ordination Act* (No.8 of 1999).

which they operate. They have a duty to promote human rights and remedy any violations that may arise out of their activities.⁴⁰

State and non-state actors within Kenya's oil and gas sector have a duty to promote and protect the right of women to access equal economic opportunities in the oil and gas sector. To eradicate poverty within communities, women must also be economically empowered so that they can contribute towards the State's development.⁴¹ This can only be done if gender equality is not only viewed as a human right but its importance is also recognised for development in economic, environmental and social spheres of life.⁴² As the late UN Secretary General Kofi Annan once stated, "...study after study has taught us that there is no tool for development more effective than the empowerment of women."⁴³

This research demonstrates the potential impact of Kenya's upstream O&G sector on WEE and undertakes an in-depth analysis of the laws and sector specific policies governing upstream oil and gas operations in Kenya to establish the extent to which the State protects and business enterprises respect, women's economic rights as well as highlights the existing gaps. This study argues that a gendered approach must be adopted in law and policy for economic empowerment of women in oil and gas to be realised.

1.1 Statement of the Problem

Emphasis has been made on the impact of the oil and gas sector on the rights of affected communities in general, meaning women's rights may be overlooked owing to their traditional gendered roles. This study thus aims at bringing to fore the importance of safeguarding women's rights distinct from the rest of the community. This paper seeks to study the effects of upstream oil and gas operations on women's economic empowerment (WEE) by looking at their right to equal access to available economic opportunities including gainful work and employment. It also seeks to evaluate the existing legal and regulatory framework in Kenya to establish if it promotes and protects women's right to equal treatment and non-discrimination in upstream O&G by advancing WEE, as well as identify any gaps.

⁴⁰ *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 7 April 2008, UN HRC A/HRC/8/5.*

⁴¹ Lahiri-Dutt, K 'Digging women: towards a new agenda for feminist critiques of mining' 19(2) *Gender, Place & Culture*, 19(2), 2012, 193-212; The World Bank, *Engendering development through gender equality in rights, resources, and voice*, Oxford University Press, New York, 2001, 9.

⁴² Kenya National Bureau of Statistics (KNBS), *Women's empowerment in Kenya: Developing a measure*, July 2020, 4.

⁴³ Secretary-General, 'Empowerment of women the most effective development tool, secretary-general tells commission on status of women' UN Statements and Press Release Messages, 28 February 2005, 4.

1.2 Justification

There is a lack of discussion around women's rights and opportunities afforded to them to engage with the processes within the oil and gas sector, the benefits they stand to enjoy or challenges they are likely to face with regards to their rights to fair labour practices, access to information, public participation, land, security and other economic, social and cultural rights.

The global narrative in developing countries is of the adverse impact of finite natural resource extraction on communities especially women and the resulting under development. This study seeks to contribute to the continuing discussions in Africa on the impact of O&G exploration and production and the broader extractive industries on women's economic rights. Since Kenya's upstream O&G sector is still at its incipient stages, this study analyses the adequacy of the legal and regulatory framework governing upstream O&G in the country in safeguarding women's right to access equal economic opportunities in light of the sector's potential impact on WEE.

The research has implication for law and policy reform as it provides insights to the State and business enterprises on the gaps in law and policy. It recommends affirmative action measures that can enable WEE and address the existing gender inequalities in Kenya's O&G sector.

Finally, it is hoped that the study also promotes future gender-sensitive research on the impact of the extractives industry on women in Kenya to build on the available literature.

1.3 Objectives of the study

The research will seek to:

- i. Identify the gender differentiated manifestation of the right to equal access to economic opportunities including gainful work and employment in the upstream oil and gas sector;
- ii. Evaluate Kenya's legal and regulatory framework to ascertain its potential to protect women's right to equal access to economic opportunities by advancing WEE in the upstream petroleum sector;
- iii. Propose recommendations to the Government of Kenya and business enterprises on deliberate measures that can be included in law and policy to promote women's economic empowerment in the sector.

1.4 Hypotheses

1. The laws and policies governing upstream oil and gas operations in Kenya provide for general non-discrimination clauses with gender being one of the ambits but without acknowledging that women are disproportionately impacted by the industry.
2. A gendered approach must be adopted in Kenya's O&G legal and regulatory framework for women to have equal access to economic opportunities in the sector.

1.5 Research Questions

1. What is the impact of upstream oil and gas operations on women's right to access economic opportunities including gainful work and employment?
2. What gender-specific provisions are included in Kenya's O&G legal and regulatory framework to promote and protect women's right to equal economic opportunities?
3. What affirmative action measures can the Government of Kenya and business enterprises take to promote women's economic empowerment in upstream petroleum sector?

1.6 Theoretical Framework

Feminism has been defined as a movement for social, political and economic equality of men and women through transformation of social constructs such as law and culture. In the past, feminism was aimed at deconstructing patriarchy and promoting gender equality but modern scholars seek to push for change across all spheres of life to empower women.

For years on end, feminism has been misconstrued to mean women fighting men or who are hateful towards men. This is however not the case as men too can be feminists and fight for the equal treatment of men and women. Modern day campaigns such as the UN global solidarity movement dubbed "*He for She*"⁴⁴ call on men to use their voices and platforms to advance gender equality as it cannot be achieved if it is solely a women's agenda.

Feminist legal theory also known as feminist jurisprudence, like any other theory, has developed with time going through waves addressing different issues of female emancipation and equality, that is, liberal feminism, radical feminism, cultural feminism, critical race feminism and the current being post-modern feminism. The feminist legal method is viewed as a critique of traditional legal methods that have been relied on over time to formulate laws and policies, with the latter viewed as an impediment to the realization of women's rights and their full potential in

⁴⁴ UN Women, '*HeForShe*' - <<https://www.heforshe.org/en>> on 10 March 2021.

society. Feminist jurisprudence seeks to expose features of law that disadvantage women and treat them like outsiders. Proponents of the feminist legal theory like Christine Littleton argue that the law has been slow to respond to women's claims and that the aim of feminist legal theory and practice is therefore to develop critiques geared towards the realization of equality.⁴⁵

Liberal feminist scholars argue that women are independent and ought to enjoy equal rights and treatment as men. John Stuart Mill for example argued for formal equality under the law at a time when discrimination was on the basis that women are not suited for public life owing to their limited experience arising out of their traditional roles.⁴⁶ This wave of feminism saw women realise legislative and judicial successes in safeguarding rights such as equal pay and access to employment.

Radical feminists like Catherine MacKinnon⁴⁷ on the other hand, see the existing differences between men and women as an issue of male domination. The main focus of radical feminists is the emancipation of women's sexuality. MacKinnon states that inequality is an issue of power relations and the law. Men tend to be in positions of power and they formulate laws that resonate with them. She argues that weak laws protecting women's sexuality exist to control women and to silence them. According to her, law is an instrument of power and any change in favour of those not in power, is resisted. However, owing to the role of law in society, those who are affected by the law as is, continue to fight for change in law to avoid others suffering the same injustice.

The proponents of cultural feminism and the difference theory like Carol Gilligan⁴⁸ argue that the 'woman's voice' is a different voice and not inferior to a man's voice. Women and men respond differently when faced with similar moral dilemmas and she advocates that both sexes move away from the notion of absolutes as they have been socialised to believe. For men these are "absolutes of rights, truth and fairness to a realization of differences between other and self and a recognition that multiple truths exist".⁴⁹ Women on their part must move away from "absolute of care and recognise a claim for equality and rights".⁵⁰ Robin West also refers to the differences between men and women and notes that these differences are not as easy to contrast because men are oblivious to or do not experience the external conditions that pose challenges to women and which the law

⁴⁵ Littleton CA, 'Equality and feminist legal theory' 48 (4) *University of Pittsburgh Law Review*, 1987, 1043.

⁴⁶ Mill JS, *The subjection of women*, 2nd ed, London, Longmans, Green, Reader and Dyer, 1869.

⁴⁷ MacKinnon CA, *Toward a feminist theory of the state*, 1st ed, Harvard University Press, 1991.

⁴⁸ Gilligan C, *In a different voice: Psychological theory and women's development*, Harvard University Press, Cambridge Massachusetts, 1982.

⁴⁹ Morrison W, *Jurisprudence: from the Greeks to post-modernism*, Cavendish Publishing Limited, London, 1997, 502.

⁵⁰ Morrison, *Jurisprudence: from the Greeks to post-modernism*, 502.

trivialises.⁵¹ According to her, men's perspective is different as they reason as separate and independent individuals (separation thesis) while women reason out of a connectedness (connection thesis). She enumerates four experiences that differentiate men from women and which connect women to life, that is, pregnancy itself, heterosexual penetration leading to pregnancy, menstruation and breast-feeding.⁵² By virtue of these the woman's voice provides an alternative theory which must be taken into account in law as men do not experience the same. West states that "we need to flood the market with our own stories until we get one simple point across: men's narrative story and phenomenological description of law is not women's story and phenomenology of law".⁵³ According to Christine Littleton inequality is created, it is not natural.⁵⁴ The feminist legal theory develops three interrelated theories that is, theories of sex discrimination, gender oppression and sexual subordination, to explain women's inequality and how it ought to be addressed. Littleton states that the question of difference and its relationship to inequality is key and cuts across all three theories because the difference between men and women has traditionally been used to justify the exclusion of women. According to the feminist jurisprudence, 'men are the norm' with women viewed as the different and inferior gender; the 'others' so to speak.⁵⁵ Littleton concludes that there is no linkage between difference and inequality and difference cannot be used as a justification for inequality.

The difference theory recognises that in as much as there is need for gender equality, there is a danger in formal equality of men and women as their rights are impacted differently by political, cultural and socio-economic factors. Without acknowledging these gendered impacts, then it is difficult to address the barriers that exist to attain the much-sought equality. Cultural feminists advocate for women's perspectives to be taken into account and their voices heard as their rights are affected differently in comparison to their male counterparts. If equal treatment was to be accorded to men and women, all other factors held constant, women may only stand to be further disenfranchised owing to past discrimination. There must be gender equity hence the reason for the clamour for affirmative action in law to promote women's rights. There must first be inclusion of women before gender equality or parity can be achieved. Affirmative action laws acknowledge that women have in the past been disadvantaged by law and that there continues to exist barriers

⁵¹ West R, 'The difference in women's hedonic lives: A phenomenological critique of feminist legal theory' 15 *Wisconsin Women's Law Journal*, 2000, 149-215.

⁵² West R, 'Jurisprudence and Gender' 55 (1) *University of Chicago Law Review*, 1988, 2-3.

⁵³ West R, 'Jurisprudence and Gender', 65.

⁵⁴ Littleton CA, 'Equality and Feminist Legal Theory', 1045-1052.

⁵⁵ Littleton CA, 'Equality and Feminist Legal Theory', 1048.

to the full realization of rights. There must therefore be some deliberate effort to include them in political, social, economic and cultural life.

The feminist legal theory adopted in this research will also be supported by the 'human development and capability approach' which focuses on human flourishing. This is people-centred approach to development whose proponents argue that an individual's well-being is determined by their capability of achieving the life they want and value. Human beings are diverse and reference to 'equality of man' ignores these differences and in so doing people may receive equal treatment resulting in further inequality to the detriment of the already disadvantaged who require something more to achieve what they deem valuable.⁵⁶ Sen's main argument is that social arrangements should strive to expand peoples' capabilities, that is, their freedom to achieve what they value doing and being.⁵⁷ This should be the basis of assessing equality and inequality. Sen critiques traditional welfare economics that evaluate well-being in terms of income, wealth and utility.⁵⁸ He adopts Aristotle's view that while economic growth is key for human development, '...wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else'.⁵⁹ According to him in judging one's quality of life, one ought to look at what they are able to achieve and be. He uses the terms functionings- the various things a person may value doing or being, capability- the substantive freedom one has to enjoy functionings and; agency- the ability to pursue things one values.⁶⁰ Well-being is not merely an issue of if one is happy with what they have but instead considering if one has the freedom of choice to take up opportunities to achieve things of value to them.

Nussbaum in furtherance of the capabilities approach posits that to respect equal worth of persons is to promote their ability to mould a life in accordance with what they deem most valuable to them.⁶¹ She argues that choice of capabilities varies depending on the concerns of a society and for this reason the approach does not prescribe what should be captured in policy. Even then she notes that things people value may be products of structures of inequality and discrimination

⁵⁶ Sen AK, 'Equality of what?' in McMurrin S (ed) *Tanner lectures on human values*, vol.1 Cambridge University, Cambridge, 1980, 196-220. See also, Sen AK, *Inequality reexamined*, Harvard University Press, Boston Massachusetts, 1992, 1.

⁵⁷ Sen AK, *Inequality reexamined*, 4-5. See also Alkire S, 'Why the capability approach?' 6(1) *Journal of Human Development*, 2005, 122.

⁵⁸ Traditional approaches like utilitarianism or resourceism, focus exclusively on subjective well-being or the availability of means to the good life. See, Sen AK, 'Equality of what?' and Sen A, *Inequality reexamined*.

⁵⁹ Aristotle, Ross WD and Brown L, *The Nicomachean ethics*, Oxford University Press, Oxford, 2009.

⁶⁰ Sen AK, *Development as freedom*, Oxford University Press, Oxford, 1999, 19, 75, 87.

⁶¹ Nussbaum M, 'Women and equality: The capabilities approach', 138(3) *International Labour Review*, 1999, 227.

hence there is need proposes a list of central human functionings and capabilities to be promoted in policy.⁶²

According to Mahbub ul Haq, the objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives. Economic growth is just but one facet of human development.⁶³ Thus when considering development policies, a two-fold approach must be adopted, *how the policy will affect economic output* (economic growth) vis-à-vis *how it will affect people's quality of life* (human flourishing).⁶⁴ If women are empowered then they can realise their right to self-determination and can actively contribute to development of the families, communities and nation at large.

This study will adopt a cultural feminist and difference theory lens in examining the potential of O&G laws and policies in Kenya to promote women's economic rights and advance WEE. It will argue that while men and women have a right to equal enjoyment of rights, the need for differential treatment within the sector arises out of the impact on their gendered roles. Communities in Kenya are patriarchal in nature and the petroleum sector is androcentric. Chances are higher that men will benefit more from the economic opportunities in the O&G industry including taking up the few available jobs. Women by virtue of the household roles and care responsibilities, ascribed to them by men may not be in a position to enjoy the same benefits. The human development and capability approach will give context to issues concerning women that would not necessarily be on the agenda for the State and business enterprises at the onset of an O&G project. In O&G it is not enough that law provides for women's right to access equal economic opportunities but more importantly that they are free to take up the opportunities and use them for their betterment and this would entail effectively eliminating the existing barriers to WEE. Advancement of women's rights therefore, gives them a chance to access economic benefits, to undertake decent work and maintain their independence and dignity- a chance to better themselves. To do this however, the gender-differentiated impact of O&G must be taken into account. This research seeks to show that although men and women are different, they are entitled to equal opportunities their differences taken into account.

⁶² Nussbaum M, 'Women and equality, 235. Also, Nussbaum M, *Women and human development*, Cambridge University Press, 2000, 78-80.

⁶³ Ul Haq M, 'The human development paradigm' in Fukuda- Parr S and Kumar SA (eds), *Readings in human development*, 2nd ed, Oxford University Press, Delhi, 2004, 17-18.

⁶⁴ Alkire S and Deneulin S 'A normative framework for development', in Deneulin S and Shahani L (eds) *An introduction to the human development and capability approach*, International Development Research Center, London, 2009, 13.

1.7 Literature Review

Goal 5 of the SDGs calls for gender equality and empowerment of all women and girls. Women can contribute to development if an enabling environment is created. Gender relations influence and determine the roles of men and women including their economic abilities. States, through laws and policies have a duty to protect women's right to access equal economic opportunities including those in the oil and gas sector. Business enterprises on their part have a corporate responsibility to respect rights of communities where they operate and promote gender equality. The focus of this review is to establish if there is need for existing frameworks governing O&G to adopt a gendered approach for WEE to be achieved.

This review considers three aspects that have the potential to enable or impede WEE. First, it looks at the effect of gender relations on women's right to access economic opportunities and the challenge this poses to WEE in the O&G sector and broader extractives industry. It then considers whether laws and policies effectively promote and enforce equality in the extractives sector, enabling women access economic opportunities and lastly, whether there is a connection between corporate social responsibility and WEE.

There is limited literature available on the impact of the extractive industries on women particularly in the O&G sector. Research tends to focus on the impact on women's direct involvement in the industry with few addressing the gender dynamics and power structures influencing their participation. Further, most of the available information is from the mining sector.

1.7.1 Gender relations and women's economic empowerment

Gender like class, ethnicity and race is a social construct that is subject to change. It is a factor used in "distribution of privileges, prestige, power, social and economic resources"⁶⁵ to men and women. When examining issues in law or development in a patriarchal society like Kenya, it is useful to adopt a gendered approach to understand the differentiated experiences of men and women. Ndungo *C et al*⁶⁶ state that gender relations are multi-stranded in that they allocate labour roles, determine the distribution of resources and assign authority and the power to make decisions. Gender determines differentiated entitlement to resources.⁶⁷

⁶⁵ Ndungo C, Masiga C, Bekalo I, Ochola WO and Mwonya RA, 'Gender and natural resource management' in Ochola WO, Sanginga PC and Bekalo I (eds) *Managing natural resources for development in Africa: A resource book*, University of Nairobi Press, 2010, 215.

⁶⁶ Ndungo C *et al*, 'Gender and natural resource management', 212.

⁶⁷ Kameri-Mbote P, 'Women, land rights and the environment: The Kenyan experience' 49 (3) *Development*, 2006, 43.

While oil and gas projects come with plenty of economic opportunities, studies have shown that owing to gender relations, men are the ones who benefit most from jobs.⁶⁸ Götzmann and Bainton argue that an understanding of gender relations is key to inform gender responsive measures in impact assessments for example.⁶⁹ A report by World Petroleum Council (WPC) and the Boston Consulting Group (BCG)⁷⁰ shows that women constitute about 22% of the global workforce in the oil and gas industry. Of these, only 15% hold technical and field jobs while at least 50% perform office and business support functions. Women are underrepresented in the O&G industry especially in upstream operations where jobs are perceived to be too demanding or dangerous for women. A report by UNDP, IFC, IPIECA, and the Columbia Centre on Sustainable Investment (CCSI) attributes the low numbers to the existence of legal and socio-cultural barriers as regards gender and the lack of technical skills and knowledge which have made it difficult for women to actively participate be it formally or informally.⁷¹ Where women have paying jobs, they are expected to return home to perform household chores or their unpaid jobs. Men often do not suffer this double burden. The opportunities are available to all but for them to be enjoyed equally, some affirmative measures must be taken to empower women as there already exists a gender disparity within the industry.

Patriarchal power relations between men and women are produced and reproduced within the extractives industry. Bradshaw, Linneker and Overton⁷² argue that the “supernormal profits” from the extractives industry encourage what they refer to as “supernormal patriarchy” that is, exaggerated gender identities and inequalities. They are of the opinion that women are not a homogenous group and in fact experience patriarchal power differently depending on their roles as workers, prostitutes or ‘wives’ in the extractives industry. They recommend that while it is important to challenge the hyper-masculine identities in the extractives industries, focus should be on the causes and not the outcomes on women. This requires an understanding of the difference between women and the supernormal patriarchal relations. Women may be disempowered because their income-earning activities like farming are devalued due to higher wages paid in extractive industry jobs which are mostly taken up by men and also because of loss of land and market. This increases their dependency on men. In other instances, women take up

⁶⁸ Götzmann N and Bainton N ‘Embedding gender-responsive approaches in impact assessment and management’ 39 (3) *Impact Assessment and Project Appraisal*, 2021.

⁶⁹ Götzmann N and Bainton N ‘Embedding gender-responsive approaches in impact assessment and management’, 174.

⁷⁰ Rick K, Marten I and Lonski UV, ‘Untapped reserves: Promoting gender balance in oil and gas’, Boston Consulting Group, 2017, 6, 8 and 10.

⁷¹ IPIECA, International Finance Corporation (IFC), United Nations Development Programme (UNDP) and the Columbia Center on Sustainable Investment (CCSI), *Mapping the oil and gas industry to the Sustainable Development Goals: An atlas*, 2017.

⁷² Bradshaw S, Linneker L & Overton L, ‘Extractive industries as sites of supernormal profits and supernormal patriarchy?’ 25(3) *Gender & Development*, 2017, 439-454.

employment opportunities, changing the dynamics in marriage and family, the effect of which is to challenge patriarchy. Even then this could only mean a shift in patriarchal control from husband to a male boss.

Peterside finds that women in oil-rich regions in the Niger Delta remain underrepresented in the economic sphere including in the O&G labour market. Patriarchy and cultural discrimination continue to act as barriers to the socio-economic empowerment of women in spite of the gender-equality laws and policies in Nigeria. He argues that despite women's critical role in society as the main food producers and other roles pertaining to the survival needs of the country, they lack access to opportunities that allow them full participation in the nation's development because of poverty and lack of education. They are most affected by the negative impacts of O&G sector on land, water and the environment. The sector has also seen an increase in prostitution and insecurity of women due to the conflicts that have engulfed the Niger Delta region. According to him emphasis has been on the gender discriminatory practices and their disadvantages on women and little has been done in response to the effect of resource related conflicts on women's livelihoods.⁷³

Similarly, according to Jenkins,⁷⁴ gender inequalities against women manifest in the extractives industry in form of less income earned and participation in consultations and decision making. Men's attitude towards women's participation also poses a challenge. Even where they can participate, low literacy levels and traditional norms continue to leave women disadvantaged.

Gyan notes that women are likely to be overlooked in the O&G sector if no affirmative action measures are put in place because the sector is already male-dominated and women do not have the technical know-how required in the industry nor access to resources or education that would improve their skills and capabilities.⁷⁵ In cases where women have the skills, society still dictates that their reproductive roles are paramount and they should therefore immerse themselves in their roles as caregivers rather than engage in employment activities. He analysed data from a study conducted at the Tema Oil Refinery in Ghana into the perceptions about women working in the oil industry and found that 40.9 per cent of the respondents opined that both men and women had the same talents and skills and the only reason women were left out is because of their relegation to the background by society.⁷⁶ Further 56.4 per cent of respondents felt that the

⁷³ Peterside SJ, 'Survey on women and livelihoods in the Niger-Delta; an overview of women's economic activities in oil producing communities in Akwa-Ibom, Bayelsa, and Rivers State' 2018.

⁷⁴ Jenkins K, 'Women, mining and development: An emerging research agenda' 1(2) *The Extractive Industries and Society*, 2014, 329.

⁷⁵ Gyan C, 'The role of women in the oil industry' 9 (3) *Journal of Social Sciences*, 2013, 95.

⁷⁶ Gyan C, 'The role of women in the oil industry' 96.

appointment of many women in the oil industry was likely to adversely affect productivity because of their double roles as workers and mothers and this affected their ability to work overtime. However, the biggest challenge was that they may have to proceed on maternity leave greatly affecting production in the event that half the number of women had to proceed on leave around the same time.⁷⁷ Gyan concludes that women's subordinate role in the oil industry is attributed to the beliefs, gender stereotypes and perceptions society has of women and that these should be challenged and awareness created on the negative effects of gender inequality so as to allow legal instruments on women's rights to take effect.⁷⁸

Franco and Kunkel conducted a study in two regions in Canada based on three criteria: "the region must be resource-rich; there is evidence of limited or no essential infrastructure and assets required by women to achieve their full potentials; and the region must display complexities and opportunities in forging sustainable livelihoods for women."⁷⁹ In one region women benefited from the extractives industry local development agenda as they were actively engaged in government-corporation partnerships responding to their requests for alternative livelihoods to be set up for them. In the other region, women were adversely affected by resource extraction because they were dependent on land for their sustenance, no alternative sources of livelihood put in place for them and thus needed continued access to land.⁸⁰ Morales⁸¹ argues that focus of resource development has been on economic growth and employment yet the extractives industry can have devastating and far-reaching effects on communities in the long-term. With regards to property rights, pollution from operations has environmental impacts such as land degradation which may render it unsuitable for subsistence livelihoods as well as water contamination. This interferes with women's livelihoods as well as their domestic roles.⁸² Further, increased disposable income leads to problems like inflation, income inequalities and substance abuse which all have a bearing on women's economic rights.

The guidelines by the African Development Bank-African Natural Resources Centre⁸³ acknowledge the fact that benefits of the oil and gas industry are often viewed from the community's perspective yet the impacts are gender specific. This creates an impression of

⁷⁷ Gyan C, 'The role of women in the oil industry' 97.

⁷⁸ Gyan C, 'The role of women in the oil industry' 99.

⁷⁹ Franco IB and Kunkel T, 'Extractives and sustainable community development: A comparative study of women's livelihood assets in the Americas' 5 (11) *International Journal of Social Science Studies*, 2017, 55.

⁸⁰ Franco IB and Kunkel T, 'Extractives and sustainable community development', 58.

⁸¹ Morales S, 'Digging for rights: How can international human rights law better protect indigenous women from extractive industries' 31(1) *Canadian Journal of Women and the Law*, 2019, 58-90.

⁸² Morales S, 'Digging for rights' 67-68.

⁸³ African Development Bank- African natural resources center, 'Women's economic empowerment in oil and gas industries in Africa' 2017.

equality but the fact is that men benefit most. The guidelines propose ensuring women benefit from compensation and royalties, direct employment by oil companies as well as indirect employment by having in place requirements for suppliers and subcontractors to employ women, skills training and providing a conducive environment for women-owned businesses to access the industry as possible approaches to WEE. Likewise, Franco and Kunkel identify six main priority assets needed to transform women's livelihoods and help them realise their full potential within resource regions. The assets include: employment opportunities, income generation and management, education and training, work experience and apprenticeships, infrastructure development, and upfront investment in remote communities.⁸⁴

1.7.2 Gender equality in legal frameworks

Mwabu brings to fore the fact that the sector is 'welfare-neutral' in that oil as a resource is neither a blessing nor a curse but its impact is in fact determined by how the resource is 'extracted, managed, shared, and how its proceeds are deployed'. He claims that this is dependent on the governance regimes that a society puts in place to regulate the exploration and production of oil and the benefits accruing to improve the livelihoods of local communities.⁸⁵ In addition to the formal regulatory framework the sector is governed by informal institutions including inter alia the local land use practices and the established relationships between oil companies and local communities.⁸⁶

Kameri-Mbote⁸⁷ argues for the place of legal pluralism in Kenya while acknowledging the fact that it may lead to gender inequalities. She states that customary law cannot outrightly be described as perpetrating gender inequality while formal laws cannot exclusively address issues of gender equality. The two are not mutually exclusive and aspects of customary law can be combined with formal laws to effectively provide for gender equality. She points out that gender division of labour reflects the power dynamics in gender relations and roles are associated with particular sex. This has also resulted in certain careers being perceived as masculine or feminine. In the past, Kenya's patriarchal order meant that legal and social standards were made in the interest of men, limiting women's participation in development.⁸⁸ With the advent of the Constitution 2010, there is a stronger legal foundation for gender equality. This does not mean that customary laws and practices cease to exist but that they are also expected to conform to the standards of equality

⁸⁴ Franco IB and Kunkel T, 'Extractives and sustainable community development' 58-64.

⁸⁵ Mwabu G, 'Kenya's oil governance regime: Challenges and policies' in Langer A, Ukiwo U and Mbabazi P (eds) *Oil wealth and development in Uganda and beyond: Prospects, Opportunities, and Challenge*, Leuven University Press, 2020, 351.

⁸⁶ Mwabu G, 'Kenya's oil governance regime', 354.

⁸⁷ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 5 (1) *Oslo Law Review* 2018, 21.

⁸⁸ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 22.

contained in constitutional provisions and herein lies the challenge. It is not enough to have good laws in place promoting gender equality, for them to be effective, society must be willing and able to enforce the laws. This limits the extent to which formal laws can change deeply embedded discriminatory practices resulting from customary laws among other semi-autonomous social fields.

Gender silent laws governing the extractives industry may be a contributing factor to the existing gender inequalities. Mwabu observes that Kenya's legal, policy and institutional framework governing the extractive sector in Kenya barely provides for the economic empowerment of local communities let alone the participation of women in the sector. Women's participation may however be inferred from other laws not specific to the sector.⁸⁹ Bradshaw, Linneker and Overton⁹⁰ observe that extractive industry laws and policy are formulated to 'protect' women rather than to promote equal pay and equal access to employment opportunities yet the reality is that men and women do not have equal access to economic opportunities.

Lyimo⁹¹ states that representation of African women in the O&G labour force is a negligible fraction. She emphasises the need for industry players to take gender-specific interventions geared towards economic empowerment of women as currently, the industry is "overwhelmingly male". This is the only way the gender gap can be closed. She recommends that states ought to develop policies that promote empowerment of women and encourage their participation in the oil and gas sector as women constitute a large percentage of the population and can be instrumental in sustainable economic development. It is therefore possible to address the gender disparity in accessing opportunities in the industry but this must include deliberate measures being taken to empower women. Laplonge agrees that although there is need for policies and programs aimed at improving gender equality in the extractives industry, the basis should not be the disadvantage suffered by women as this connotes women are inferior to men and without the backing of these policies, women do not have the ability to access the same opportunities as men. He says this is factually wrong as men rely on the masculine structures the sector and society have in place, that propel their dominance in the sector and this by no means makes them stronger than women.⁹²

⁸⁹ Mwabu G, 'Kenya's oil governance regime', 364.

⁹⁰ Bradshaw S, Linneker L & Overton L, 'Extractive industries as sites of supernormal profits and supernormal patriarchy?', 439-454.

⁹¹ Lyimo J, 'Managing for gender equality results: empowerment of women for equitable participation in the oil and gas sector' Africa Portal, 2017.

⁹² Laplonge D, *So you think you're tough: Getting serious about gender in mining*, Factive Pty Ltd, 2014, 68.

Simons and Handl⁹³ on their part argue that the challenge with laws and policies in the resource extraction industry is that they provide for general statements that gender considerations ought to be taken into account in operations. The use of gender-neutral language is oblivious of the fact that experiences of men and women in the sector is different owing to their gendered social relations. No specific means of doing this is proposed or insight given on how to achieve this. It is left to the discretion of the actors, which more often than not is the bare minimum. This inadvertently negatively impacts women as they are underrepresented in the oil and gas industry owing to the existing legal and socio-cultural barriers. Kameri-Mbote states that the interaction between gender-neutral statutory laws in Kenya and other social factors like tradition, culture and religion has impacted women's rights to access land and environmental resources. She suggests that roles should be the determining factor for who holds the right to access land and environmental resources and the right should not solely be based on land ownership as it currently is.⁹⁴

Regional and international human rights instruments like the ICESCR, United Nations Declaration on the Right of Indigenous Peoples (UNDRIP)⁹⁵ and African Charter on Human and Peoples' Rights (ACHPR)⁹⁶ provide for the right to self-determination which allows women to freely pursue their economic development. Morales⁹⁷ discusses the extent to which international human right law (focusing on UNDRIP) protects indigenous women's right to self-determination against the negative impact of the extractives industries. Where there is damage to the environment, women may altogether lose their sources of livelihood.⁹⁸ The UNDRIP provides that Indigenous peoples have the right to participate in decision-making in matters likely to affect their rights according to their own procedures.⁹⁹ Thus, Morales concludes that, protection is best offered through operationalisation of indigenous laws and practices and this entails states and businesses having consultations with the locals and seeking out women's free, prior, and informed consent prior to any development project. Women must play a major role in consultative

⁹³ Simons P and Handl M, 'Relations of ruling: A feminist critique of the United Nations guiding principles on business and human rights and violence against women in the context of resource extraction' 31 (1) *Canadian Journal of Women and the Law*, 2019, 113-150.

⁹⁴ Kameri-Mbote P, 'Women, land rights and the environment', 43.

⁹⁵ Article 3- *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Session, UN Doc A/RES/61/295 (2007).

⁹⁶ ACHPR, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

⁹⁷ Morales S, 'Digging for rights', 58-90.

⁹⁸ Morales S, 'Digging for rights' 74.

⁹⁹ Article 18- *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Session, UN Doc A/RES/61/295 (2007).

processes as they are more adversely affected than men. Morales,¹⁰⁰ Franco and Kunkel¹⁰¹ maintain that a gendered approach to consultative processes must be adopted by the State if indigenous women's rights are to be upheld.

The Natural Resource Governance Institute is in the process of undertaking research on how extractive sector laws and policies contribute to gender equality. The institute's findings so far reflect the "gender blindness" of the extractive sector and the limited laws and policies within the sector that make reference to women or gender.¹⁰² The main question is whether the existing laws, policies and governing framework promote or stifle equal opportunities for women and men in upstream oil and gas operations.

1.7.3 Business and human rights

The burden to protect human rights is no longer the sole duty of states but also the corporate responsibility of business enterprises operating in the oil and gas sector. According to Abe,¹⁰³ multinational corporations (MNCs) tend to focus on operations leading to profit and tailor their codes and policies as such. Governments tend to support the preferences of corporations domiciled in their countries.¹⁰⁴ This position by Ruggie is reiterated by Igbayiloye, Ojibara and Ugowe who argue that one of the challenges developing countries face is having weak laws and policies governing oil and gas operations. To encourage foreign direct investments, governments tend to make the rules flexible and overly accommodating to attract oil companies and investors.¹⁰⁵ Lange blames this approach adopted by governments of developing nations towards non-regulation of MNCs on the World Bank's recommendation that poor countries put in place investor friendly laws and policies.¹⁰⁶ This has led to business enterprises in the sector operating in disregard of human rights and their activities having direct and indirect impacts on community rights. Abe suggests that the United Nations Guiding Principles on Business and Human Rights¹⁰⁷ (*UN Guiding Principles* or UNGPs) may just be the lens through which a human rights standard

¹⁰⁰ Morales S, 'Digging for rights', 62.

¹⁰¹ Franco IB and Kunkel T, 'Extractives and sustainable community development' 64. "The government, the extractive industry, local community, and women should be all stakeholders and participants in consultation and decision-making processes."

¹⁰² Natural Resource Governance Institute gender team, 'How can extractive sector laws and policies contribute to gender equality?' Natural Resource Governance Institute, 23 June 2020 --< <https://resourcegovernance.org/blog/extractive-sector-laws-policies-contribute-gender-equality>> on 11 August 2020.

¹⁰³ Abe O, 'The feasibility of implementing the United Nations guiding principles on business and human rights in the extractive industry in Nigeria' 7 *Journal of Sustainable Development Law & Policy*, 2016.

¹⁰⁴ Ruggie JG, 'Business and human rights: The evolving international agenda' (101) 4 *The American Journal of International Law*, 2007, 822.

¹⁰⁵ Igbayiloye O, Ojibara H and Ugowe A, 'Legal response to human rights challenges of multinational corporations in Nigeria' 6 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2015, 106.

¹⁰⁶ Lange S, 'Gold and governance: Legal injustices and lost opportunities in Tanzania' 110 (439) *African Affairs*, 2011, 233.

¹⁰⁷ UN HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011, UN A/HRC/17/31.

could be mainstreamed into corporate conduct and practice. Even then, he observes that the implementation of the UNGPs is challenging for developing countries especially in the extractives sector as they grapple with weak implementation of laws, corruption, poor administration and the need to attract foreign direct investment to sustain their industry.¹⁰⁸

Transnational corporations (TNCs) and MNCs are key actors in the upstream value chain as they invest and carry out exploration and production activities. According to John Ruggie,¹⁰⁹ one of the difficulties states struggle with is the application of municipal governance systems to TNCs operating within their borders. He states that “business dislikes binding regulations until it sees their necessity or inevitability.” Ruggie,¹¹⁰Weissbrodt and Kruger¹¹¹ are of the view that the creators of human rights obligations failed to take into account that non-state actors like TNCs wield more power than some states and with power should come responsibility. Businesses must thus bear responsibility for the rights they impact, women’s rights not excluded. MNCs have signed voluntary global guidelines to regulate and promote CSR some of which provide for gender equality.

According to Coleman¹¹² empowering women is good for business. Improving women’s status is one of the most critical levers of international development. Positive results flow from enabling women control their own income. She argues that although foreign aid and the human rights community have been at the forefront of women’s empowerment in developing countries, this is not enough. The global private sector has some of the largest companies with even more money than governments and it must also do its part in contributing to women’s empowerment. Companies continue to incorporate women-centered programs in their corporate social responsibility (CSR) to respect human rights but in her view, this should not just be for the sake of maintaining a good corporate image as there is a business case for promoting WEE, that is, a more productive labour force, improved global supply chains and expanded customer base. The business case for empowering women concerns itself with women as consumers, beneficiaries of social investments and as part of the workforce.

¹⁰⁸ Abe O, 'The feasibility of implementing the United Nations guiding principles on business and human rights in the extractive industry in Nigeria', 137.

¹⁰⁹ Ruggie JG, 'Business and human rights', 819.

¹¹⁰ Ruggie JG, 'Business and human rights', 824.

¹¹¹ Weissbrodt D and Kruger M, 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' 97 *The American Journal of International Law*, 2003, 901.

¹¹² Coleman I, 'The global glass ceiling: Why empowering women is good for business' 89 (3) *Foreign Affairs*, 2010, 13.

Abebe¹¹³ concurs that gender-related initiatives like increasing female employment opportunities and targeted community development programs “help reduce costs, improve efficiency and improve company-community relations” securing a social license to operate thus enabling management to attend to its core business.¹¹⁴

Jenkins¹¹⁵ on the other hand is of the view that companies in the extractives industries address women’s issues as part of CSR activities and not as part of the potential workforce. Lange and Wyndham¹¹⁶ posit the same stating that MNCs embrace and claim women’s empowerment to “moralize their image” so as to attract investors and consumers- the “gender equality as smart economics agenda”. They argue that some companies adopt the women’s empowerment agenda for business gain but women’s needs and perspectives are not considered in the CSR initiatives. Grieco agrees that not enough thought goes into CSR activities and they are likely to fail as they do not take into account women’s multiple productive and reproductive roles within families and communities.¹¹⁷ In fact Lange and Wyndham find that just because a corporation champions gender equality does not mean this translates to gender sensitive social investments. Their study of Equinor’s social investments in Tanzania revealed that men were the main beneficiaries but this was disguised in the gender-neutral language used in the company’s CSR reporting. This is worsened by the fact that host states often do not have laws requiring O&G companies to support local staff save for local content provisions, or institutions in place to oversee CSR.¹¹⁸ They recommend the need for further research examining ways in which host governments can alter the existing power asymmetries between them and TNCs.

Whether companies take interest in women’s empowerment driven by CSR or as a business strategy, they have a corporate responsibility to respect women’s rights as human rights. Coleman concludes that the burden of addressing gender inequality in Sub-Saharan Africa amongst other regions, lies with the private sector and if there is to be a transformative shift for both corporations and women, initiatives by corporations must be intentionally geared towards women’s empowerment.¹¹⁹

¹¹³ Abebe JO, ‘Broadening options for promoting women’s participation in the extractive sector in Africa’ Social Science Research Network, 2016.

¹¹⁴ Abebe JO, ‘Broadening options for promoting women’s participation in the extractive sector in Africa’, 2.

¹¹⁵ Jenkins K, ‘Women, mining and development: An emerging research agenda’, 329.

¹¹⁶ Lange S and Wyndham V, ‘Gender, regulation and corporate social responsibility in the extractive sector: The case of Equinor’s social investments in Tanzania’ 84 *Women’s International Forum*, 2021.

¹¹⁷ Grieco, K, ‘Of bodies and territories: women, mining and modernity in the Peruvian highlands’ Society for Latin American Studies Annual Conference, Birkbeck, University of London, 3-4 May 2014.

¹¹⁸ Lange S and Wyndham V, ‘Gender, regulation and corporate social responsibility in the extractive sector’, 7.

¹¹⁹ Coleman I, ‘The global glass ceiling’, 13-14.

1.7.4 Conclusion

The evidence demonstrates that oil and gas operations (also as part of the broader extractives industry) undoubtedly impacts men and women differently with women being more adversely affected. The burden is on industry actors particularly states and business enterprises to promote WEE in light of the existing social, economic and cultural practices that exist in patriarchal society. Gender relations determine gender roles and this is unfortunately mirrored in the male-dominated extractives industry. It however underscores the need to understand the lived experiences of women in society so as to find a point of convergence between customary practices, petroleum laws and company responsibility to effectively promote women's right to access economic opportunities in the sector.

This review also emphasizes the need for states and companies within the sector to adopt a gendered approach in formulating laws and policies so as to eliminate the existing gender inequalities in the sector and promote WEE and this may call for affirmative action measures to be taken.

There is need for further research on the impact of the O&G sector on women's economic rights focusing more on the context in which they seek to be realised. Most of the existing literature is on women as a homogenous group yet this is not the case. Data should be disaggregated as women are impacted differently depending on their backgrounds.

There is also a gap in literature as to whether inclusion of gender-specific clauses and affirmative measures in favour of women in governing frameworks (laws and corporate policies) is the key to WEE and ultimately gender equality in the sector. More information needs to be availed in this regard, on adopted measures that have been successful in the promotion of WEE in O&G.

1.8 Methodology

Gender relations influenced by customs and practices continue to determine the roles of men and women in the economic space. Through a legal feminist lens, this study examines the adequacy of laws and policies governing Kenya's upstream oil and gas sector in addressing the impact of the sector on local women's right to access equal economic opportunities, and the existing barriers to women's economic empowerment owing to gender relations.

Since Kenya's upstream O&G sector is still in its early stages, this study does not purport to undertake a comparative analysis but rather draws experiences from a number of resource rich countries to demonstrate the potential impact the sector may have on WEE in Kenya. More focus

is however placed on countries like Nigeria, Ghana and Uganda that have similar socio-economic dynamics to Kenya. Of the three countries, Nigeria has the most developed O&G sector while Uganda's is still at its early stages. Just like in Kenya, patriarchal structures exist in these countries and gender still determines roles for men and women especially in rural set ups. Women depend on agriculture, fishing and other land related economic activities as well as informal trade for their livelihoods. They have limited access and control over economic resources, less access to education, waged employment opportunities, information and decision-making processes. In all three countries, both customary and statutory legal systems exist.

The study adopts a socio-legal approach and relies mostly on qualitative research to develop the argument that the impact of upstream O&G activities on local communities' economic rights is gender differentiated because of gender roles, and therefore a gendered approach must be adopted in the governing framework to advance WEE. While no fieldwork was undertaken during this study to collect empirical data, it is informed by findings from past qualitative research on the impact of the extractives industry on women's rights.¹²⁰

It relies on the review and analysis of statutes, case law, government policies and guidelines as primary sources and journal articles, published research and sector specific reports, books and websites. Reference is made to soft laws that guide the industry players and shape industry practices. Although not necessarily legally binding, stakeholders in the sector tend to adhere to them. These include international standards, guidelines, human rights policies, codes of conduct and industry best practices.

1.9 Limitations and assumptions

Not much research has been done and availed on the gendered impact of the oil and gas sector on WEE in Kenya hence the data relied on in this study is from different sources, disciplines and timeframes. Moreover, while a field study to collect empirical data would be ideal, none is conducted during the research period due to time and geographical constraints as well as the ongoing COVID-19 global pandemic. Thus, the study relies on published reports of past studies done by other researchers and institutions. It is assumed that the data collected is accurately captured.

¹²⁰ Some of the studies relied on include, African Development Bank- African natural resources center, *Women's economic empowerment in oil and gas industries in Africa*, 2017; Global Alliance for Green and Gender Action, *Impacts of extractives on land, environment and women's rights in East Africa*, June 2018; Götzmann N, Kristiansson L and Hillenbrand J, *Towards gender responsive implementation of extractive industries projects*, The Danish Institute for Human Rights, 2019; and Scott J, Dakin R, Katherine H and Eftimie A, 'Extracting lessons on gender in the oil and gas sector' The World Bank, Extractive Industries for Development Series Number 28, 2013.

The focus of the research is limited to women from host communities in rural areas but the issues addressed in the study may be applicable to women across Kenya.

1.10 Chapter summary

Chapter 1 is an introduction to the study. It gives the background to the study, statement of the problem, justification, research problem and objectives, theoretical framework, literature review, the methodology, hypotheses, limitations and assumptions and thereafter, the chapter breakdown for this thesis.

Chapter 2 discusses the right of women to equal access to economic opportunities in the upstream O&G sector, the need for WEE and how this relates to women's rights in the Kenyan context.

Chapter 3 focuses on the legal and regulatory framework governing the petroleum industry in Kenya. It identifies and analyses sections in law and policy on gender equality that protect women from discrimination and promote WEE. The chapter seeks to identify the gaps in municipal law and whether these can be filled through international and regional instruments Kenya has ratified and domesticated into law. This chapter also considers various soft law instruments that govern oil corporations' upstream operations.

Chapter 4 illustrates the differentiated impact the upstream oil and gas sector has on WEE drawing experiences from resource rich countries like Ghana, Nigeria, and Uganda. While these may be common across different oil producing countries, the research contextualises these within the Kenyan setting taking into account the current status of women's rights in the country. It focuses on the right to access equal economic opportunities including access to decent work and gainful employment within the O&G industry be it through direct or indirect employment or in supplies. It highlights the opportunities and challenges women encounter on the road to economic empowerment.

Chapter 5 summarises the research findings and describes what the upstream oil and gas sector in Kenya ought to look like moving forward, in its recommendations to the State, business actors and relevant stakeholders. Finally, the conclusion to the study.

CHAPTER TWO

THE RIGHT TO ACCESS EQUAL ECONOMIC OPPORTUNITIES: THE CASE FOR WEE IN UPSTREAM O&G

2.0 Introduction

Chapter One provided an introduction into the research. It outlined the problem statement, and described the research objectives and the questions the study looks to answer. This chapter seeks to contextualise the need for WEE in upstream oil and gas. It will first provide the rationale for WEE and how it is key in achieving gender equality. It will also highlight the need for gender mainstreaming in the industry to ensure both men and women enjoy access to equal economic opportunities. It will then discuss the factors that affect women's right to access economic opportunities especially decent work and employment in the sector and the role of law in promoting gender equality through WEE in particular. It will subsequently highlight the need to adopt a rights-based approach to ensure petroleum laws and policies advance WEE.

2.1 Definition of women's economic empowerment

There has been a persistent cry for women's empowerment world over with many viewing it as one of the ways that gender equality can be realised in the political, social and economic spheres of life. Economic empowerment is one key area in which inequalities continue to exist with women being the disadvantaged group. The African Development Bank (AfDB) has defined WEE as “a phenomenon whereby equality in economic opportunities increases and the “*gender gap*” decreases.”¹²¹ It is the process of increasing the ability of women to participate in the development of the economy and contribute towards valuable change by increasing their economic capabilities, skills set, market information and ability to make financially independent decisions. It is aimed at having women and men enjoying access to equal economic opportunities in terms of division of labour, accumulation of assets and influence on institutions that determine development.¹²²

Gender mainstreaming is one strategy that can be used by stakeholders to address the issues of gender inequality within the sector. The UN Economic and Social Council (ECOSOC) defines gender mainstreaming as:

¹²¹ African Development Bank- African natural resources center, *Women's economic empowerment in oil and gas industries in Africa*, 2017, 17.

¹²² Definition by UN Women in UN Women and ILO, *Decent work and women's economic empowerment: good policy and practice*, 2012.

A strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated.¹²³

Laplonge simply describes it as “the idea that an organization can integrate gender into every aspect of its business and workplace”.¹²⁴

There are three approaches to gender mainstreaming in the extractives industry- the development approach, human rights approach and the efficiency approach (the business case).¹²⁵ The next section discusses the need for WEE based on each of these approaches, and the advantages this has for all connected to women.

2.2 Rationale for WEE in upstream oil and gas

The country looks to benefit from the revenues accruing from natural resource extraction as a whole. Focus may be in the locale where the petroleum is situated but it is expected that the benefits will be enjoyed by all and the profits derived therefrom will contribute towards the overall development of Kenya. It is anticipated that the livelihood of communities living in the resource rich areas will improve and as with any other development project, infrastructure and social amenities will also be developed. This can easily be projected as the desirable outcome but as seen in other states like Nigeria¹²⁶ that have developed extractive industries, it is not always the reality. Focus is usually placed on elevating the economic situation of the communities in general without much consideration being taken to understand the gendered impact the industry has on society.

Men and women are likely to derive different benefits and bear differentiated risks during upstream O&G operations.¹²⁷ A research study by World Bank on women in the extractives industry¹²⁸ found that women were less likely than men to enjoy the benefits of oil projects in their locale but were exposed to greater socio-economic and environmental risks. This is influenced by a myriad of factors within communities ranging from economic, socio-cultural to political dynamics including *inter alia* tradition and culture, petroleum laws and policies and political will.

¹²³ ECOSOC, *Report of the Economic and Social Council for 1997*, UN A/52/3 (18 September 1997), Chapter IV.

¹²⁴ Laplonge D, *So you think you're tough*, 145.

¹²⁵ Lahiri-Dutt K and Gill Burke G, 'Gender mainstreaming in Asian mining: a development perspective' in Lahiri-Dutt K (ed) *Gendering the field: Towards sustainable livelihoods for mining communities*, NU E Press, 2011, 224-226

¹²⁶ Turner TE and Brownhill LS, 'Women's oil wars in Nigeria' 35 *Labour, Capital and Society / Travail, capital et société*, 2002.

¹²⁷ Centre for Governance and Development, *Gender dimensions and implications of coal mining in the Mui basin of Kitui county, Kenya*, 2015, 1.

¹²⁸ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 2013.

There must first be an understanding of some of these factors and how they relate to the existing gender gap, to inform gender mainstreaming in a bid to sufficiently address the problem.

Women's economic participation is key for development. Research has shown that those who have access to economic opportunities are more likely to invest their earnings in their homes and families¹²⁹ as compared to men who tend to spend on alcohol, cigarettes and social vices like prostitution that do not stand to benefit their families.¹³⁰ Also, given the opportunity women are more likely to start businesses aimed at social good for the benefit of the larger community.¹³¹

In addition, access to income generating activities and economic opportunities allows women to have their dignity respected as they are able to make some financially independent decisions.¹³² This is especially important for female headed households where the woman is the sole provider for her family.

Studies have shown that there is a business case for gender diversity and the inclusion of women in the extractives industry. A gender diversified workforce is beneficial to a company because it increases the talent pool lowering the amount spent on recruitment and retention of skilled labour, brings in different perspectives as men and women reason differently and, reduces staff turnover because of increased competition. Where local women are employed, a company has the added advantage of getting community insights that can help it maintain its social license to operate by holistically attending to community needs and concerns. This may also ensure that there are less disruptions of operations by the community. Overall companies with gender-diverse workforces are better placed to increase their revenues.¹³³ Moreover, supporting women-led businesses helps in building community-company relations as there is likelihood of stability and growth because women unlike men reinvest their benefits in their families and communities.¹³⁴ Engaging women from affected communities and allowing them to participate also helps companies understand the existing gender dynamics to avoid their operations having adverse

¹²⁹ World Bank, *World Development Report 2012: Gender equality and development*, 2011. Kivuva E and Kinuthia K, 'Kenya gender ranking drops on education, economic exclusion' Business Daily, 6 April 2021 --<<https://www.businessdailyafrica.com/bd/data-hub/kenya-gender-ranking-drops-on-education-economic-exclusion-3351044>> on 20 September 2021.

¹³⁰ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 8, 22.

¹³¹ Hechavarria DM, Ingram A, Justo R and Terjesen S, 'Are women more likely to pursue social and environmental entrepreneurship?' in Hughes KD and Jennings JE (eds) *Global women's entrepreneurship research: Diverse settings, questions and approaches*, Edward Elgar Publishing, 2012, 135-151.

¹³² Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 3.

¹³³ IFC, Umbrella facility for gender equality, CommDev, *Unlocking opportunities for women and business: A toolkit of actions and strategies for oil, gas, and mining companies*, 2018, 15.

¹³⁴ Organisation for Economic Co-Operation and Development (OECD), Investing in Women and Girls--<<https://www.oecd.org/dac/genderdevelopment/investinginwomenandgirls.htm>> on 17 April 2021.

effects on women's rights, as well as to guide companies on relevant and sustainable corporate social programs to invest in.¹³⁵

However, despite the arguments advancing the benefits of women's participation in the extractives industry as good business practice, some scholars believe the intention is not genuinely to promote gender equality but to maintain the status quo. Laplonge,¹³⁶ Mayes and Pini¹³⁷ (in reference to the Australian mining workforce) are of the view that businesses seek to include women for the gendered benefits they bring to a male workforce for example, lowering the stress levels in the company, taking advantage of their communication style, increased morale and loyalty. The reason for women's inclusion is not necessarily for their technical expertise and skillset. The women who survive in the industry try to act like their male counterparts so that they can fit in and be accepted. They do not associate their positions with feminism. Catherine Macdonald argues that from the various analyses done by scholars, the business case for diversity in the workplace and increased women's participation in the extractives industry, is a façade to attain society's approval. She argues that the narrative is controlled by the industry which remains largely androcentric and in fact seeks to maintain the status quo.¹³⁸

In conclusion, promoting WEE within O&G industries is beneficial to women, families, communities, corporates and the country, as they contribute towards sustainable growth and development.

2.3 Gender gaps and drivers of WEE

The World Bank, in its survey and analysis of the gendered impacts of oil and gas production identified three gender gaps that manifested the differentiated impact of the industry on men and women, that is, asset gap, information gap and vulnerability gap.¹³⁹ These gaps will be expounded on in this section in light of how they give context to this study and the influence they have on WEE.

The UN Secretary General's high-level panel on women's economic empowerment¹⁴⁰ identified seven 'drivers of transformation' that stakeholders can action to realise WEE and subsequently

¹³⁵ IFC *et al*, *Unlocking opportunities for women and business*, 18.

¹³⁶ Laplonge D, *So you think you're tough*, 70.

¹³⁷ Mayes R and Pini B, 'The Australian mining industry and the ideal mining woman: Mobilizing a public business case for gender equality' 56 *Journal of Industrial Relations*, 2014, 538.

¹³⁸ Macdonald C, 'The role of gender in the extractives industries' United Nations University, WIDER Working Paper 52/2017, 2-<https://www.wider.unu.edu/node/73811> on 11 August 2020.

¹³⁹ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 18.

¹⁴⁰ UN Secretary General's high-level panel on women's economic empowerment, 'Seven drivers and recommendations' UN Women-<https://hlp-wee.unwomen.org/en/about/seven-drivers#driver-7> on 23 February 2021.

identified top recommendations. The drivers are: tackling adverse norms and promoting positive role models; ensuring legal protection and reforming discriminatory laws and regulations; recognizing, reducing and redistributing unpaid work and care; building assets—digital, financial and property; changing business culture and practice; improving public sector practices in employment and procurement; and strengthening visibility, collective voice and representation. These drivers provide possible solutions that can inform actions to address the identified gender gaps in WEE in the upstream O&G sector.

2.3.1 Income generating assets (gender asset gap)

Extractive industry projects like petroleum exploration and production are expected to generate revenues for the state and income for the community. For the locals, employment opportunities can be in the form of direct, indirect or induced employment.¹⁴¹ The upstream oil and gas sector does not create many direct employment opportunities and the few jobs that are available tend to be technical in nature requiring high levels of skill. Nonetheless, there are opportunities arising from indirect employment in the supply chain and provision of goods and services. Locals can also benefit from induced employment whereby people set up new business ventures not necessarily in the petroleum industry but as a result of the increase in disposable income. Other sources of income would be compensation for land and royalty payments in some cases.

Unfortunately, in most developing economies, women have less access to income generating assets. With regards to waged employment, they tend to be limited to indirect employment owing to their lack of technical skills and they are also likely to earn less for same work done as their male counterparts. Moreover, only a small percentage of women have access to financial and/or physical assets to secure credit facilities to set up businesses. Kenyan law does not bar women from accessing credit facilities but they have to overcome bureaucratic hurdles from the formal sector as most financial institutions require title deeds as collateral.¹⁴²

In Kenya, like in many other developing African countries, women mostly engage in unpaid work in and around the home which is not recognised by the industry or in law; further entrenching them into poverty especially where the men take up formal employment leaving the women to shoulder the extra burden. Women make up slightly over a third (35.5%)¹⁴³ of Kenya's wage employment and well over half (57.13%) of the workforce in 'vulnerable employment' and

¹⁴¹ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 24.

¹⁴² Kenya Land Alliance and FIDA Kenya, *Policy brief: Women, land and property rights and land reforms in Kenya*, 2006, 1.

¹⁴³ Kenya National Bureau of Statistics (KNBS), *Economic Survey 2020*, para.3.11.

traditional societal roles.¹⁴⁴ They remain underrepresented in jobs that require higher education or specialised skills like those in extractives industry where they comprise 16.9 per cent compared to 83.1 per cent of men.¹⁴⁵

In addition, women are the ones mostly engaged in subsistence farming relying on it as a source of livelihood for themselves and their families. This is their only claim to land in many instances and therefore, loss of land coupled with the negative impacts of exploration and production of petroleum such as pollution and environmental degradation pose a greater risk to women yet compensation for land is often paid to the men¹⁴⁶ as title documents are issued in their name. Women only hold 1 per cent of registered land titles on their own and 5-6 per cent jointly with men.¹⁴⁷

Lastly, women from the affected communities, mostly in the rural areas, suffer from time poverty. The World Bank defines time poverty as:

working long hours and having no choice to do otherwise. An individual is time poor if he/she is working long hours and is also monetary poor or would fall into monetary poverty if he/she were to reduce his/her working hours below a given time poverty line.¹⁴⁸

As earlier stated, women tend to mostly undertake unpaid work at home which hardly leaves them with time to take up the economic opportunities available in the context of the upstream oil and gas sector.¹⁴⁹ While some of these factors may be experienced by women in developed countries, most of them apply to developing African States where tradition and culture have a great influence on communities.

¹⁴⁴ World Bank Data Bank Gender Statistics 2019, Vulnerable employment, female (% of female employment) (modeled ILO estimate)- Kenya --<<https://data.worldbank.org/indicator/SL.EMP.VULN.FE.ZS?locations=KE>> on 7 May 2021. Vulnerable employment is defined as 'a high proportion of contributing family workers- generally unpaid, although compensation might come indirectly in the form of family income-may indicate weak development, little job growth, and often a large rural economy'.

¹⁴⁵ Calculation of percentages using KNBS Economic Survey data, 2017 and 2018 in KNBS, *Women's empowerment in Kenya: Developing a measure*, July 2020, 3.

¹⁴⁶ Bobson BI, 'Black gold' Oxfam, 25 February 2019 -- <<https://kenya.oxfam.org/latest/blogs/black-gold>> on 18 September 2021.

¹⁴⁷ Kenya Land Alliance and FIDA Kenya, *Policy brief: Women, land and property rights and land reforms in Kenya*, 2006, 1.

¹⁴⁸ Bardasi E and Wodon Q, 'Working long hours and having no choice time poverty in Guinea' The World Bank Poverty Reduction and Economic Management Network Gender Group & Human Development Network Development Dialogue on Values and Ethics, Policy Research Working Paper Number 4961, June 2009, 2 - <https://openknowledge.worldbank.org/handle/10986/4156> on 25 February 2021.

¹⁴⁹ IFC et al, *Unlocking opportunities for women and business*, 11.

2.3.2 Traditions and cultural practices (gender vulnerability gap)

Kenya, like most African states, is a patriarchal society. This means that in most traditions and cultures men are revered while women are expected to take a back seat¹⁵⁰ in decision making both at home and in society at large.

Historically, tradition and culture have played a big role in widening the gender gap as pertains to the right of men and women to access equal economic opportunities. Traditionally, men and women have gender ascribed roles with men taking up the role of breadwinners and women taking on homemaker and caregiver roles. As the breadwinners, men can engage in formal and skilled work to generate income. Women on their part are responsible for unpaid work that contributes to the wellbeing of their families. This as earlier mentioned, is behind the time poverty women suffer and continue to suffer for as long as they perform only their traditional gendered roles. Certain cultures even suggest what work is deemed appropriate for women and what is not.¹⁵¹ For many, oil and gas would not exactly be a ‘woman’s job’¹⁵² and this attitude is worsened by the low number of women participating in upstream oil and gas around the world.

With regards to compensation and resettlement, women tend to be left out of important discussions pertaining to land ownership and compensation package because land ownership is associated with men.¹⁵³ Loss of land also may also deprive women of their traditional livelihoods. With no alternative livelihood opportunities offered to women, their economic potential stands to be affected.¹⁵⁴

There also exist traditional barriers to the right to education. Women have always been disadvantaged when it comes to enjoyment of the right to education. In some communities, the girl child’s right to education is secondary to that of their male counterparts.¹⁵⁵ This means that many women lack the technical know-how or the skillset to take up some of the economic opportunities presented by oil projects. A ripple effect is that there remains a low number of women in the sector who can champion for the rights of women and for inclusion. A higher percentage of the already few women working in the sector are engaged in informal jobs.

¹⁵⁰ Institute for Human Rights and Business (IHRB), *Human rights in Kenya’s extractive sector: Exploring the terrain*, December 2016, 45.

¹⁵¹ Scott J *et al*, ‘Extracting lessons on gender in the oil and gas sector’, 25.

¹⁵² Waetjen T, *Workers and warriors: Masculinity and the struggle for nation in South Africa*, University of Illinois Press, 2004.

¹⁵³ Institute for Human Rights and Business (IHRB), *Human rights in Kenya’s extractive sector: Exploring the terrain*, December 2016, 65.

¹⁵⁴ Institute for Human Rights and Business (IHRB), *Human rights in Kenya’s extractive sector: Exploring the terrain*, December 2016, 68.

¹⁵⁵ Centre for Governance and Development, *Gender dimensions and implications of coal mining in the Mui basin of Kitui county, Kenya*, 2015, 7.

2.3.3 Public participation and agency (gender information gap)

The right to public participation and the process of decision making is a preserve of men in most traditions and cultures in Kenya.¹⁵⁶ Women are treated as ‘there to be seen and not necessarily heard’. The men make decisions touching on their families and society even where the women stand to be affected.¹⁵⁷ The AfDB observed that because of tradition and culture women may not have a voice to speak out during meetings they attend with men, with some standing the risk of domestic violence if they dare to express themselves without a man’s permission.¹⁵⁸ Moreover, they do not have a say in how the income generated from oil and gas projects is to be utilised at home but instead, they become even further dependent on men for their economic needs.¹⁵⁹

Another challenge tied to the right to public participation that impedes WEE in upstream oil and gas is lack of access to relevant information. According to the Women’s Empowerment in Kenya report, women are more disadvantaged than men in access to information and communication technology key in enhancing access to information, financial services and products and which also gives them a sense of independence as they do not have to rely on their male relations to get information.¹⁶⁰ It is difficult for women to participate in what they have no knowledge on. Failure to participate in meetings, means that women stand the likelihood of being largely unaware of the opportunities available to them during upstream petroleum projects. It also prevents them from taking part in the decision-making process.¹⁶¹ This greatly undermines women and the contribution they can make towards development projects.¹⁶²

Again, owing to gendered roles and the fact that women face time constraints, they cannot always make time to attend meetings as scheduled by sector stakeholders as this will interfere with their workloads.¹⁶³ Their failure to participate in meetings is also attributed to low literacy levels amongst women in most of the affected communities.¹⁶⁴

¹⁵⁶ Institute for Human Rights and Business (IHRB), *Human rights in Kenya’s extractive sector: Exploring the terrain*, December 2016, 49.

¹⁵⁷ Bobson BI, ‘Black gold’ Oxfam, 25 February 2019 -- <<https://kenya.oxfam.org/latest/blogs/black-gold>> on 18 September 2021.

¹⁵⁸ AfDB, ‘*Women’s economic empowerment in oil and gas industries in Africa*’, 39.

¹⁵⁹ Kropiwnicka MA and Van Paassen B, ‘The gendered impacts of large-scale land based investments and women’s responses’ Trocaire, July 2020, 8 --< <https://www.cidse.org/2020/07/09/the-gendered-impacts-of-large-scale-land-based-investments-and-womens-responses/>> on 18 September 2021.

¹⁶⁰ Kenya National Bureau of Statistics (KNBS), *Women’s empowerment in Kenya: Developing a measure*, July 2020, 3.

¹⁶¹ AfDB, ‘*Women’s economic empowerment in oil and gas industries in Africa*’, 16.

¹⁶² Scott J *et al*, ‘Extracting lessons on gender in the oil and gas sector’, 22.

¹⁶³ AfDB, ‘*Women’s economic empowerment in oil and gas industries in Africa*’, 39.

¹⁶⁴ Okudo O, *The gender assessment study report for the oil and gas sector in Kenya*, Ministry of Petroleum and Mining, State Department for Petroleum, April 2021, 29. Also, AfDB, ‘*Women’s economic empowerment in oil and gas industries in Africa*’, 39.

2.4 Legal, regulatory and policy frameworks on WEE

The UN SDGS recognise gender equality as one of the prerequisites for sustainable development. While there are a number of barriers preventing women from achieving their full potential, the legal framework governing the O&G sector and indeed the larger extractives industry may be a contributing factor. International and regional human rights conventions and instruments like CEDAW, ICESCR, ACHPR (Maputo Protocol) together with various ILO Conventions provide for equal access to work and economic opportunities. Developing countries like Kenya which have ratified these instruments have undertaken legal reform to include gender equality and non-discrimination clauses in domestic laws. Despite the legal reforms, women continue to face discrimination due to challenges in implementation and enforcement posed by social norms, power relations and gender stereotypes.¹⁶⁵

The law can also, be a double-edged sword in that it can provide solutions to address the existing gender inequalities in the sector or it can in itself exacerbate the inequalities through use of gender-neutral language, general non-discrimination on the basis of gender clauses or its failure to provide for the same.¹⁶⁶ The neutrality of laws with regards to gender issues especially in androcentric industries like O&G, is purportedly for the protection of women but in essence this is discriminatory as it hinders the advancement of women's economic rights. The challenge is that majority of the legislators and enactors of policies in the petroleum industry are male and mostly elitists, locking out women's voice to influence policies to suit their needs.¹⁶⁷ They cannot relate to the barriers that women at the community level face in the realization of economic empowerment.¹⁶⁸

In patriarchal societies, parallel legal systems¹⁶⁹ may exist for example, customary laws existing alongside statutory laws. In as much as statutory laws may adopt a gender-neutral tone in promoting equality and non-discrimination, women may not feel the impact of the statutory provision as customary law has a greater influence on the people it applies to and gendered roles

¹⁶⁵ *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on gender dimensions of the guiding principles on business and human rights*, 23 May 2019, UN A/HRC/41/43 (hereafter *Gender Dimensions of the UNGPs*), para. 11.

¹⁶⁶ Gichuhi M and Wambua C 'Gender' Ambani JO and Wasunna MK (eds) *Mining Law, commentaries on Kenya's framework legislation*, Strathmore University Press, 2018, 138.

¹⁶⁷ Odhiambo RA and Oduor M, 'Gender Equality' in Odero SO, Mbondenyi MK and Lumumba PLO (eds) *The Constitution of Kenya: Contemporary readings*, Law Africa (K) Ltd, 2011, 123. See also Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 28. The lack of representation for women in positions of influence is a challenge to the realisation of gender equality.

¹⁶⁸ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 3.

¹⁶⁹ OECD, 'The impact of legal frameworks on women's economic empowerment around the world: challenges and good practices', Conference organised by OECD Global Relations Secretariat, OECD Auditorium, 7 March 2018, 5.

dictate men and women are not equal. Laws, regulations and policies cannot singly address the issues affecting WEE. They must be cognizant of other factors that affect women including gender and social norms that may be discriminatory in nature and take this into consideration for them to be impactful in the realization of WEE.

Key areas of concern in O&G legal framework that affect WEE would be those touching on labour rights, land acquisition and compensation, participation and decision making, education and training. For example, African women mostly engage in unpaid work and informal employment. Labour laws do not provide for or govern unpaid care and work because its value towards national development cannot be captured, yet women suffer time poverty as a result, denying them an opportunity to develop themselves and to participate in income generating activities because of the time dedicated to executing the work.¹⁷⁰ Women undertake at least two and a half times more unpaid work than men¹⁷¹ leaving them more vulnerable to high poverty levels. The failure by law to recognise unpaid labour means that women cannot enjoy other labour-related benefits like childcare services, maternity and parental leave while men in paid employment who hardly undertake any unpaid work get to enjoy benefits like paternity leave. Unpaid work and care ought to be recognised in law and policy. It should be a burden equally borne by both men and women to reduce the time spent by women carrying out the work.

There has been an increase in the number of women who have completed school, resulting in more women joining the formal employment labour market. This does not necessarily mean that they enjoy equal access to the same opportunities as men. The increased participation is not indicative of the quality of jobs women occupy. In the O&G sector, the few women who participate in the workforce are in lower-income earning positions compared to their male colleagues because the laws and gender norms do not create an enabling environment for them to equally benefit from economic opportunities as their male counterparts. In addition, women remain underrepresented in corporate boards and executive management positions where decisions that influence change are made. This has led to deliberate moves being made to include women in these positions through quota systems for example, similar to what countries like Kenya have done to include women in elective and appointed positions (two-thirds gender rule).

Legal frameworks must deliberately provide for women's needs,¹⁷² failure to which traditional and cultural practices that revere men, will continue to subdue women's rights to quality, decent work

¹⁷⁰ Hunt A and Samman E, 'Women's economic empowerment' Development Progress Research Report, September 2016, 17-
<https://cdn.odi.org/media/documents/10683.pdf> on 22 April 2021.

¹⁷¹ ILO, *Women at work trends*, 2016, 7.

¹⁷² OECD, 'The impact of legal frameworks on WEE around the world', 6.

and to participate in income generating activities more so in O&G which is already male-dominated. OECD proposes that achieving WEE requires the integration of gender specific perspectives at the design stage of policy and programming to ensure the formulation of sound laws and policies.¹⁷³ An analysis by the World Bank of the gendered impact of the extractives sector found that the risks borne by women due to upstream petroleum operations can be mitigated if there are proper policies and local investment focusing on women.¹⁷⁴

Gender equality has been described as a ‘shared global challenge’.¹⁷⁵ This means that aside from state governments, all actors in the O&G sector including companies, financial institutions and civil society, also have a responsibility to advance gender equality in their undertakings. This has led to an increased inclusion of gender equality provisions in soft law instruments which prescribe best practices in the industry and which sector actors tend to adhere to. In some cases, companies have been found to have stronger policies than is even required by the state frameworks in the countries in which they operate.¹⁷⁶

Chapter 3 of this study will provide an in-depth analysis of the Kenyan legal and regulatory framework.

2.5 Adoption of a rights-based approach to realise WEE

The petroleum industry is a ‘boys club’ and if no deliberate measures are taken by the state and companies to include women, then the industry only serves to further entrench the gender gaps in society.¹⁷⁷ Women’s rights are human rights and thus an inalienable, integral and indivisible part of universal human rights. In light of this, states and companies have a duty and responsibility to safeguard women’s rights to ensure that they do not suffer inequality or discrimination as a result of business activities. To this end, the Special representative of the Secretary-General, John Ruggie developed the UN ‘Protect, Respect and Remedy’ framework outlining the responsibilities of states and business enterprises with regard to human rights. This framework is effected in the UN Guiding Principles. This research will adopt the protect and respect pillars of the framework to assess the adequacy of Kenya’s O&G legal and regulatory framework in safeguarding women’s right to equal economic opportunities.

¹⁷³ DAC Network on Gender Equality (GENDERNET), *Women’s Economic Empowerment*, Issues Paper, 2011, 3-
<https://www.oecd.org/dac/gender-development/47561694.pdf> on 22 February 2021.

¹⁷⁴ Scott J *et al*, ‘Extracting lessons on gender in the oil and gas sector’, 8.

¹⁷⁵ OECD, ‘The impact of legal frameworks on WEE around the world’, 2.

¹⁷⁶ Scott J *et al*, ‘Extracting lessons on gender in the oil and gas sector’, 4.

¹⁷⁷ Lyimo J, ‘Managing for gender equality results: empowerment of women for equitable participation in the oil and gas sector’, 2017; Scott J *et al*, ‘Extracting lessons on gender in the oil and gas sector’, 1.; IPIECA, International Finance Corporation (IFC), United Nations Development Programme (UNDP) and the Columbia Center on Sustainable Investment (CCSI), 27.

2.5.1 State duty to protect human rights

The study underpins the importance of a strong legislative framework and policy governing the industry that adequately provides for realization of women's rights. It is not sufficient to only make provision for equality and non-discrimination broadly especially in the context of a developing country like Kenya where gender equality is yet to be attained in most development areas. Research has shown that there needs to be a careful and deliberate move towards designing government and company policy to advance women's rights to access decent work and employment. Alive to the fact that men are most likely to benefit from the economic opportunities in the O&G sector, the State must exercise caution when coming up with regulatory frameworks and enforcement mechanisms to ensure there is provision for affirmative action measures and that gendered language is used in drafting. In the absence of this, the State may fail in its duty to protect women's rights from the negative impact of business activities.¹⁷⁸

The country's petroleum laws may not explicitly provide for women's participation but the national policy can remedy this by providing for gender mainstreaming and targeted interventions such as creation of women's funds, quota systems in employment and state partnerships with industry players to offer trainings tailored for women in extractives and business.

2.5.2 Companies responsibility to respect human rights

It is a balancing act for oil companies that set up operations within the community. The communities have set ways of life applying tradition, culture and religion that may clash with a company's ideals. It is pivotal for the companies to understand the communities and find a way to work with them to successfully undertake their operations while occasioning minimum harm on them. The practice is for companies to consider the communities' rights wholesomely without paying much attention to the different impact business activities have on men and women within the community. While the community may thus be said to be benefitting, it becomes evident that women disproportionately enjoy the benefits and bear the risks in comparison to men. To avoid further increasing the gender gap, oil companies and service providers have a responsibility to respect the rights of men and women alike. This would entail them understanding the plight of women in the affected communities to ensure that they do no harm or exacerbate the existing inequalities any further. In addition, the oil companies may contribute towards the eradication of existing traditional gender biases within the communities by introducing gender policies that

¹⁷⁸ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 4.

must be adhered to for the community to participate in the project for example, gender quotas that must be observed by local suppliers. Consulting the whole community includes taking into consideration the views and opinions of women and encouraging them to take part in decision making. This greatly contributes to companies ensuring they get a social license to operate as they will be met with less hostility. They may also contribute to a training fund or offer training opportunities to women for example, Shell's girls in energy programme, United Kingdom's Women in science and engineering (WISE) campaign, and Oil and gas technical apprentice programme (OGTAP) steering group.

Companies can promote women's participation by using gender champions, taking into account time poverty when scheduling meetings and having them in environments that offer a safe space for women to openly engage.¹⁷⁹

Gender considerations and gender mainstreaming are also requirements that lending institutions and development partners are emphasizing more of with institutions like World Bank, AfDB, IFC¹⁸⁰ and EITI¹⁸¹ calling for governments and oil companies to make provisions for the same in policy and project design.

2.5.3 Access to remedy in case of violation

Need for resolution of grievances between the companies and the communities is inevitable during oil operations. The locals must feel that their rights have been protected and respected and in the event they do not, it is better to have a system through which grievances can be addressed. This should also be made available to women.

2.6 Conclusion

This chapter defined WEE and justified the need for WEE in the upstream oil and gas sector. It also highlighted some of the factors that influence WEE in oil and gas and referenced some of the drivers that can be employed to realise WEE. It thereafter lay the foundation for gender equality and women's empowerment in law. It advanced the argument that there is need for a human rights-based approach in upstream operations with stakeholders in the industry adopting the three UN Guiding Principles pillars of 'protect, respect and remedy'. Chapter three evaluates the

¹⁷⁹ AfDB, 'Women's economic empowerment in oil and gas industries in Africa', 39.

¹⁸⁰ IFC, *IFC Performance standards on environmental and social sustainability*, 2012.

¹⁸¹ EITI International Secretariat, *Towards gender-responsive EITI implementation*, September 2019, guidance note 30.

adequacy of Kenya's upstream O&G legal and regulatory framework in promoting WEE and addressing the challenges discussed in this chapter.



CHAPTER THREE

LEGAL AND REGULATORY FRAMEWORK GOVERNING KENYA'S UPSTREAM PETROLEUM SECTOR

3.0 Introduction

Women are an untapped resource with lots of potential that can contribute to development yet they continue to be discriminated against on the basis of sex. They continue to languish in poverty and their voices albeit important and offering a different perspective to the petroleum sector, remain unheard. The UN Working group on the issue of human rights and transnational corporations and other business enterprises observed that states and businesses have not paid enough attention to gender equality in discharging their respective duties and responsibilities under the UN Guiding Principles.¹⁸² This manifest in existing gender-neutral laws governing business operations. It begs the question, to what extent does legal and regulatory framework governing Kenya's upstream petroleum sector protect and promote women's rights to equal treatment and freedom from discrimination in the economic sphere.

Indeed, the country looks to profit from its natural resources and it is probable that the laws and policies governing the O&G sector may focus mostly on the commercial relations in the upstream sector.¹⁸³ It is crucial however, for the State to recall that the natural resources are held in trust for the people of Kenya and for the industry to contribute towards sustainable development, the laws and regulations must be well developed, and address societal impacts of the sector as well. The law should also avert temptations by government to offer incentives that are only favourable to businesses or individuals at the expense of the citizenry.¹⁸⁴

Most oil companies are foreign investors and are not necessarily familiar with the socio-cultural dynamics of the country in which they operate. Even then despite the numerous studies that demonstrate the gendered impact of male dominated industries like the extractives industry, very few countries have taken deliberate steps to promote women's rights in laws and policies. Ensuring that companies respect women's rights would thus be guaranteed if the country's framework already provides for the same. It also provides a legal basis for companies within the industry to not only include women but to also enable them take up economic opportunities in upstream operations. In Peru for example, companies that would otherwise fear clashing with the

¹⁸² *Gender Dimensions of the UNGPs*, para. 3.

¹⁸³ Cordaid, *Oil exploration in Kenya: Success requires consultation*, August 2015, 22.

¹⁸⁴ Damilola SO, 'Legal strategies and tools for mitigating legal risks associated with oil and gas investments in Africa' 39(9) *Organization of the Petroleum Exporting Countries (OPEC) Energy Review*, 2015, 249.

culture and traditions of the people, draw their responsibility to include women from the law that is already in place.¹⁸⁵ Otherwise, the local women can only hope that the companies adopt a gender-sensitive approach in their operations and will employ measures that promote gender equity as part of CSR.

This chapter will mostly focus on the existing laws and policies applicable to the O&G sector in Kenya remaining cognizant of the fact that the upstream sector is still in its initial years with the Petroleum Act, 2019 being relatively new. It will therefore also consider soft law instruments, commonly applied and accepted by stakeholders within the sector including governments and oil companies, as best standards of practice towards sustainable management of resources. While there may be sector specific laws, policies and regulations like the Petroleum Act, there is also need for gender mainstreaming across other governing frameworks that interact with the sector and which determine who has access to natural resources and the benefits arising therefrom. Such laws that also influence WEE include, land and property laws, succession laws, labour and procurement laws amongst others.

3.1 Legal framework safeguarding women's right to access equal economic opportunities in the O&G sector

The previous chapter highlighted gender gaps that have the potential to affect WEE in O&G and identified legal protection and discriminatory laws and regulations reforms as one of the drivers of WEE that can be used to address these gaps. This chapter assesses the extent to which provisions in various laws and policies governing Kenya's upstream O&G address gender gaps in terms of benefit sharing, access to information, environmental protection, women's ownership of property, resettlement and compensation. It will also identify some of the gaps in the regulatory framework that may perpetuate existing inequalities and which may result in the State's failure to fulfil its duty to protect women's rights and business enterprises to respect the same.

3.1.1 National laws and policies

i. The Constitution of Kenya, 2010

The Constitution of Kenya is the frontrunner in promoting gender equality.¹⁸⁶ Article 27 provides that every person is equal before the law and that no person shall be discriminated directly or indirectly on the basis of sex. It describes equality to include the full and equal enjoyment of all rights and fundamental freedoms. Sub-article (3) expressly states that women and men have the

¹⁸⁵ Ward B and Strongman J, 'Gender-sensitive approaches for the extractive industry in Peru', 37.

¹⁸⁶ Article 10 (2)(b) and (d), *Constitution of Kenya* (2010), recognises inclusiveness, equality, human rights, non-discrimination, protection of the marginalised as national values and principles of governance in Kenya.

rights to equal treatment, including the rights to equal opportunities in political, economic, cultural and social spheres. The State is to take legislative measures, design policies and affirmative action programmes to redress any disadvantages suffered by groups subject of past discrimination.¹⁸⁷ This is buttressed by Article 56 which requires the State to put in place affirmative action programmes designed to ensure that marginalised groups¹⁸⁸ are provided with special opportunities in educational and economic fields as well as access to employment. It can be interpreted to apply to local content in the O&G sector whereby the State has an obligation to put in place affirmative action programmes that afford women special opportunities for access to employment and other economic opportunities.¹⁸⁹

The challenge posed by formal equality is that the outcome of equal treatment is not necessarily equal enjoyment of opportunities.¹⁹⁰ This is why lobby groups pushed for the inclusion of substantive equality¹⁹¹ through affirmative action measures like quotas in the Constitution.¹⁹² The main aim was to address the historical disadvantage suffered by women amongst other vulnerable groups. The inclusion of affirmative action in the Constitution makes it an 'intrinsic part of the right to equality' and not restricted to exceptional circumstances.¹⁹³ This creates the basis for any affirmative action provisions in favour of women in laws and policies governing the petroleum sector in Kenya.

The substantive equality approach adopted in Article 27(6) of the Constitution is due to the realisation that formal equality is not realistic owing to past discrimination visited upon women and as such simply prohibiting discrimination on the basis of sex may not be enough to remedy injustices without additional effort.¹⁹⁴ If indeed gender equality is to be realised, the underlying barriers that prevent women from competing on a level playing field to men, that is, power

¹⁸⁷ Article 27 (6), *Constitution of Kenya* (2010).

¹⁸⁸ Defined in Article 260, *Constitution of Kenya* (2010).

¹⁸⁹ Cordaid, *Oil exploration in Kenya: Success requires consultation*, August 2015, 15.

¹⁹⁰ Kinyanjui S and Kameri-Mbote P, 'The constitutional promise: Realising the right to gender equality and non-discrimination in Kenya' 2018(Special Issue) *East African Law Journal*, 2018, 19. Also, Fredman S, 'Engendering socio-economic rights', 25 *South African Journal of Human Rights*, 2009, 419.

¹⁹¹ Fredman S and Goldblatt B, 'Gender equality and human rights' United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), Discussion Paper Number 4, July 2005, 8 --<<https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/goldblatt-fin.pdf?la=en&vs=1627>> on 19 September 2021. The authors summarise the four elements comprising substantive equality to include addressing the disadvantages experienced by women due to the gendered context in which they operate (hence need for affirmative action), the acceptability of differential treatment in warranted cases, transformation of social institutions to accommodate gender differences rather than expecting women to adapt to existing male standards and lastly, focus on individuals rather than uniform treatment of all.

¹⁹² This was after previous failed attempts to introduce affirmative action provisions through Parliament.

¹⁹³ Ochieng WK, 'Chimera of constitutionally entrenched gender quotas', 61.

¹⁹⁴ Ochieng WK, 'Chimera of constitutionally entrenched gender quotas', 68.

relationships and social constructs, must be addressed to avoid women being further disenfranchised.¹⁹⁵

Article 27(6) thus creates a positive obligation on the State which is highly beneficial to WEE in O&G as it requires the State to take measures towards destabilising existing gender imbalance to realise constitutional provisions on equality and non-discrimination. Women can rely on this provision to call the State to action in instances where it would otherwise prefer to remain silent.¹⁹⁶ In so far as the O&G sector is concerned, the effectiveness of the Constitutional provisions on equality will depend on the measures taken to eliminate the barriers that hinder women's equal enjoyment of economic rights¹⁹⁷ and how well they transform the sector from being male-dominated.

Land is the main source of livelihood in Kenya¹⁹⁸ and access and control of land is crucial for the realisation of other rights. Acquisition of land by the government or oil companies poses a threat to the realisation of rights.¹⁹⁹ In fact, the practice has been viewed as land grabbing without consultation or compensation.²⁰⁰

Land²⁰¹ in Kenya belongs to the people of Kenya collectively as a nation (public land), as communities (community land) or as individuals (private land).²⁰² All minerals and mineral oils are part of public land vested in the national government and held in trust for the people of Kenya.²⁰³ The principles guiding the use and management of land in Kenya include equitable access to land, sustainable and productive management of land resources and elimination of gender discrimination in law, customs and practices relating to land and property therein.²⁰⁴

Under Article 40, every person has the right to acquire and own property and this includes land. The right is limited in case of compulsory acquisition by the State for public purpose or in the public interest as per the law and upon 'prompt payment in full, of just, compensation to the

¹⁹⁵ Kinyanjui S and Kameri-Mbote P, 'The constitutional promise', 19.

¹⁹⁶ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 28. See also Kinyanjui S and Kameri-Mbote P, 'The constitutional promise', 20.

¹⁹⁷ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 27; Kinyanjui S and Kameri-Mbote P, 'The constitutional promise', 20.

¹⁹⁸ Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari, U.N. Doc. A/HRC/7/16 (Feb. 13, 2008), 67.

¹⁹⁹ Wickeri E and Kalhan A, 'Land rights issues in international human rights law' 4(10) *Malaysian Journal on Human Rights*, 2010, 1

²⁰⁰ Stephens P, 'The global land grab: An analysis of extant governance institutions' 20 *International Affairs Review*, 2011, 1.

²⁰¹ Land is defined under Article 260, *Constitution of Kenya* (2010) to include, any body of water on or under the surface, marine waters and natural resources such as minerals, fossil fuels and other sources of energy.

²⁰² Article 61, *Constitution of Kenya* (2010).

²⁰³ Article 62 (1) (f) and (3), *Constitution of Kenya* (2010).

²⁰⁴ Article 60(1), *Constitution of Kenya* (2010); Section 4(2) *Land Act* (No. 6 of 2012); Section 5, *Community Land Act* (No.27 of 2016).

person'.²⁰⁵ Compensation is the “payment made to a landowner, land occupier or those with other forms of interest in land through use, or occupation, to be rendered in the form of cash, in the provision of alternative land or in any other form in kind, when the original rights have been compulsorily extinguished by the State or local authority in the public interest, to facilitate the construction of a development infrastructure.”²⁰⁶ Compensation is also to be paid to occupants **in good faith** (*emphasis added*) of land compulsorily acquired who may not be the land owners.²⁰⁷

ii. Petroleum Act, 2019

The Petroleum Act is the overarching statute governing upstream petroleum operations in Kenya. The Act provides for *inter alia* local content and training, compensation for land, profit-sharing and environmental safeguards all of which impact WEE. There ought to be equitable sharing of benefits accruing from natural resources be it compensation, local content and training, mitigation measures or socio-economic infrastructure.²⁰⁸ The rights, needs, priorities, interests and expectations of the affected communities must be considered for efficient benefit-sharing and this entails their participation.²⁰⁹

The national government holds natural resources such as minerals and fossil fuels in trust for the people of Kenya²¹⁰ but the surface land and properties where the resource lies if not public land, is the property of the host community or individual. It is the duty of the national government to facilitate the access of land for upstream activities as outlined in the Constitution²¹¹ and any other written law.²¹²

Contractors or licensees are expected to obtain prior consent in writing, from land owners to allow them access land for exploration activities.²¹³ Consent is obtained once compensation if any, is agreed upon. Section 110 (1) expressly states that the consent given is binding on all parties having an interest in the land. An occupier or person other than the owner who has interest in the land shall also be entitled to compensation for any loss or damage he may sustain by the development of petroleum infrastructure so long as the claim is made within three months after the

²⁰⁵ Article 40 (3), *Constitution of Kenya* (2010). See also section 111, *Land Act* (No. 6 of 2012).

²⁰⁶ Odidi CO, 'Policy and legal framework on development-driven involuntary resettlement in African countries, Draft', School of Environmental Studies, Moi University, 1993.

²⁰⁷ Article 40 (4), *Constitution of Kenya* (2010).

²⁰⁸ Soderholm P and Svahn N, 'Mining, regional development and benefit sharing in developed countries', 45 *Resources Policy Journal*, 2015, 83.

²⁰⁹ Orago NW and Musangi PV, 'Titanium mining benefit-sharing in Kwale County' in Ambani JO (ed) *Drilling past the resource curse? Essays on the governance of extractives in Kenya*, Strathmore University Press, 2018, 32.

²¹⁰ Article 62 (1) (f) and (3), *Constitution of Kenya* (2010).

²¹¹ Article 40 (3), *Constitution of Kenya* (2010). See also the *Land Act* (No. 6 of 2012).

²¹² Section 9 (2) and (3), *Petroleum Act* (No.2 of 2019).

²¹³ Sections 108 and 110, *Petroleum Act* (No.2 of 2019).

development. Compensation in either case be it to the owner or another party with an interest in the land shall be paid in full within four months from date the consent is issued.²¹⁴ The law calls for just and prompt compensation and this is a key component of benefit sharing as it offsets the burden of loss of land and other factors of production for persons displaced.²¹⁵ The challenge with this is that ‘just’ is subjective²¹⁶ as the impact of O&G on land can outlive the project and women are the biggest dependents on land for their livelihood.

The Act provides for local content requirements in all operations at the prevailing market rate, whereby contractors are to give preference to locally available raw materials, services provided and goods manufactured in Kenya in so far as they meet industry expectations. Priority is to be given to employment and engagement of qualified and skilled Kenyans at all levels.²¹⁷ A training fund is also established under the Act to train Kenyans in upstream petroleum operations.²¹⁸ These are positive provisions that can ensure locals take part in upstream operations and are equipped with necessary skills for the future, but they are not gender-responsive.²¹⁹ There is no express mention of gender representation, gender equality, WEE, or how women’s equal participation in the sector is guaranteed given their gendered roles in Kenya’s patriarchy. Kenya is yet to pass into law the **Local Content Bill, 2018**.²²⁰ The Bill provides for a general non-discrimination on the basis of gender clause in employment of locals and procurement of local goods and services.²²¹ It also provides for the development of indigenous skills across the extractive industry value chain.²²² This creates opportunities for women to participate in the sector.²²³

Just like the Act, **Kenya’s Model Production Sharing Contract (MPSC)** is not gender-sensitive save for the clause on local content that provides for fair gender practices to be employed by contractors.²²⁴ Given the myriad of challenges women face even with this provision, they may

²¹⁴ Section 110 (1), *Petroleum Act* (No.2 of 2019).

²¹⁵ Orago NW and Musangi PV, ‘Titanium mining benefit-sharing in Kwale County’, 31.

²¹⁶ Kairu F and Maneno M, ‘Land governance in Kenya: Where did the rain started beating us’, 152 *Adili*, 2015, 7.

²¹⁷ Sections 19 (1)(g) and 50, *Petroleum Act* (No.2 of 2019).

²¹⁸ Section 52, *Petroleum Act* (No.2 of 2019).

²¹⁹ Mayorga AE, ‘Extractive industries value chain: A comprehensive integrated approach to developing extractive industries’ Extractive Industries and Development Series No. 3 Africa Working Paper Series no. 125, The World Bank, 2009, 6 --<
<http://hdl.handle.net/10986/18400>> on 23 September 2021.

²²⁰ The *Local Content Bill* (2018) is “to provide for a framework to facilitate the local ownership, control and financing of activities connected with the exploitation of gas, oil and other petroleum resources”.

²²¹ Clause 4, *Local Content Bill* (2018).

²²² Clause 4, *Local Content Bill* (2018).

²²³ AfDB, ‘*Women’s economic empowerment in oil and gas industries in Africa*’, 41. Ghana and Nigeria have similar local content policies to Kenya. South Africa’s Broad-Based Black Economic Empowerment (BBBEE) law expressly introduced measures to ensure women benefit from oil drilling and exploration and that women-owned businesses are part of the supply chain.

²²⁴ Clause 29(3)(g)(ii) MPSC, *Schedule- Petroleum Act*, (No.2 of 2019).

not access these benefits. A lack of clear delineation on how men and women will take up training opportunities is likely to have a trickledown effect on uptake of employment opportunities in O&G.²²⁵

The MPSC provides that best petroleum industry practices be applied. This does not mean gender considerations will be factored in to the contract. For example, the Association of International Petroleum Negotiators (AIPN) guidance notes²²⁶ recommends labour relations as an optional provision for contracting parties seeking to capture certain principles of social justice and human rights. Nonetheless, if the Government is committed to realising gender equality and keen on advancing women's rights through the MPSC, Article 71 of the Constitution gives Parliament powers to ratify agreements and this can be used to urge parties to incorporate gender-sensitive provisions.²²⁷ This process calls for public participation and women can make their concerns known.²²⁸

The Act further provides that the Energy and Petroleum Regulatory Authority (EPRA) is to ensure the local community in a project area participates in the process of reviewing and awarding permits²²⁹ and that Parliament shall undertake public participation before ratifying or refusing to ratify the production sharing contract and the field development plan.²³⁰ The reality of this remains to be seen given there is no clear-cut rule on what constitutes public participation in the extractives industry.²³¹ In fact, courts have been called upon to determine effective public participation in the industry with the emerging theme being that while it depends on the facts of the case, it ought to be inclusive.²³² Cases have been dismissed for insufficient evidence demonstrating the infringement of the right.²³³ Moreover, public participation can only be effective in so far as the public has access to relevant information²³⁴ and given the existing gender information gap, women may be further ostracised if no guidelines are developed to ensure their participation as envisaged in these provisions. The role of county governments is also not

²²⁵ Okudo O, *The gender assessment study report for the oil and gas sector in Kenya*, Ministry of Petroleum and Mining, State Department for Petroleum, April 2021, 56-57.

²²⁶ AIPN, *Guidance notes to international model offshore drilling contract*, 2020.

²²⁷ Orago NW and Musangi PV, 'Titanium mining benefit-sharing in Kwale County', 31.

²²⁸ Article 118, *Constitution of Kenya* (2010).

²²⁹ Section 24 (8) and (9), *Petroleum Act* (No.2 of 2019).

²³⁰ Section 31 (3), *Petroleum Act* (No.2 of 2019); Article 71 *Constitution of Kenya* (2010).

²³¹ Awuor L, 'Emerging jurisprudence on public participation and the link to stakeholder engagement' The Extractive Sector Forum, Institute for Human Rights and Business, 20 April 2016.

²³² *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* (2014) eKLR.

²³³ *Pasred Youth Group/Forum & other petitioners as named in the schedule annexed v Attorney General & 5 others* (2015) eKLR.

²³⁴ *Friends of Lake Turkana Trust v Attorney General & 2 others* (2014) eKLR. The court stated that access to environmental information is a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.

prescribed in this regard yet they are the embodiment of the community.²³⁵ In the absence of county governments participation, this begs what of women.

The national government's share of profits derived from upstream petroleum operations is distributed between the national government, the county government in the project affected area (20%) and the local community (5%).²³⁶ The Act only provides the formula for sharing petroleum profits whereby 5 per cent of the national government's share is to be allocated to the community. There is no further criterion given for the distribution of these funds to different groups within the community especially women who heavily depend on land for their livelihood.²³⁷ The **Natural Resources (Benefit Sharing) Bill**²³⁸ suffers a similar weakness as it makes no clear mention of who within the community is entitled to receive benefits and this may result in misuse and misallocation.²³⁹ It provides for benefit sharing between the affected organization and the county government from which flows the benefits accruing to the community.²⁴⁰ Given gender relations and power dynamics in some communities, women are likely to miss out on the benefits because they are subsumed into the community in which access to and control of assets is by men. For women to successfully share in the benefits accruing from upstream petroleum activities, Kenya must adopt a comprehensive revenue sharing regime that takes into account financial, economic, social,²⁴¹ environmental, generational and stakeholder considerations.²⁴² This framework ought to benefit all stakeholders who are part of or affected by O&G activities. The Act and the bill are both silent as to whether any regulations are to be formulated to guide the distribution and use of funds allocated to the community.²⁴³

The Act can borrow from the Mining Act which provides for community development agreements (CDAs). These are not only key for transparency and accountability in the sector as a tool for benefit sharing but also ensure that projects contribute to the improvement of a community's

²³⁵ *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* (2014) eKLR.

²³⁶ Section 58, *Petroleum Act* (No.2 of 2019).

²³⁷ Sivi-Njonjo K, 'Case studies of revenue-sharing models: What Kenya can learn from other countries' in Ambani JO (ed) *Drilling past the resource curse? Essays on the governance of extractives in Kenya*, Strathmore University Press, 2018, 77. Also in Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 39.

²³⁸ Parliament, under Article 66 (2), *Constitution of Kenya* (2010), is obligated to enact legislation that ensures local communities and economies benefit from investments in property. *The Natural Resources (Benefit Sharing) Bill* (2014) is currently committed to the Standing committee on land, environment and natural resources.

²³⁹ Mwabu G, 'Kenya's oil governance regime', 363.

²⁴⁰ Part V, *The Natural Resources (Benefit Sharing) Bill* (2014).

²⁴¹ IFC, *The art and science of benefit sharing in the natural resource sector*, 15- Social and environmental considerations entail taking into account the positive and negative impacts and risks of a project on communities, including vulnerable groups.

²⁴² Sivi-Njonjo K, 'Case studies of revenue-sharing models', 82.

²⁴³ Okudo O, *The gender assessment study report for the oil and gas sector in Kenya*, Ministry of Petroleum and Mining, State Department for Petroleum, April 2021, 52-53.

ECOSOC needs.²⁴⁴ The law requires license holders to sign a CDA with the affected or impacted community²⁴⁵ and this presents an opportunity for women to participate in decision making processes as all affected persons must be included in consultations resulting in a CDA. Under the Mining (Community development Agreement) Regulations, 2017²⁴⁶ a community development committee is to be formed and the membership includes one elected representative of women²⁴⁷ and two elected youth representatives, one of whom must be a woman. Also, consultations must be conducted in a location accessible to all members and “may not necessarily require unanimity but shall be insufficient if held only with a few people or elders of the community”.²⁴⁸ These provisions are commendable as they ensure women’s voices are heard in consultative and decision-making processes.²⁴⁹ In addition, special programmes that benefit women, youth and persons with disabilities are among the issues that may be addressed in the CDA.²⁵⁰

The National Upstream Petroleum Advisory Committee established to advise the Cabinet Secretary on upstream draws membership from different departments and agencies of the government.²⁵¹ There is no mention however whether the constitution of the committee should take gender representation into consideration. It also fails to include representation from the State Department of Gender, Kenya National Commission on Human Rights or the National Gender and Equality Commission which would be pertinent in advising on issues of gender and human rights in O&G operations.

The Petroleum Act is gender-neutral despite the fact that the industry is at present male-dominated and that power relations determining access to and control of resources and power to make decisions touching on women, still apply in Kenya by dint of customary law.²⁵² This can further exacerbate inequalities in the sector, as it makes provisions from an egalitarian perspective making an assumption that both men and women will have equal access to benefits at the community-level.²⁵³ Although the Act is not explicitly gender sensitive in its provisions it does not outrightly prevent women from participating in upstream O&G. In the absence of

²⁴⁴ Gichuhi M and Wambua C ‘Gender’, 136-137.

²⁴⁵ Section 109 (i), The Mining Act, No.12 of 2016.

²⁴⁶ Legal notice No. 148 of 2017.

²⁴⁷ Menard A and Moses E, ‘Gender and extractive governance: Lessons from existing legal and policy frameworks’, World Resource Institute and Natural Resource Governance Institute, July 2021, 49 --< <https://resourcegovernance.org/analysis-tools/publications/gender-and-extractive-governance-lessons-existing-legal-and-policy>> -The language used in the regulations does not expressly state that the representative should be a woman.

²⁴⁸ Regulation 10(6), Mining (Community Development Agreement) Regulations, 2017.

²⁴⁹ Gichuhi M and Wambua C ‘Gender’, 137.

²⁵⁰ Regulation 8(2)(f), Mining (Community Development Agreement) Regulations, 2017.

²⁵¹ Section 12, *Petroleum Act* (No.2 of 2019).

²⁵² Kameri-Mbote P, ‘Constitutions as pathways to gender equality in plural legal contexts’ 40.

²⁵³ Kameri-Mbote P, ‘The land has its owners! Gender issues in land tenure under customary law’ UNDP-International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action, Nairobi, 31 October– 3 November, 2005, 6.

comprehensive provisions on women's right to equal opportunities under the Act, should need arise for balancing diverse interests for example needs of women vis-à-vis ethnic communities, the likelihood that ethnic considerations will be taken into account is greater.²⁵⁴

iii. Public Procurement and Asset Disposal Act, 2015

The government has used public procurement as an instrument of social policy²⁵⁵ in the PPDA by expressly providing for preferential treatment of women in the awarding of tenders. The Public Procurement and Asset Disposal Act gives effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and asset disposal by public entities. The Act promotes gender-responsive public procurement by providing opportunities for procuring entities to favour women owned businesses.²⁵⁶ It recognises women as being part of a disadvantaged group²⁵⁷ and they enjoy preferential treatment under the Act as a result of this prejudice. All State organs and public entities must reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.²⁵⁸ The Act also makes deliberate exemptions for women especially in light of the challenges they face in accessing credit facilities or assets. Women owned enterprises are also exempt from tender²⁵⁹ and performance securities.²⁶⁰

Preference shall be given to procurement of Kenyan goods and services subject to availability and realization of the applicable standards.²⁶¹ Women's financial interests are also protected through direct payments.²⁶² The Act provides that where the tender is awarded to a women owned enterprise; the procuring entity must ensure that all the money paid out is paid into an account where the mandatory signatory is a woman. This requirement that the procuring entity must ensure money is paid into an account where the mandatory signatory is a woman is laudable as it gives women control over their own finances and financial independence, allowing them to reinvest.

Other affirmative action funds like the Women Enterprise and Uwezo funds may also be beneficial to women looking to set up businesses directed at the upstream supply chain.

²⁵⁴ Kinyanjui S and Kameri-Mbote P, 'The constitutional promise', 28-29, 33.

²⁵⁵ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 35.

²⁵⁶ International Trade Center, *Making public procurement count for women*, 2020, 4.

²⁵⁷ Section 2, *Public Procurement and Asset Disposal Act* (No.33 of 2015).

²⁵⁸ Sections 53 (6) and 157(10), *Public Procurement and Asset Disposal Act* (No.33 of 2015).

²⁵⁹ Section 61 (5), *Public Procurement and Asset Disposal Act* (No.33 of 2015).

²⁶⁰ Section 142 (3), *Public Procurement and Asset Disposal Act* (No.33 of 2015).

²⁶¹ Section 155, *Public Procurement and Asset Disposal Act* (No.33 of 2015).

²⁶² International Trade Center, *Making public procurement count for women*, 4.

iv. Environmental Management and Co-Ordination Act, 1999

Under EMCA, exploration for the production of petroleum is listed as a high-risk project that requires an environmental impact assessment study report (EIA) be submitted to the National Environment and Management Authority (NEMA) before commencing or financing a project.²⁶³ The law requires NEMA to publish the EIA report.²⁶⁴

An environmental impact assessment is a legal requirement under EMCA in Kenya that must be done prior to the issuance of a license. While an economic and social analysis of the project is included in an EIA report,²⁶⁵ there is no indication in law of the need to include a gender assessment or adopt a gendered approach when carrying out an EIA. Business enterprises are not mandated to conduct impact assessments in which gender issues are considered. The Petroleum Act provides for an ESIA but similarly makes no express provisions on what must be captured and whether gender issues are part of the assessment. This is a gap in the law yet the EIA is an effective tool that can be used to ensure women's voices and concerns are heard, and negative impact of O&G projects on them identified.²⁶⁶ The State has an opportunity to include gender analysis as one of the terms and requirements that must be met in impact assessment and management²⁶⁷ for O&G projects.

The expectation is that projects in the O&G sector will enhance development and as such gender-neutral approaches in impact assessment may only maintain the status quo rather than identify potential positive measures that should be adopted to eliminate biases and promote gender equality in the sector.²⁶⁸ There ought to be a requirement that project proponents undertaking impact assessments take into account gender relations in affected communities so as to understand existing barriers limiting women's participation including gender stereotypes, cultural and traditional norms and practices.²⁶⁹ In the absence of this it is the State's duty to advise business enterprises on the importance of considering these factors to avoid their activities from

²⁶³ Section 58, *Environmental Management and Co-ordination Act* (No.8 of 1999).

²⁶⁴ Section 59, *Environmental Management and Co-ordination Act* (No.8 of 1999).

²⁶⁵ Regulation 18 (1)(o), *The Environmental (Impact Assessment and Audit) Regulations*, 2003, Legal Notice No.101.

²⁶⁶ Ngei S, 'Why women need to be part of environmental and social impact assessments' Transparency International Kenya -- <<https://tikenya.org/why-women-need-to-be-part-of-environmental-and-social-impact-assessments/>> on September 15, 2021.

²⁶⁷ Götzmann N & Bainton N 'Embedding gender-responsive approaches in impact assessment and management', 172.

²⁶⁸ Götzmann N & Bainton N 'Embedding gender-responsive approaches in impact assessment and management', 173.

²⁶⁹ Hill C, Namara C, Orcaya J, Bogrand A and Sellwood SA, 'Hidden in plain sight: gender analysis of the environmental and social impact assessment of the East African crude oil pipeline' 39 (3) *Impact Assessment and Project Appraisal*, 2021, 230. Also Ngei S, 'Why women need to be part of environmental and social impact assessments' Transparency International Kenya -- <<https://tikenya.org/why-women-need-to-be-part-of-environmental-and-social-impact-assessments/>> on September 15, 2021.

adversely impacting women's rights as well to ensure mitigation measures are gender responsive and promote agency of women.²⁷⁰

The failure of law to provide for gender responsive impact assessments also means lack of uniformity in the process of capturing data on project impacts on women during the process. It may then become difficult to identify and plan for potential areas of empowerment for women. Impact assessments should be an ongoing process through the lifetime of a project as the impact may change at different stages and in the event the effect is negative, mitigation measures or remedies should effectively address any violation.

v. Property laws

Given past disadvantages suffered by women with regards to access to and ownership of land, it is imperative that the Land Act recognises spouse(s) of any person with a registered land right as well as the actual occupant of the land and their spouse(s) as interested persons in case of compulsory acquisition.²⁷¹ In the case of community land, every member has the right to equal benefit and treatment in all dealings in community land.²⁷² Women can claim land ownership under the Marriage Act.²⁷³ Married women and married men have equal rights to acquire, administer, hold, control, use and dispose of property whether movable or immovable.²⁷⁴ Spouses jointly own matrimonial property according to their contribution towards acquisition.²⁷⁵ While this provision encompasses women's right to own land, the challenge remains in quantifying women's contribution as it is mostly non-monetary and this deters many from claiming their property rights.²⁷⁶ Many benefits to the community in O&G arise from land claims. The law is clear that women have as much right as men to own, access and use land yet despite this, majority of titles are still held by men.²⁷⁷ This is an issue of implementation of legal provisions²⁷⁸ that could result in women missing out on compensation and other land related benefits arising from the O&G sector. The law also fails to acknowledge women's 'non-remunerated reproductive labor'²⁷⁹

²⁷⁰ UN Guiding Principles, para. 3 (c) and (d).

²⁷¹ Section 107 (7), Land Act (No. 6 of 2012).

²⁷² Section 30, Community Land Act (No.27 of 2016).

²⁷³ Section 3(2), Marriage Act (No.4 of 2014).

²⁷⁴ Section 4, Matrimonial Property Act (No.49 of 2013).

²⁷⁵ Section 7, Matrimonial Property Act (No.49 of 2013); Section 93, Land Registration Act, 9No.3 of 2012).

²⁷⁶ Nnoko-Mewanu J and Abdi N, 'Securing women's property rights in Kenya' Human Rights Watch, 7 March, 2020 -- <<https://www.hrw.org/news/2020/03/07/securing-womens-property-rights-kenya>> on 18 September 2021.

²⁷⁷ AfDB, 'Women's economic empowerment in oil and gas industries in Africa', 16.

²⁷⁸ Cardno, *Gender assessment in the oil & gas sector in Kenya*, Draft final report, October 2017, 41. Also, Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 24, 29.

²⁷⁹ AfDB, 'Women's economic empowerment in oil and gas industries in Africa', 16.

which is highly dependent on land yet there may be an increase in the workload despite it losing value vis-à-vis men's paid work within the sector.²⁸⁰

Customary law is applicable to land dealings in Kenya in so far as it is not repugnant to justice and morality and inconsistent with the Constitution. Even then the continued application of customary systems tends not to apply principles of gender equality in access to land. Lack of application of existing laws by customary law, traditional practices, norms and power structures restricts women's access to land.²⁸¹ Customary practices limit women's participation in deliberations pertaining to land consequently affecting their decision making on their use of land, compensation or benefit sharing as it is not under their control.²⁸² By dint of section 108 of the Petroleum Act, the provisions of the Constitution and relevant land laws apply to upstream O&G. Therefore, if well implemented, the existing statutory provisions governing equal land rights should outlaw any customs and practices that discriminate against women in relation to land.

vi. National Policy Documents

While **Kenya's Vision 2030**,²⁸³ recognises the importance of gender equality and women's empowerment in realizing sustainable socio-economic development, it only includes gender as one of the subsectors under the social pillar of the country's development blueprint seemingly making an assumption that economic development is gender-neutral.²⁸⁴ It attributes the disadvantages suffered by women in accessing labour markets and productive resources to the underdevelopment of women's capabilities due to limited access to capital, education, training and restrictive cultural practices.²⁸⁵ The economic pillar under which oil, gas and minerals is discussed is silent on gender despite the existing inequalities in access to productive assets that must be addressed for women to equally benefit.²⁸⁶ The country is currently implementing the third medium term plan (MTP III) which has mainstreamed the UN SDGS²⁸⁷ as well as Africa's

²⁸⁰ Cardno, *Gender assessment in the oil & gas sector in Kenya*, Draft final report, October 2017, 16. See also, Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 2013.

²⁸¹ Kenya Land Alliance and FIDA Kenya, *Policy brief: Women, land and property rights and land reforms in Kenya*, 2006, 1. Swedish International Development Cooperation (Sida), 'Quick guide to what and how: Increasing women's access to land' Women's Economic Empowerment Series, October 2012; Kachingwe, C, *From under their feet: A think piece on the gender dimensions of land grabs in Africa*, ActionAid, April 2012.

²⁸² Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 52.

²⁸³ Government of the Republic of Kenya, *Kenya's Vision 2030*, 91.

²⁸⁴ Chan MK and Mbogoh A, *Strengthening women's voices in the context of agricultural investments: Lessons from Kenya*, International Institute for Environment and Development and Kenya Land Alliance, 2016, 32.

²⁸⁵ Okudo O, *The gender assessment study report for the oil and gas sector in Kenya*, Ministry of Petroleum and Mining, State Department for Petroleum, April 2021, 56-57.

²⁸⁶ Chan MK and Mbogoh A, *Strengthening women's voices in the context of agricultural investments: Lessons from Kenya*, International Institute for Environment and Development and Kenya Land Alliance, 2016, 32.

²⁸⁷ *UNA/RES/70/1 2015*, Goal 5- Gender equality and Goal 8- decent work and economic growth.

Agenda 2063.²⁸⁸ It seeks to implement affirmative action measures to empower women through the Women enterprise fund,²⁸⁹ Uwezo fund, National government affirmative action fund (NGAAF)²⁹⁰ to enhance women's access to financial facilities and Access to government procurement opportunities (AGPO) which is to realise access to the statutory 30 per cent reserved for women under procurement laws. Oil and gas stakeholders should take note of these funds²⁹¹ and build the capacity of women to take advantage of the same.

The UNGPs are the most internationally accepted standard governing business and human rights. There is currently no requirement for strict compliance to the principles but states and businesses operating in the O&G sector are increasingly taking up initiatives to ensure they carry out human rights due diligence to identify the human rights risks that may arise out of their activities and coming up with measures to mitigate these and to provide for remedial action in case of harm.²⁹² While Kenya's laws may not adopt a business and human rights language with regards to the petroleum sector, it is commendable that it has domesticated the UN Guiding Principles on Business and Human Rights in its **National Action Plan on Business and Human Rights (NAP)**.²⁹³ This provides a direct framework for a multi-stakeholder approach in the protection of human rights by the State and expectations of business enterprises operating in the country to prevent doing harm, respect and address rights.²⁹⁴ It identifies challenges that women face in decision making and participation in economic activities because of business operations such as cultural and historical barriers and low awareness on labour rights. The policy actions are formulated under the three UNGP pillars of protect, respect and remedy. The State's duty to protect entails formulating laws and policies that set out expectations that all businesses within Kenya's jurisdiction respect human rights. Introduction of the requirement for conducting human rights due diligence assessment, before approval of licences or permits to businesses is among the proposed policy actions. This is a positive move that if properly implemented can ensure a gender dynamic is incorporated to inform measures to be taken to address potential impact of the sector on women's rights.

²⁸⁸ African Union Commission, *Agenda 2063: The Africa we want*, 2015. This is Africa's blueprint and master plan for transforming Africa. Women and girls' empowerment is a priority area under Agenda 17.

²⁸⁹ Regulation 6(2)(e)- *The Public Finance Management (National Government Affirmative Action Fund) Regulations*, (2016).

²⁹⁰ Regulation 3- *The Public Finance Management (National Government Affirmative Action Fund) Regulations*, (2016).

²⁹¹ Okudo O, *The gender assessment study report for the oil and gas sector in Kenya*, Ministry of Petroleum and Mining, State Department for Petroleum, April 2021, 51.

²⁹² Park R, Metzger B and Foreman L, *Promoting gender diversity and inclusion in the oil, gas and mining extractive industries: A women's human rights report* The Advocates for Human Rights, 2019.

²⁹³ National action plan on business and human rights for the implementation of the United Nations guiding principles on business and human rights, June 2019. The NAP is set to be presented to Parliament for adoption into policy.

²⁹⁴ Igbayiloye O *et al*, 'Legal response to human rights challenges of multinational corporations in Nigeria', 119.

It has been argued that discrimination and exclusion of women can be perpetuated or reproduced by the adoption of gender-neutral approaches to impact assessment contrary to the goals set out in the UN SDGs and Kenya's Vision 2030 which seek to address issues of non-discrimination and promote substantive gender equality.²⁹⁵ Akin to this is the fact that under these instruments, it is the States duty to protect against human rights violations by third parties which include business enterprises²⁹⁶ and the responsibility of businesses to respect human rights by exercising due diligence²⁹⁷. As per the Gender Dimensions of the UNGPs, gender neutral approaches to due diligence are insufficient and gender equality is part and parcel of respecting human rights.²⁹⁸ While the government is expected to help O&G companies enhance their awareness of the culture and practices of the host country, the latter can contribute to empowerment and gender equality by having in place gender-sensitive policies that foster an inclusive local content culture as well as exercising due diligence in anticipating and managing gender-differentiated impacts of their activities.²⁹⁹

This **National Policy on Gender and Development**³⁰⁰ on its part, is geared towards the effective implementation of the provisions on equality and non-discrimination as envisaged in the Constitution and Kenya Vision 2030. Its goal is to “achieve gender equality by creating a just society where women, men, boys and girls have equal access to opportunities in the political, economic and social spheres of life.” The policy recognises the differences and inequalities between men and women and considers this in crafting approaches to realise its objectives. Its key priority actions include strengthening legal frameworks for gender equality and women's empowerment, implementing measures to overcome barriers faced by women in accessing and having control over economic opportunities and resources, eliminating discrimination in access to employment, labour and training, and ensuring meaningful participation by women in decision-making processes. The policy *inter alia* recognises the need to incorporate women in non-traditional trades like mining, recognise unpaid care and the burden it imposes on women, need to have women participate in and benefit from investments in various natural resources development initiatives, among others.³⁰¹ The Policy provides a framework for gender

²⁹⁵ Götzmann N & Bainton N 'Embedding gender-responsive approaches in impact assessment and management', 172.

²⁹⁶ *UN Guiding Principles*, para. 3.4.6.

²⁹⁷ *UN Guiding Principles*, para. 17.

²⁹⁸ *Gender Dimensions of the UNGPs*, para. 21.

²⁹⁹ IPIECA *et al*, *Mapping the oil and gas industry to the Sustainable Development Goals*, 27.

³⁰⁰ Sessional Paper No.02 of 2019.

³⁰¹ National policy on gender and development, October 2019, (Sessional Paper No.02 of 2019), 28-38.

mainstreaming and institutionalisation of gender equality in the O&G sector as it applies to government ministries, departments and agencies and to the private sector.³⁰²

3.1.2 International and regional instruments

Regional and international instruments which advance women's rights and emphasise the need for the State to take appropriate measures to eliminate laws and practices that hinder equality and non-discrimination against women and which Kenya has ratified form part of Kenyan law.³⁰³

Gender-specific instruments Kenya has ratified like the Convention on the elimination of all forms of discrimination against women (CEDAW)³⁰⁴ and the Protocol to the African charter on human and people's rights on the rights of women in Africa (Maputo Protocol)³⁰⁵ call on State parties to take appropriate measures including legislation to eliminate discrimination on the basis of sex and ensure full development and advancement of women to guarantee the exercise and enjoyment of their human rights.³⁰⁶ The inclusion of affirmative action provisions in the country's national laws is in compliance with the State's international obligations under these instruments.³⁰⁷ This demonstrates the need for more than formal equality if women are to enjoy equal opportunities as men.³⁰⁸

Article 4 (1) of CEDAW which Kenya has ratified reads:

Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when objective of equality of opportunity and treatment have been achieved.

Treaty bodies like the Committee on CEDAW and the Human Rights Council further elaborate upon these obligations in general comments and recommendations. General resolution 5 of the Committee on CEDAW recommends that "States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's

³⁰² National policy on gender and development, October 2019, (Sessional Paper No.02 of 2019), 13.

³⁰³ Article 2 (5) and (6), *Constitution of Kenya* (2010).

³⁰⁴ ICESCR, General Assembly resolution 2200A (XXI), 16 December 1966.

³⁰⁵ *Protocol to the African charter on human and people's rights on the rights of women in Africa*, 11 July 2003, 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique.

³⁰⁶ Article 2(b), *CEDAW*; Article II (1)(b), *Maputo Protocol*.

³⁰⁷ Article 2(a), *CEDAW*; Article II (1)(a), *Maputo Protocol*.

³⁰⁸ Kinyanjui S and Kameri-Mbote P, 'The constitutional promise', 23.

integration into education, the economy, politics and employment”.³⁰⁹ This in no way connotes discrimination against men.³¹⁰

Under the Maputo Protocol, States are to adopt and enforce legislative and other measures “to guarantee women equal opportunities in work, career advancement and other economic opportunities”³¹¹as well as their right to sustainable development.³¹²

CEDAW also recognises the plight of rural women in accessing equal benefits to men and the roles they play towards the economic wellbeing of their families including, unpaid work.³¹³ Kenya is also among the countries that adopted the Beijing Declaration and the Platform for Action (BPFA)³¹⁴, a global policy document on gender equality whose agenda is women’s empowerment. It calls on governments and the international community to take strategic measures *inter alia* to end inequality in economic structures and policies, in all forms of productive activities and in access to resources.³¹⁵

The core human rights instruments International Covenant on economic, social and cultural rights (ICESCR)³¹⁶ and African Charter on Human and Peoples’ Rights (ACHPR)³¹⁷ also place an obligation on State Parties to ensure equal enjoyment of rights by both men and women. The ICESCR recognises the right to self-determination which gives women the ability to freely pursue their economic development³¹⁸ and provides that in no case may people be deprived of their means of subsistence.³¹⁹

ACHPR calls on State Parties 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”.³²⁰ This is a necessary safeguard for both men and even more for women.

Kenya has a “legal obligation to respect, protect, promote and fulfil the right to non-discrimination for women and to ensure the development and advancement of women in order to

³⁰⁹ CEDAW General recommendation No. 5: Temporary special measures, 1988, UN Doc A/43/38.

³¹⁰ CEDAW General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), 2004, 18.

³¹¹ Article XIII, *Maputo protocol*.

³¹² Article XIX, *Maputo protocol*.

³¹³ Article 14, *CEDAW*.

³¹⁴ Beijing Declaration and Platform for Action, The Fourth World Conference on Women, adopted at the 16th plenary meeting, 15 September 1995.

³¹⁵ BPFA, para 44.

³¹⁶ *CEDAW*, General Assembly resolution 34/180, 18 December 1979.

³¹⁷ *ACHPR*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

³¹⁸ Article 1.1, *ICESCR*.

³¹⁹ Article 1.2, *ICESCR*.

³²⁰ Article 21.5, *ACHPR*.

improve their position to one of de jure as well as de facto equality with men”.³²¹ International and regional instruments lay a good foundation for the advancement of women’s right to equality in all spheres of life. However, it has been observed that their implementation is dependent on a state’s goodwill. Fortunately, the Constitution 2010 is transformative and progressive on the right to equal access to opportunities by women and hopefully unlike in the past the State will be more compliant with its obligations.³²²

3.1.3 Soft law instruments

The Petroleum Act provides that upstream petroleum operations shall be conducted in accordance with best petroleum industry practices. This provides an avenue for reliance on soft law instruments in the O&G sector. The sector is ever evolving and new approaches being adopted improving what would be deemed best practice at any given time. Soft law allows States and companies to take advantage of best practices that may not be captured in hard or domestic laws. The biggest challenge is that most soft law instruments are either quasi-judicial or voluntary in nature and merely guide states and business enterprises on industry standards.³²³ In fact, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises reported that many businesses handle gender issues as a ‘tick box’ exercise without addressing the structural inequality.³²⁴ Examples of soft law instruments are industry model forms, other host government instruments, company policies and codes of conduct, international and regional development partner standards like those of the UN, AfDB, IFC and the World Bank.

The United Nations Global Compact which was operationalized in 2000, is the world’s largest voluntary CSR initiative.³²⁵ The UN Global Compact urges businesses to adopt the Women’s Empowerment Principles (Equality Means Business) which emphasise the need for corporates to empower women. The Natural Resource Charter recommends that governments and international community ensure extractive industry projects comply with internationally recognised human rights standards paying special attention to the gendered effects.³²⁶ Development organisation standards like the IFC Performance Standards³²⁷ and World Bank

³²¹ CEDAW General recommendation No. 25, 4.

³²² See Kinyanjui S and Kameri-Mbote P, ‘The constitutional promise’, 25.

³²³ Ruggie JG, ‘Business and human rights’, 819.

³²⁴ *Gender Dimensions of the UNGPs*, para. 3.

³²⁵ The Global Compact Network Kenya (GCNK) is the UN Global Compact’s local network in Kenya. The country currently has 243 participants. -- <https://www.unglobalcompact.org/engage-locally/africa/kenya> on 11 June 2021.

³²⁶ Precept 12, Natural Resource Governance Institute, *Natural resource charter* (2nd ed), 2014, 38-39.

³²⁷ IFC, *IFC Performance standards on environmental and social sustainability*, January 2012.

Environmental and Social Standards³²⁸ are to be applied by clients to manage environmental and social risks impacts. They also require clients to identify disadvantaged groups likely to be disproportionately affected by projects and advance measures to mitigate the impact.

Various frameworks by international associations within the O&G sector like the Organisation for Economic Co-Operation and Development (OECD)³²⁹, International Petroleum Industry Environmental Conservation Association (IPIECA), World Petroleum Council also acknowledge the existing gender inequality issues within the sector and highlight the need to understand the context in which O&G projects are taking place, identifying and prioritizing women likely to be impacted and creating an environment free from discrimination with equal opportunities for all that will effectively include women.

Oil companies in their governing policy documents commit to various international human rights standards like UN SDGS, UN Guiding Principles, ILO core labour principles, OECD guidelines and IFC performance standards. Some policies like bp business and human rights policy³³⁰ and TOTAL human rights guide³³¹ recognise that the rights of individuals belonging to vulnerable groups like women, are likely to be adversely impacted by their operations. While Chevron's human rights policy³³² and Shell's approach to human rights³³³ have equality and non-discrimination provisions as well processes for engagement with the community within which they operate, they do not recognise the differentiated impact of its activities on the local community. These policies also require that suppliers to oil companies respect human rights in their work for the companies.

3.2 Conclusion

The Constitution is clear that oil is a national resource but this does not change the local communities' perception that they are entitled to benefits from O&G operations and that employment opportunities are reserved for them. Women as part of these communities are no exception and they too lay claim to what they deem rightfully theirs. Hence the need for a sound

³²⁸ International Bank for Reconstruction and Development/The World Bank, *The World Bank environmental and social framework*, 2017.

³²⁹ OECD is cognisant of the fact that women are a vulnerable group and their rights may be at greater risk in particular industries and more attention must therefore be paid to them. Enterprises should also promote equal opportunities for women and men with respect to employment and occupation preventing discrimination on grounds of marriage, pregnancy or parenthood- *OECD Guidelines for multinational enterprises*, OECD Publishing, 2011, para.40 and para. 54.

³³⁰ bp, 'Business and human rights policy' May 2020, 2- "We respect the rights of individuals belonging to groups or populations which may be particularly vulnerable to adverse impacts, including ...women..."

³³¹ TOTAL, 'Human rights guide' 2015, 28- with regards to the right to an adequate standard of living directs that "Particular attention should be paid to identifying and including disenfranchised individuals in the community, such as women..."

³³² Chevron, *Business conduct and ethics code*, 2020.

³³³ Shell, *Shell's approach to Human Rights*, 3. See also Shell, *General business principles*, 2014.

governing framework that incorporates the social and economic impact of the sector on local communities.

Upstream O&G laws, policies and programs are underlying factors that determine how women interact with the sector. Domestic laws and international standards in most resource endowed countries do not sufficiently adopt a gender responsive approach. This has led to the continued failure to address the violation of women's right to equal economic opportunities in the O&G sector making it difficult for them to empower themselves.³³⁴

Kenya has a vantage point when it comes to the laws, policies and regulations governing O&G. Kenya's upstream petroleum sector is still developing and it can therefore learn from the experiences of other resource rich countries with similar social, cultural and economic practices and ensure it enacts sound laws and policies that allow women to access and enjoy benefits of the sector while pre-empting and preventing or mitigating the likely risks to them.

The existing legal and regulatory framework in Kenya is both a proponent and inhibitor of WEE in Kenya. Sector specific laws, policies and regulations governing trade and investment in Kenya tend to be gender-neutral providing for general gender equality and non-discrimination clauses if at all. They tend to exacerbate existing discrimination against women because they fail to take into account differentiated impacts on men and women.³³⁵ A few statutes and policies like the PPDA, Kenya Vision 2030, National Policy on Gender and Development and NAP are consistent with Article 27(6) and encompass affirmative action measures towards redressing past injustices on women. The Petroleum Act and EMCA leave a lot to be inferred in the implementation of local economic development provisions. It could be argued that they are in fact gender-blind despite the gendered impact of upstream O&G on women and men as evidenced in this study. This is likely to further disempower women as their role and contribution to development remains undervalued or overlooked. While gender mainstreaming is lauded towards the promotion of equal opportunities for women and men, formal equality on its own as enshrined in most domestic laws cannot currently ensure gender equality in the sector. Women specific programmes must be included for gender mainstreaming to be effective. For women to benefit, the legal and regulatory framework should create an enabling environment for economic empowerment and gender equality, in this case targeting women.

³³⁴ Seck SL and Simons P, 'Resource extraction and the human rights of women and girls', iv.

³³⁵ *Gender Dimensions of the UNGPs*, para. 17.

CHAPTER FOUR

IMPACT OF UPSTREAM PETROLEUM SECTOR ON WOMEN'S ECONOMIC RIGHTS

4.0 Introduction

In most African cultures, gender relations play a role in determining the access and distribution of resources especially land, assigning of authority and agency and decision-making processes between men and women.³³⁶ This affects their lived experiences. Though most companies do not disaggregate data collected during social impact assessments in terms of gender, studies undertaken by development agencies and academic scholars have revealed that women and men are impacted differently by the extractive industry development projects. It is also worth noting that women are not a homogenous group and they are impacted differently by the industry but gender discrimination tends to be the most central, in addition to all other forms of discrimination they encounter.³³⁷

To inform any action or intervention aimed at promoting WEE in upstream oil and gas, there must first be an understanding of the impact of upstream petroleum operations on women.³³⁸ While the positive outcomes are lauded, the adverse impacts of the sector on women pose a threat to WEE and are likely to widen the gender gap.

This chapter highlights current and potential impact of the sector on WEE, focusing on women from project affected communities, majority of whom are in rural set ups, low-income earners and limited from taking up economic opportunities owing to low levels of skills. It will focus on four issues that are likely to be affected and which will impact WEE in Kenya if proper due diligence is not done that is, land tenure, local content, consultation and participation and lastly social capital. There are some similarities in the impact of the industry on local women in resource-rich developing countries across the globe. Given that Kenya's upstream petroleum sector is still in the incipient stage, experiences are drawn from countries with developed sectors

³³⁶ Ndungo C *et al*, 'Gender and natural resource management', 212. Götzmann N *et al*, *Towards gender responsive implementation of extractive industries projects*, 8.

³³⁷ Seck SL and Simons P, 'Resource extraction and the human rights of women and girls' 31 *Canadian Journal of Women and the Law*, 2019, iii. See also Bradshaw S, Linneker L & Overton L, 'Extractive industries as sites of supernormal profits and supernormal patriarchy?' 446-447.

³³⁸ Abebe JO, 'Broadening options for promoting women's participation in the extractive sector in Africa', 17. Franco IB, Meruane PS and Derbyshire E, 'SDG 5 gender equality: Not just a women's issue: Sustainable leadership in male dominated industries- the case of the extractive industry' in Franco IB, Chatterji T, Derbyshire E and Tracey J (eds) *Actioning the global goals for local impact: towards sustainability science, policy, education and practice*, Springer, Singapore, 2019, 69.

like Nigeria, and emerging sectors like Ghana and Uganda. Reference will also be made to the broader extractives industry as the impact on women is likely to be similar given the pre-existing factors.

4.1 Impact of upstream oil and gas on women's right to access economic opportunities

Studies show that women in areas where development projects are implemented, tend to be more vulnerable than men. Their chances of accessing the accruing benefits are much fewer yet they bear the brunt of the risks. This does not mean that they do not benefit from socio-economic development as a result of oil and gas projects, as they obviously do as part of the larger community, but that they are more likely to shoulder certain burdens by virtue of gender differences and existing barriers.

There are existing socio-economic factors in Kenya that are barriers to WEE. While the local women are pregnant with expectation that their livelihoods will be improved and poverty levels eradicated, if these factors are not taken into consideration, Kenya's upstream petroleum sector may not have much of a positive impact on WEE. A baseline study carried out in Uganda's Albertine region found that men stood to benefit more from oil development because of the existing gender relations whereby men were dominant in the economic sphere.³³⁹

4.1.1 Land Tenure

It has been said that "Land represents power and empowerment for those who own and control it, including the power to make decisions, economic power, political power and sexual bargaining power".³⁴⁰ Land in Kenya is a sensitive issue with a lot of politics attached to it. There are three land ownership regimes i.e., public land, private land and community land. Of key concern to the project affected communities would be private and community owned land. Kenyan land laws permit women to own and transact in land in their own name. They can even inherit land from their deceased male relatives. Although the laws are quite progressive, clearly providing for ownership of land by both men and women, in practice patriarchy trumps law as some communities continue to stifle women's rights to own property and particularly access to,

³³⁹ International Alert, *Governance and livelihoods in Uganda's oil-rich Albertine Graben*, 2012.

³⁴⁰ ActionAid, *From marginalisation to empowerment: The potential of land rights to contribute to gender equality -observations from Guatemala, India and Sierra Leone*, February 2013 - https://actionaid.org/sites/default/files/from_marginalisation_to_empwermnt_final_research_report.pdf on April, 15, 2021.

ownership and control of land, arguing culture and tradition.³⁴¹ This has seen majority of titles to private land being issued in a man's name despite there being women entitled to or relying on the land. As regards community land, men remain at the forefront when it comes to dealing with issues. This poses a challenge especially to female headed households and widows.

Owing to the nature of exploration and production activities, there is bound to be increased pressure on natural resources from land to water and a number of socio-economic factors that influence WEE are likely to be impacted including land acquisition and compensation, loss of livelihood and economic benefits, food insecurity and increased workload.³⁴²

i. Land acquisition, lease and use

Land on which the resources are sited or on which infrastructure needs to be developed, must be accessed by oil companies with the help of the Government either through acquisition, long term leases or permission to use. This often results in the voluntary or in most cases involuntary resettlement of communities on the promise of compensation. Voluntary resettlement occurs where the affected people agree with the acquirer to vacate the land willingly upon compensation. Involuntary resettlement which includes both physical and economic displacement, takes place where the locals do not have power to refuse resettlement especially in large scale projects like O&G deemed to be of national interest and in which the government has an interest.³⁴³ It should be noted that in Kenya the surface rights may be held by the State, community or individual but all mineral rights vest in the national government in trust for the people of Kenya.³⁴⁴ Any compensation to communities or individuals is for surface rights and not mineral rights. Even then, compensation is gender blind as companies tend to compensate the land owners and not necessarily the person using and occupying land.³⁴⁵ The patriarchal nature of many Sub-Saharan communities, means men and not women are the title holders. Women especially in the rural areas have access to land through marriage or relationships with other male family members.³⁴⁶ Women may therefore, lack power to assert their right to compensation.

³⁴¹ Nnoko-Mewanu J, 'Securing women's property rights in Kenya' Human Rights Watch, 7 March 2020 -- <<https://www.hrw.org/news/2020/03/07/securing-womens-property-rights-kenya>> on 18 September 2021.

³⁴² Kariuki F, 'Land rights issues in the extractives sector in Kenya' Ambani JO (ed) *Drilling past the resource curse? Essays on the governance of extractives in Kenya*, Strathmore University Press, 2018, 144.

³⁴³ Vanclay F, 'Project-induced displacement and resettlement: from impoverishment risks to an opportunity for development?' 35 (1) *Impact Assessment and Project Appraisal*, 2017, 7.

³⁴⁴ Article 62(3), *Constitution of Kenya* (2010).

³⁴⁵ Abebe JO, 'Broadening options for promoting women's participation in the extractive sector in Africa', 7.

³⁴⁶ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 36; ActionAid Kenya, GROOTS Kenya and LANDac 'Securing women land rights in Africa- Kenya' Working Paper 1: Securing Women's Land Rights in Africa, July 2018, 1.

There are exceptional cases like in Buliisa, Uganda where women drew economic benefits as Tullow Oil allocated compensation to them as land users despite the outcry that the amount was not sufficient as compensation was for the crops on the land and not for the land itself or the damage thereto. This positive move, left men feeling emasculated and owing to cultural practices, the women did not get to enjoy the benefits and had to hand over control of the compensation to men. There were also increased reports of domestic violence where men felt the women were in over their heads.³⁴⁷

ii. Loss of livelihood

Exploration activities are likely to restrict a community's access to some natural resources. Women in most parts of Sub-Saharan Africa rely on land for their subsistence. A report by the International Land Coalition found that agriculture accounts for approximately 21 per cent of Africa's GDP with women contributing up to 80 per cent of the labour force.³⁴⁸ They engage in informal work for their livelihood. They offer their services on farms, sell cultivated produce, collect biofuel for domestic consumption and so on. Women play an important role in ensuring there is food security. In Ogoniland Nigeria, women primarily engage in farming activities and contribute to the agricultural products in the State. The activities of oil companies in the region have led to severe environmental degradation adversely affecting their rights to productive activities and to food. Women now have to exert more time and effort to produce food than they did prior to O&G activities in the area.³⁴⁹

Potential environmental impact resulting from oil spills or discharge of effluent waste in water bodies can also have a negative impact on women who are fishmongers as fish population is likely to decline. The impact may be worse where O&G operations are offshore. In Ghana's Cape Three Points region, the fishermen in Sekondi were warned against fishing in the area of the offshore oil rig which happens to be a rich fishing ground. This would not only impact the women who are fishmongers but also those who are dependent on the fishermen's income.³⁵⁰

The loss of land and access to natural resources to oil development also means loss of livelihood for many women. This has a negative effect on WEE especially where no alternative land with

³⁴⁷ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector*, 2014, 20, 22.

³⁴⁸ International Land Coalition, *Gendered impacts of commercial pressures on land*, 2011, 4-5.

³⁴⁹ Nsirim-Worlu HG, 'Gender analysis of oil and gas governance in Nigeria: Nigeria natural resources charter precepts V and VI' SSRN Electronic Journal, 2018, 7, 10.

³⁵⁰ Boohene R and Peprah JA, 'Women, livelihood and oil and gas discovery in Ghana: An exploratory study of Cape Three Points and surrounding communities' 4 *Journal of Sustainable Development*, 2011, 186.

similar properties or source of livelihood is offered to them as most have a single source of income. In Nigeria, more women are looking for alternative sources of livelihood due to the challenges they have to endure relying on land during O&G activities. In Uganda's Albertine oil-rich region, compensation was paid for the crops that were affected but not for the long-term repercussions, exploration would have on the land and on livelihoods.³⁵¹ The World Bank suggests that 'women's livelihood strategies' be captured in baseline studies for resettlement action plans, to allow women make informed decisions.³⁵² The loss of livelihood and economic opportunities has a negative impact on WEE because it also increases the dependency of women on men.

iii. Increased workload

As men take on the paid jobs in the sector, women are left with the burden of assuming the men's roles at home. This serves to further widen the gender gap as the women are forced to take on more unpaid work or low-income generating jobs and casual work, while the men take on better paying formal jobs. An increased workload also increases time poverty that women suffer because they do not have time to invest in acquiring other beneficial skills and knowledge that they can leverage on to get jobs in the sector.

There is also likely to be loss of environmental capital. Pollution is a guaranteed outcome of upstream operations; it only differs in magnitude. There is bound to be alteration of soil properties especially following decommissioning leaving what was once productive land barren. Water pollution is also a probable result and this can further contribute to time poverty already experienced by women as they may be forced to travel farther just to fetch clean water for their domestic use.

4.1.2 Local content

Local content may in this case be defined as the added value brought to a host country from petroleum related activities. It includes, "employing people from the local area; providing technical vocational education and training to the local workforce; sourcing from and otherwise supporting the capacity of local businesses and supply chains; and supporting knowledge transfer to local workforces and supply chains".³⁵³ Local can either be in reference to the local community

³⁵¹ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector, 2014, 22.*

³⁵² Ward B and Strongman J, 'Gender-sensitive approaches for the extractive industry in Peru: Improving the Impact on women in poverty and their families' World Bank, Extractive Industries for Development Series Number 24, 2011.

³⁵³ Götzmann N *et al*, *Towards gender responsive implementation of extractive industries projects*, 38.

in proximity to the extraction and production site, as is the case in this research, or local meaning the whole country.

Some of the factors likely to affect WEE in terms of local content are entrepreneurship, waged employment, unpaid labour, education and training. Research however shows that women world over, have access to few opportunities in the petroleum industry.

i. Entrepreneurship

A positive outcome of the oil and gas sector is increased income to invest and this provides an opportunity for locals to set up new businesses and strengthen existing ones.³⁵⁴ There is likely to be a market boom meaning increased demand for goods and services in project areas as well as escalation of prices. Both women and men can benefit in one form or another as good business acumen, and not necessarily technical skills, are required for businesses outside the industry. In Turkana, there is a great opportunity to empower women to set up businesses as some local men are of the view that starting businesses is not part of their tradition.³⁵⁵ Women traders in Sekondi-Takoradi Township in Ghana's oil rich Three Cape region, are seeing greater opportunities as the influx of workers in the area has seen increased demand for goods and services resulting in an escalation in prices.³⁵⁶

The impediment women are likely to suffer is the lack of access to credit facilities or start-up capital.³⁵⁷ Women do not have control over assets and hence no collateral to secure funds from financial institutions to set up businesses. The regulations put in place by financial institutions may also be unfavourable to women because of the pedestal on which a male figure is placed in a woman's life. In Ghana for example, the managing director of Zenon Mining faced challenges on two occasions trying to access a loan from financial institutions. The first time her application was declined because the bank manager asked that she come accompanied by her husband yet she did not have one at the time. The second time she successfully made an application but the bank manager chose to contact her husband rather than her, to inform him that his application had been successful.³⁵⁸

³⁵⁴ Lind J, 'Governing black gold: lessons from oil finds in Turkana, Kenya' 3.

³⁵⁵ Tullow Kenya B.V, *Ustawi: Partnering to drive change*, Issue 2, 2019, 31.

³⁵⁶ Boohene R and Peprah JA, 'Women, livelihood and oil and gas discovery in Ghana', 190.

³⁵⁷ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 28.

³⁵⁸ Abebe JO, 'Broadening options for promoting women's participation in the extractive sector in Africa', 9.

However, more women are now organizing themselves into groups to increase their chances of securing capital to start businesses.³⁵⁹ This gives them an opportunity to take up economic opportunities in the sector like supplier contracts, that they otherwise cannot invest in as individuals. These groups are also supported by companies and make it easier for the Government to also advance support. A group of women in Turkana were able to organise themselves and come together to benefit from a vehicle ownership scheme organised by Tullow Oil, the main upstream oil company in Kenya, in partnership with Toyota Kenya to enable them be contracted to provide transportation services to Tullow.³⁶⁰ In Papua New Guinea, Oil Search has successfully partnered with women from local communities to support the formation of women's agricultural and fishing co-operatives as an additional sustainable livelihood and means of financial freedom. One of the co-operatives supplies produce to the locally-owned catering company that services the oil company. It also offers training in agriculture.³⁶¹

A commendable move by Tullow Oil in Turkana is publicising tenders and contracting opportunities through its communication offices and placing of advertisements in local and national media. This is aimed at fostering transparency yet even then local communities are of the view only a select few and local politicians, benefit.³⁶² Challenges may also arise where other members of society like politicians and the elite are the drivers behind women-owned businesses as this means the local women are no longer the real beneficial owners. This has been Tullow Oil's experience in Turkana.³⁶³

ii. Waged employment

Creation of employment opportunities is perhaps one of the main expectations that local communities have yet the sector is more capital than it is labour intensive. This means the employment opportunities will be few and mostly for skilled labourers. Petroleum projects also mean there will be development of infrastructure like pipelines and transport networks, all of which create a labour market for both skilled and unskilled workers. Historically, multinational corporations operating in countries with now developed extractive industries preferred to have male employees and there were laws enforced to prevent their spouses from living with them at extraction sites to avoid incurring extra costs paying women. This resulted in the gender

³⁵⁹ Lind J, 'Governing black gold: lessons from oil finds in Turkana, Kenya', 4-5.

³⁶⁰ Osoro D and Kinyua I, 'Women in the mining value chain: A landscape review of barriers to women's economic empowerment' The Association of Women in Energy and Extractives in Kenya (AWEiK), November 2019.

³⁶¹ IPIECA et al, *Mapping the oil and gas industry to the Sustainable Development Goals*, 30.

³⁶² Cordaid, *Oil exploration in Kenya: Success requires consultation*, August 2015, 23.

³⁶³ Osoro D and Kinyua I, 'Women in the mining value chain', 22.

stereotype that is still prevalent in the industry with the petroleum sector being viewed as a 'boys' club'.³⁶⁴

Jobs in the sector are gendered with men taking up the technical roles with much higher pay, while women take on more informal jobs providing goods and services to the companies and as workers performing household chores. These roles attract a much lesser pay. A representative of Total E&P Uganda confirmed that contractors preferred to employ men alleging they are stronger and work faster, adding that culture also played a role in keeping women away from the available jobs.³⁶⁵ In androcentric communities like those in Kenya, men continue to take up most of the emerging opportunities for waged employment. This is also because they are the ones who often possess the requisite skills. In Uganda it was felt that women were better placed to benefit from indirect employment rather than competing for the few opportunities through direct employment.³⁶⁶ In Turkana, an assessment by Cordaid reported that there was a perception that women tend to be denied employment opportunities by oil companies on the basis of gender.³⁶⁷ Even then there are cases of change in traditional gendered roles with women being beneficiaries of employment opportunities and taking up jobs previously perceived as men's work such as truck drivers, community liaison officer and security guards but not as machine operators in oil fields.³⁶⁸

Furthermore, the few skilled women who are fortunate enough to be formally employed tend to receive unequal pay for same work done by their male counterparts and their job titles remain inferior. This disparity in income undermines women's bargaining power.³⁶⁹ Women have in some cases exchanged sexual favours with senior management for employment in oil companies.³⁷⁰ In other instances, they may also have to part with money for jobs.

Owing to traditional practices and cultures which have seen men control economic resources, women are not at the forefront in taking up jobs. Even skilled women tend to shy away from taking part in upstream operations as they are castigated for devoting less time to their domestic roles and in some cases taking on waged employment leaves them vulnerable to domestic abuse from

³⁶⁴ Abebe JO, 'Broadening options for promoting women's participation in the extractive sector in Africa', 5.

³⁶⁵ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector*, 2014, 24.

³⁶⁶ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector*, 2014, 25.

³⁶⁷ Cordaid, *Oil exploration in Kenya: Success requires consultation*, August 2015, 27.

³⁶⁸ Shikuku CK *et al*, 'Gender role transformation in the oil mining industry in Kenya', 102.

³⁶⁹ Götzmann N *et al*, *Towards gender responsive implementation of extractive industries projects*, 22. Daley E, 'Gendered impacts of commercial pressures on land' International Land Coalition (ILC) Report, 2011, 51. AfDB, *Women's economic empowerment in oil and gas industries in Africa*, 7.

³⁷⁰ Shikuku CK *et al*, 'Gender role transformation in the oil mining industry in Kenya', 102.

their partners. Women who dare to venture into other jobs ‘preserved’ for men, as would possibly be the case where an oil project is taking place, are viewed as defiant having abandoned their main role in society. A resettlement action plan and EISA carried out for the Mozambique Liquefied Natural Gas (MozLNG) Project in the Afungi Peninsula revealed that men controlled the economic activity (fishing) in the area and that women who took part were not ‘carrying out a serious activity’ as a woman’s primary role is caregiving.³⁷¹ This was the opinion of both men and women indicative of women’s inability to act with autonomy where economic activities are concerned. The same is the case in communities around Ghana’s oil-rich Three Points region where men have more access to the economic resources and women rarely go to sea to fish despite it not being taboo.³⁷²

The governance structures in a country also influence how women engage with the sector. In Peru, local leaders challenge the employment of women alleging safety of women will be comprised hence men are better suited for the jobs.³⁷³ In South Africa on the other hand there is a legal quota (10 per cent) in place that has seen more women being employed in extractives.

iii. Education and training

Women and girls have always been disadvantaged when it comes to enjoyment of the right to education. In African communities the girl child’s right to education was, and in some communities still is, secondary to that of boys. Those fortunate to attend school oft drop out along the way to get married or have children. This has been the practice for years but the Kenyan government’s efforts to ensure every child gets a basic education brings hope for the future and more girls are now completing secondary education and enrolling in institutions of higher learning. At times, the petroleum sector brings with it some positive social development including construction of schools and these may be of benefit to women and girls who have access to them. It is worth noting that in Ogoniland, the number of women and girls enrolled in school has not increased since oil companies began operations in the area and this is despite them moving out of their land and losing their livelihood thus having more time to attend school.³⁷⁴ In Kenya, Tullow Oil has a bursary program supporting Turkana locals to pursue higher learning in universities both locally and abroad.³⁷⁵

³⁷¹ Götzmann N *et al*, *Towards gender responsive implementation of extractive industries projects*, 29-30.

³⁷² Boohene R and Peprah JA, ‘Women, livelihood and oil and gas discovery in Ghana’, 188.

³⁷³ Ward B and Strongman J, ‘Gender-sensitive approaches for the extractive industry in Peru’, 55.

³⁷⁴ Nsirim-Worlu H.G, ‘Gender analysis of oil and gas governance in Nigeria’, 8.

³⁷⁵ Shikuku CK *et al*, ‘Gender role transformation in the oil mining industry in Kenya’, 101; Lind J, ‘Governing black gold: lessons from oil finds in Turkana, Kenya’ 6.

Jobs in the upstream petroleum sector are mostly technical and require specialised skills and training. In Kenya, not much has been invested in women to develop skill sets that may be beneficial to them to enable them work in the upstream sector. With regards to skilled and technical jobs, although there is a slight increase in the number of women and girls studying Science, Mathematics, Engineering and Technology (STEM) subjects the percentage remains relatively low. This means fewer women than men can assume the limited technical roles in the sector. On the flip side, those who are fortunate to secure jobs in the sector, are likely to benefit from transfer and acquisition of new skills and technologies. There are also training funds established in some countries to train locals so that they are better placed to take up technical waged jobs. This again poses a challenge to WEE as very few women are working in the sector and can access the funds. Kenya is one of the countries being supported under the Skills for Oil and Gas Africa (SOGA)³⁷⁶ project whose aim was to equip approximately 32, 000 East African residents (35 per cent being women) with skills to work in the O&G industry. It also seeks to support development of local small and medium enterprises to enter the O&G supply value chain.³⁷⁷

As the sector develops, it is anticipated that a number of other economic activities will also be supported creating demand for goods and services for example, catering, banking and insurance services, telecommunication and so on.³⁷⁸ Women are more likely to secure economic opportunities in these supporting sectors rather than directly in the petroleum sector. This is because they have fewer skills, minimal qualifications and experience. This places them at a disadvantage. Even then owing to the high standards maintained by the petroleum sector, they still require some level of qualification to take advantage of the benefits in these other sectors. There is also the possibility of outsiders taking up benefits over the locals because they lack the necessary skills. This is an even heightened challenge for women. Uganda like Kenya is in the process of coming up with a local content law. Even then Traidlinks, a non-profit organisation in Uganda runs a local content initiative to train local farmers on business practices and improve their capacity to meet supply requirements of oil camps and local businesses. Traidlinks

³⁷⁶ An initiative by the UK Department for International Development, the German Ministry for Economic Cooperation and Development and the Norwegian Agency for Development Cooperation. The countries are being supported by Total, Tullow, Eni, Shell, Anadarko, BP and the LNG Joint Venture group.

³⁷⁷ IPIECA *et al*, *Mapping the oil and gas industry to the Sustainable Development Goals*, 45. Also, AfDB, *Women's economic empowerment in oil and gas industries in Africa*, 40.

³⁷⁸ Boohene R and Pephrah JA, 'Women, livelihood and oil and gas discovery in Ghana', 187.

purchases produce from farmers and resells to business enterprises like Tullow Oil and Equator Catering. The program is unfortunately not specific to women.³⁷⁹

To note however is that education is not a stand-alone factor as was observed in a study by Golder Associates in Peru, where women are increasingly enrolling in studies in areas of interest to the extractives industry yet they still remain underrepresented in the sector.³⁸⁰ This has been attributed to other existing socio-economic and structural barriers.

Training is not necessarily restricted to technical skills for use within the sector. It can be on a diverse range of skills that are useful to the locals in securing jobs in others sectors or economic opportunities. In a baseline survey in Uganda, the locals felt it would have been prudent to receive some training on financial or investment management because most of them were receiving amounts of cash that they had never come across and were not sure of how to maximise or where to store the money as they did not have bank accounts.³⁸¹ In Lokichar, the community expressed the need for oil companies to engage women in various capacity building platforms and trainings to impart in women skills that they can use to empower themselves. They also proposed benchmarking with other women groups as a means for women to experience the reality of empowerment and to also encourage them to take up leadership roles towards implementation of gender policies.³⁸² Even then Tullow Oil through a contracted organization, Technoserve, has made efforts to train locals in Turkana County on business and entrepreneurship to assist them grow their enterprises.³⁸³

iv. Unpaid labour

In the past, women were exploited as they were expected to engage in agricultural activities to support the extractives sector. They were being exploited as this was unpaid labour. This discrimination against women coupled together with other barriers like tradition and culture has seen women continue to engage in unpaid labour despite modern day measures to include women's participation in the sector. It acts as a barrier to them accessing decent productive work.

In African societies, roles are ascribed on the basis of gender. In patriarchal communities, men as the head of households are the breadwinners and it is expected that they take up any economic

³⁷⁹ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector*, 2014, 27.

³⁸⁰ Golder Associates, 'Baseline study of gender equity in the Latin American and Caribbean oil and gas industry' Environmental Services Association of Alberta, ARPEL Social Report 1, 2004- <https://arpel.org/library/publication/189/> on 15 April 2021.

³⁸¹ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector*, 2014, 23.

³⁸² Shikuku CK *et al*, 'Gender role transformation in the oil mining industry in Kenya', 104.

³⁸³ Tullow Kenya B.V, *Ustawi: Partnering to drive change*, Issue 2, 2019, 30.

opportunities in terms of jobs outside the home. Women are seen as nurturers and their roles are limited to domestic chores like cooking, cleaning, fetching water and firewood, and care giving. They may engage in small-scale income generating businesses. The men on their part leave their chores at home to take up formal jobs. This leaves a lacuna forcing women's roles in society to change as they take on the extra burden so that their homes can continue to run uninterrupted.³⁸⁴ These tasks are time consuming depriving women and girls of the opportunity to maximise on the economic opportunities available in the sector. Time poverty also prevents them from developing skills that can enable them take up the opportunities and waged jobs. Women have been found to devote approximately three times more hours a day to unpaid care than men, greatly contributing to time poverty and further entrenching gender disparity in terms of socio-economic opportunities.³⁸⁵ There is no evidence of the upstream petroleum sector acknowledging the contribution of unpaid labour and caregiving work towards sustainability of the sector yet men are able to report to work clean, in good health and nourished because of women's efforts at home.³⁸⁶

4.1.3 Consultation and participation processes

Free, prior and informed consent principles are crucial for community engagement. Consent ought to be obtained from affected persons before project commencement and consultations continue right through to the end. Women as part of the affected communities, stand to be greatly affected by upstream operations. If they are not included in consultation processes, then this begs the question 'exactly whose consent must be obtained?' Even countries like Canada that have developed oil industries, acknowledge that the exclusion of women from negotiations concerning benefits greatly contributes to the adverse impacts of the sector on their rights.³⁸⁷

One study showed that women are more likely to face discrimination when dealings touching on land are taking place owing to socio-cultural and political relations that prevent them from participating in decision-making and hampering "their ability to exercise freely both 'voice' and 'choice' in decisions that affect their lives and livelihoods".³⁸⁸ It is also not enough to just have women present but they must be accorded an opportunity to voice their interests and concerns

³⁸⁴ Jenkins K, 'Women, mining and development: An emerging research agenda', 330.

³⁸⁵ UN, *The sustainable development goals report 2019*, 32.

³⁸⁶ Kidder T, Romana S, Canepa C, Chettleborough J and Molina C, 'Oxfam's conceptual framework on women's economic empowerment' Oxfam GB for Oxfam International, May 2017, 27.

³⁸⁷ Sarah Morales, 'Digging for rights: How can international human rights law better protect indigenous women from extractive industries' 31 (1) *Canadian Journal of Women and the Law*, 2019, 62.

³⁸⁸ Daley E, 'Gendered impacts of commercial pressures on land', 52; Institute for Human Rights and Business (IHRB), *Human rights in Kenya's extractive sector: Exploring the terrain*, December 2016, 49.

failure to which they are likely to disengage from the process. It is through consultation and participation that women get to know of the available opportunities as well as the harm that may be occasioned on them by the sector. Also, women must be consulted before any social investment is undertaken as they are more likely to root for projects that benefit the larger community and not just self. In Papua New Guinea, a women's group was part of the negotiations around the Ok Tedi Mine and as a result, women were able to reap financial benefits of the project as part of the compensation amount was allocated to women's projects, scholarships for women and payments deposited to individual family bank accounts.³⁸⁹ In Nigeria, a poor community engagement process resulted in the under-utilisation of Chevron Nigeria Ltd.'s developed infrastructure projects because the community did not view the projects as their own. The facilities were even targeted during the 2003 inter-ethnic clashes in the Niger Delta.³⁹⁰

In some communities with patriarchal rich culture and traditions like those in Kenya and Uganda, women are not allowed to directly participate in public affairs.³⁹¹ They can be seen but it would be taboo for them to speak in a forum where men are discussing. In the case of Mui Coal Basin, a gender-blind consultative approach was adopted with a female informant disclosing that as a 'deputy head of household' she did not participate in the consultations as they always invited her husband who is the head of household.³⁹² This is despite consent being a statutory provision in Kenya as demonstrated in the previous chapter. These unequal power relations and the subsequent barriers undermines women's rights and takes away their power to make independent economic decisions on matters affecting them.³⁹³ Furthermore, they have limited access to the channels through which opportunities are advertised be it employment or call for tenders or even notification of the EISA process.

Some companies make effort to convene women only meetings to discuss the impact of projects and in other instances make it a requirement that in public consultation meetings, women must also be represented. This notwithstanding, women still fail to attend these meetings simply because of the timing of the meetings which clash with their daily routines and schedules. In the

³⁸⁹ Popoitai Y and Ofosu-Amaah W, 'Negotiating with the PNG mining industry for women's access to resources and voice: The Ok Tedi mine life extension negotiations for mine benefit packages' World Bank Institute, Report Number 84838 v2, 2013-
<https://openknowledge.worldbank.org/handle/10986/17557>.

³⁹⁰ Hoben M, Kovick D, Plumb D, Wright J, 'Corporate and community engagement in the Niger Delta: Lessons learned from Chevron Nigeria Limited's gmou process' Consensus Building Institute (CBI), 2012, 4.

³⁹¹ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 22. Shikuku CK *et al*, 'Gender role transformation in the oil mining industry in Kenya', 102.

³⁹² Centre for Governance and Development, *Gender dimensions and implications of coal mining in the Mui basin of Kitui county, Kenya*, 2015, 12.

³⁹³ The WoMin Collective, 'Extractives vs development sovereignty: building living consent rights for African women' 25(3) *Gender & Development*, 2017, 434.

case of Uganda, women still faced challenges attending these meetings because of the distance they had to travel to get to the venue and opted to miss out altogether. Women relied on men for information pertaining to sector opportunities but men on their part withheld information fearing women would abandon their responsibilities at home once they started earning an income.³⁹⁴

There is also a business case for engaging women in the process.³⁹⁵ Companies are more alive to the need to consult all project affected persons.³⁹⁶ Disregarding women's concerns can result in conflicts and threaten companies' 'social license to operate' and this poses a risk to a project's success as it inevitably causes project delays.³⁹⁷ Women in Nigeria have been at war with international oil companies because of unmet expectations. They denied oil companies like Chevron/Texaco and Shell and their contractors, physical access to the western Delta for days at a time disrupting operation. The women threatened to use their femininity and strip naked to get the companies to yield to their demands. This is considered a serious 'weapon' resulted to in life-threatening situations and local men believe if exposed to this they will die. This also demonstrates the effect of the sector on traditions and culture.³⁹⁸

To address its challenges, Chevron Nigeria Ltd was forced to reshape its community engagement strategy and now uses a formal agreement process, that is, general memoranda of understanding (GMOU) approach to engage with local communities impacted by its operations; and the government. This very tool is also used to identify development projects that the community deems beneficial. This has so far been helpful in trying to restore the broken trust. This underscores the importance of meaningful consultation, incorporating all affected stakeholders and women have been part of negotiations albeit in small numbers.³⁹⁹

4.1.4 Social capital

The economic benefits of O&G sector can adversely impact social relations between men and women. The increase in disposable income may drive those who gain to engage in what is deemed

³⁹⁴ International Alert, *What's in it for us? Gender issues in Uganda's oil and gas sector*, 2014, 25.

³⁹⁵ Centre for Governance and Development, *Gender dimensions and implications of coal mining in the Mui basin of Kitui county, Kenya*, 2015, 8.

³⁹⁶ Lind J, 'Governing black gold: lessons from oil finds in Turkana, Kenya' 6.

³⁹⁷ Soderholm P and Svahn N, 'Mining, regional development and benefit sharing in developed countries', 79. Also, Wise H and Shtylla S, 'The role of the extractives sector in expanding economic opportunity' Kennedy School of Government, Corporate Social Responsibility Report No. 18, 2007, 10--
https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/csi/files/report_18_EO%2BExtractives%2BFinal.pdf on 7 June 2021.

³⁹⁸ Turner TE and Brownhill LS, 'Women's oil wars in Nigeria' 35 *Labour, Capital and Society / Travail, capital et société*, 2002, 132-164.

³⁹⁹ See generally Hoben M, Kovick D, Plumb D, Wright J, 'Corporate and community engagement in the Niger Delta', 2012.

socially unacceptable behaviour and this shakes the foundation of families and communities at large.

Those in power have agency but tend to have control and influence over those not in power. In the case of patriarchy, men are in power. They have control over the 'tools' necessary for economic empowerment be it assets, skills or ability to make decisions. They make the rules and are reluctant to embrace any change that would seemingly disempower them. The O&G sector can destabilise this socially organised structure and this can give rise to a number of social ills that negatively affect families especially women and children. This also widens the gender gap because men are in a better position to benefit.⁴⁰⁰

Women lose out because the increased income that would otherwise be used for more productive activities to support the family is used by men on alcohol, prostitution, to take on more wives and other social vices.⁴⁰¹ Women also find themselves less financially independent and more reliant on men as the main income earners. Even where they manage the money at home, they are still accountable to the men in their homes. This has been observed in project affected communities in oil-rich regions of Uganda⁴⁰² and in mining communities in Chile⁴⁰³ which are androcentric societies. Women are also left vulnerable to abusive relationships but are forced to stay because of their financial dependence on men.⁴⁰⁴

Moreover, marriages may also be impacted by the emergence of "boom towns" because of the influx of workers and increased disposal income that men have to engage in prostitution. The emergence of commercial sex workers in Ogoniland has been attributed to transnational oil companies' activities in the area.⁴⁰⁵ Women and girls also find themselves in circumstances where they turn to prostitution as a means of survival.⁴⁰⁶ Some women are forced into prostitution as an alternative source of livelihood. Others choose to engage in transactional sex work to take advantage of the increased disposable income men have as a result to O&G activities arguing that the economic benefit outweighs the stigma attached.⁴⁰⁷ Prostitution has also been on the rise in

⁴⁰⁰ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 65.

⁴⁰¹ Jenkins K, 'Women, mining and development: An emerging research agenda', 329.

⁴⁰² National Association of Professional Environmentalists (NAPE), *Women-led action-oriented research on the negative impacts of oil on women's rights, land and food sovereignty in Uganda's oil region*, 2016, 9.

⁴⁰³ Silva-Segovia J and Lay-Lisboa S, 'The power of money and gender relations from Chilean mining culture' 32(3) *Journal of Women and Social Work*, 2017, 344-358.

⁴⁰⁴ Scott J *et al*, 'Extracting lessons on gender in the oil and gas sector', 65.

⁴⁰⁵ Nsirim-Worlu HG, 'Gender analysis of oil and gas governance in Nigeria', 8. See also Shikuku CK *et al*, 'Gender role transformation in the oil mining industry in Kenya', 101.

⁴⁰⁶ Global Alliance for Green and Gender Action, *Impacts of extractives on land, environment and women's rights in East Africa*, June 2018, 29.

⁴⁰⁷ Bradshaw S, Linneker L & Overton L, 'Extractive industries as sites of supernormal profits and supernormal patriarchy?' 446-447.

Turkana. A women's group representative in Lokichar proposed that men be allowed to frequently take leave and return home from camps to curb prostitution while women should be able to return home every evening to a safer environment.⁴⁰⁸

Rather than positively promote WEE, the industry may expose women to loss of dignity and amplify their vulnerability.

4.2 Conclusion

From the foregoing, it is clear that upstream O&G operations can have both positive and adverse impacts on WEE. The sector can promote WEE by enhancing women's access to economic opportunities like entrepreneurship and supply in the value chain, waged employment, compensation, increased participation and decision making. Conversely, the negative impacts of the sector widen the gender gap and exacerbate gender inequality especially in patriarchies.

Most indicators point to women accruing fewer benefits and experiencing more risks because they are more disadvantaged and disempowered than men. Economic practices are underpinned by asset ownership and control posing a challenge for women in patriarchal societies especially in rural areas because men are in control of physical, financial and knowledge-based assets requisite for participation in upstream O&G. Women in most developing economies like Kenya's, mostly engage in unpaid work and informal waged work, hence failing to grasp the realities lived by them results in their contribution to the sector being undervalued and underinvested in. Moreover, the O&G sector loses out on the female perspective by excluding them from participating in decision-making processes yet they are also affected stakeholders in O&G projects.

Nonetheless, women have unlimited potential and play an essential role in development and poverty eradication. If the barriers that propagate inequality are removed and they have access to equal opportunities, they can greatly contribute towards sustainable development of the country and the realization of SDG5. It is the State's duty to guide companies operating in Kenya on how best to respect women's rights by encouraging them to identify, mitigate and remedy any adverse impacts O&G operations may have on them. The companies on their part have a responsibility to respect the laws and policies and avoid infringing on women's rights.

⁴⁰⁸ Cordaid, *Oil exploration in Kenya: Success requires consultation*, August 2015, 38.

CHAPTER FIVE

KEY FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.0 Introduction

An in-depth assessment has been undertaken in chapter three to establish the potential of the existing legal and regulatory framework governing Kenya's upstream petroleum sector to advance WEE. Although the upstream O&G sector is relatively new in Kenya's petroleum value chain, it is inevitable that it will have an impact on WEE as this research has demonstrated in chapter four. This chapter summarises the key findings of the research and makes recommendations to the Government of Kenya and business enterprises in the petroleum industry on affirmative action measures that can be adopted to advance WEE and safeguard women's right to access economic opportunities available in upstream activities.

5.1 Key findings

This section highlights the barriers to WEE in the upstream O&G sector.

5.1.1 Gender differentiated impact of the sector

Upstream O&G sector impacts women and men differently. Men are likely to benefit more from the positive impacts while women endure the adverse human rights impacts of the industry. Local women from project affected communities suffer from time poverty, have low-levels of skill, limited control over physical and financial assets and lack agency because of gender stereotypes, power relations, patriarchal traditions and cultural norms, denying them a chance to participate in other economic activities. Existing barriers to WEE may be exacerbated by the male-dominated O&G sector, if deliberate measures are not taken to include women.

Women continue to suffer barriers to empowerment because of gendered roles. The number of women-owned businesses are likely to be fewer and smaller because of limited control over assets and access to capital. This reduces women's capability to compete against male-owned enterprises. Women have low level of skills and limited access to financing because most of them do not control resources. This has an impact on their level of participation in the O&G sector which requires a high level of skill and high standards of goods and services further curtailing their access to available opportunities especially for large upstream O&G operations.

They also endure a double burden because of unpaid and unequal work as has been discussed in the previous chapters. Due to household obligations and care roles, women continue to suffer

from time poverty and they may not be able to dedicate the same amount of time to working in the demanding sector unlike men who do not face the same predicament. This restricts them to subsistence activities that may not elevate them out of poverty as much as economic activities in O&G would.

Finally, owing to traditional and cultural practices, some women must seek the permission of the male figures in their homes before they can take up work within the O&G industry. Failure to secure this they are likely to fall victim to domestic abuse or be shunned by the larger community for abandoning their roles. Women can only benefit from upstream O&G projects in so far as they are able to participate in the value chain. It is not enough to just include women in consultation and participation engagements. It must be effective engagement for it to be useful.

Traditions and customs continue to play a role in society especially in the rural setups where natural resources tend to be situated. The Petroleum Act is silent on this, yet traditionally defined roles can translate in the sector as evidenced in chapter 4, if not acknowledged.

5.1.2 Gaps in Kenya's legal and regulatory framework

The Constitution and other laws recognise that women have in the past been discriminated against and this is mostly attributed to patriarchy. All laws enacted post 2010 must be consistent with the provisions of the Constitution for them to be effective. The Petroleum Act is a recent piece of legislation having been passed into law in 2019. While other laws and policies relevant to upstream petroleum operations like the PPDA and Vision 2030 may have gender-sensitive provisions, the Petroleum Act which is the main law governing the sector is gender-neutral and gender-blind hence indirectly promoting the 'macho culture' of the industry to the exclusion of women. It does not adequately factor in the gendered impact of the industry and its negative effect on WEE and leaves a lot to be inferred with regards to women's economic rights. By adopting a gender-neutral approach, the Act has no affirmative action provisions advancing WEE especially on local content and training, benefit sharing, public participation and compensation which are key to women's access to equal economic opportunities.

Despite the NAP providing for human rights due diligence as a policy action, there is currently no requirement in law for companies to undertake one or submit a report to the relevant authority prior to obtaining a license or approval. The existing legal and regulatory framework only provides for environmental impact assessments (EIA) under EMCA and the Petroleum Act. The Petroleum Act also provides for social impact assessment (SIA). Both laws however do not require a gender impact assessment to be carried out and it is not clear in law if it is mandatory to capture the

gender aspect in social impact assessments. Failure to have proper data on the impact of O&G on gender and tools to monitor the effect is likely to widen the gender gap in these areas rather than protect women's rights. If the impacts of O&G activities on women are not identified, then the negative effects cannot be mitigated and the measures to promote WEE monitored.

Save for Kenya's NAP, the legal framework does not provide any guidance on corporate social responsibility by business enterprises and their agents.⁴⁰⁹ Kenya's NAP requires businesses to carry out a human rights impact assessment involving meaningful consultation and including gendered impacts of operations. There is however no provision made in law for the procedures to be adopted for effective community engagement yet this is an effective way of incorporating women's voice towards WEE and overall development.

5.1.3 Corporate responsibility to respect

Equitable sharing of benefits enhances harmony and circumvents any issues that are likely to arise between business enterprises and host communities. Companies are realising it is smart business to consult and engage with all affected members of communities especially women to get the community's consent. As highlighted in this paper women must be included in the benefit sharing as they too have potential to disrupt operations as has been the case in Nigeria's Niger Delta. In order to mitigate these challenges, companies as part of their corporate social responsibility and commitment to sustainable development, are increasingly putting in place measures to ensure women participate in upstream O&G activities and benefit therefrom.⁴¹⁰ This not only protects businesses but ensures women's right to self-realisation is respected. Women have an opportunity to empower themselves intellectually through trainings and financially through employment and supply chains. They also have agency and add to their voices to the development agenda when companies include them in consultations.

Companies that consult women before undertaking development projects as part of CSR are also more impactful as women negotiate for projects that are beneficial not only to themselves but to their families and communities as well. This ensures sustainability.

Business enterprises encourage women to organise themselves into groups so that they are able to compete for some of the available economic opportunities like supplying of goods and services within the upstream value chain.

⁴⁰⁹ Mwabu G, 'Kenya's oil governance regime', 359.

⁴¹⁰ Kemp D & Owen J, 'Community relations and mining: Core to business but not "core business"' 38 *Resources Policy Journal*, 2013, 523.

To note is that most of the practical enablers of WEE in the sector are initiated by business enterprises. Even then many developing countries adopt a less regulatory approach to CSR leaving it voluntary for business enterprises to decide how to engage communities this can have positive or negative impacts on WEE and overall development.⁴¹¹

5.2 Summary

This research has demonstrated that for WEE to be achieved in Kenya's upstream O&G sector, a gendered approach must be adopted in law and policy. This is because gender relations and power structures favouring men still determine roles of men and women, the effect of which has been to impede WEE. From the assessment of the sector's impact on women's right to access equal economic opportunities, it is evident that women's roles may be mirrored in upstream O&G which is predominantly male and they stand to bear more risks than gains. Therefore, the State and business enterprises must take cognisance of the context in which exploration and production is to be undertaken and put in place measures promoting WEE, failure to which the law in and of itself, can perpetuate gender inequality in the sector. This calls for reforms to sectoral laws and policies such as amendments to the Petroleum Act, Local Content Bill and Natural Resources (Benefit Sharing) Bill *inter alia* to include gender-sensitive provisions on equal sharing of benefits.

5.3 Recommendations

Affirmative action measures need to be adopted in law and policy mindful that programs developed for community benefit are not 'one size fits all' and it is wrong to assume men and women will benefit equally from the development. In executing its duty to protect human rights, the state should enforce gender-responsive petroleum laws and policies that promote women's inclusion and participation in the O&G sector.

i. Amendments to the Petroleum Act

The State should move away from gender neutral laws and policies as is currently the case, to more gender responsive laws. Noting that formal equality cannot currently result in gender equality in the petroleum sector, the legal and regulatory framework must acknowledge and address the underlying factors that perpetuate gender inequalities in the economic sphere. Amendments should be made to the Petroleum Act to include affirmative action measures in line

⁴¹¹ Lind J, 'How revenues from oil and gas in Africa can be made to work for ordinary people' The Conversation, 18 July 2016 -- <https://theconversation.com/how-revenues-from-oil-and-gas-in-africa-can-be-made-to-work-for-ordinary-people-61918> on 31 May 2021.

with Article 27 (6) of the Constitution and the State's commitment to SDG 5. The State should enact legally binding procedures for gender sensitive public participation, preferential treatment in local content (procurement and employment), training, percentage for women and women's activities in benefit sharing, compensation, resettlement and gendered impact assessments. The provisions should be transformative and promote positive change towards gender equality.

Community Development Agreements should also be introduced into the Act with express requirement that women participate in negotiations with companies on development activities so that any development is need specific and sustainable.

The MPSC should also adopt gender-sensitive language and have more detailed provisions on equality and non-discrimination. This is a contract that is negotiated between the State and oil companies thus providing a good entry point to mainstream gender equality in practice.

The Government of Kenya should also ensure that the Local Content Bill, 2018 and Natural Resources (Benefit Sharing) Bill are gender smart and gender responsive before being passed into law to allow women exploit available opportunities.

ii. Develop government policy on gender in the petroleum sector

The policy should advocate for mainstreaming of gender equality measures by stakeholders in the sector. It should describe the process of undertaking various gendered actions bearing in mind existing gender inequalities resulting from gender relations and power structures especially in and around local communities. This will also address the challenge of business enterprises undertaking *inter alia*, public participation, impact assessments, employment and trainings as a tick box exercise without taking consideration of gender dynamics. It should also factor in some of the issues peculiar to women like unpaid work and care that contribute to time poverty suffered by women preventing them from taking up economic activities outside the home.

Guidelines for gender-responsive stakeholder consultation and engagement should also be developed providing for instances when women cannot attend meetings cause of time poverty occasioned by gender roles. It should require women only meetings be organised at a place and time convenient to the team where they cannot attend community wide engagements.

iii. Introduction of gender dimensions in impact assessments

Legally binding procedures should be established to ensure impact assessments adopt a gendered approach or in the alternative require that gender impact assessments be undertaken as a precursor to obtaining a license. Specific indicators to be outlined in law to gather disaggregated

data, identify gender-differentiated impact of projects and provide for mitigation measures or remedies to avoid further disenfranchising women. Sex disaggregated data will enable the Government of Kenya and business enterprises to identify gaps as well as areas of positive transformation for women which can then inform comprehensive gender-responsive policy change, programs and legal reform in upstream petroleum sector to address women's economic rights.

Taking into account the property rights of women and the fact that they are largely dependent on the environment for their livelihood. One of the requirements should be to identify alternative livelihoods in mitigation especially for women.

The Ministry of Petroleum can collaborate with the State Department for Gender Affairs, Kenya National Commission on Human Rights (KNCHR), National Gender and Equality Commission (NGEC), NEMA and other stakeholders to come up with the relevant indicators to be measured in impact assessments.

iv. Building capacity and skills of women

While it is important to have gender targeted provisions in favour of women in O&G laws and policies these will not suffice if women's capacity is not enhanced to equip them with the knowledge and skill required to take up available opportunities. The Government ought to come up with training regulations to ensure targeted education and job training for women not limited to O&G but also other life and business-related skills.

The Government can partner with business enterprises to promote enrolment of females in STEM subjects. It should have budgetary allocation for training local women in project affected areas with business skills that can enable them take up opportunities in procurement and supply in O&G.

v. Monitoring of compliance

The Government should formulate a tool to measure compliance and monitor and evaluate progress made by the State towards gender equality in O&G sector. This also includes monitoring compliance with the thirty percent procurement provision for vulnerable groups. This will help in monitoring the changes to women's economic status.

Independent constitutional commissions like the Kenya National Commission on Human rights (KNCHR) and the National Gender and Equality Commission should monitor and carry out audits of public and private institutions in O&G to check if their operations are gender responsive. This

is key as there are no mechanisms provided for in the Petroleum Act to review gender-responsiveness of its provisions.

Moreover, the KNCHR as part of the committee responsible for the implementation of Kenya's NAP on BHR should be tasked with overseeing compliance of business enterprises in the sector in undertaking human rights due diligence.

vi. Integration of a gendered framework by business enterprises

Business enterprises are increasingly committing to the UN SDGs as well as acknowledging their responsibility to respect human rights of communities in their areas of operation. Towards realising these commitments, business enterprises should have gender sensitive policies and commitments to human rights. Business enterprises should carry out human rights due diligence to identify the impact of their activities on women from the onset to inform gender responsive measures that can be undertaken.

Company policies should promote work-life balance by providing for flexible hours to allow more women to participate in O&G activities especially those who shy away from taking opportunities owing to their care responsibilities and time poverty. These should also support gender equitable community engagement and make deliberate efforts to engage women and hear the women's voice and concerns so that they can tailor their corporate social responsibility projects to practical needs of the society. This can be through scheduling women only meetings taking into account time and location of meetings.

Oil companies should also have gender champions to act as liaisons between them and the local community on gender issues throughout the exploration, development and production process. They should be tasked with bringing opportunities to the attention of women and create awareness among men on the benefits of empowering women to families and communities.

Business enterprises should develop codes of conducts to increase engagement with women-owned businesses. Oil companies should make deliberate effort to include women in the procurement and supply chain and impose requirements on business relations to include women in order to secure supply contracts. They should also emphasise on prompt payment.

Moreover, business enterprises can leverage on existing relationships between communities and local organisations to build capacity of women to equip them with business and life skills that will enable them set up businesses.

5.4 Conclusion

The law can perpetuate the masculinities or macho culture that has engulfed the petroleum industry over the years. Its failure to recognise and address the masculine norms that continue to be practiced in Kenya particularly in the rural setup could further disempower women living among these communities. This study confirms that upstream O&G activities have a gendered impact on society and that women in Kenya are more likely to bear the risks while men enjoy the benefits.

Despite the Government's reassurance of its commitment to achieving gender equality, the main laws and policies governing the upstream sector have failed to demonstrate gender responsiveness because they do not take into account women's lived experiences. The law is determined by those who have power in society. For this reason, legal language in the O&G sector globally has been based on male conceptions and experiences. The law cannot adequately define that which it does not understand and the male-dominance in the sector precludes it from promoting women's rights as it is gender blind to the impacts of the sector. This underscores the importance of understanding the differentiated impact of the O&G sector on men and women in the hope that it will influence the use of gender-sensitive language thus protecting women's rights.

Since Kenya has only just commercialised its petroleum, it still has an opportunity to learn from the experiences of other countries and cause legal reform aimed at promoting WEE and protecting women's right to equal economic opportunities as provided for under Article 27 of the Kenyan Constitution. The law should not be used as a tool to condone the culture of the petroleum industry being a 'boys' club' instead, it must promote inclusion and facilitate participation of women as they too have a role to play in the development of the sector and the economy as a whole and their voice should be heard.

For WEE to be successfully achieved in upstream O&G, the sector must positively transform women's lives. Properly formulated gender-sensitive laws and policies are the first step but these must be implemented for them to effect change. Women must have power within that is, the knowledge and skills to participate in the industry including taking up employment opportunities; power to independently make economic decisions across the board and not just limited to their roles as women; power over economic assets (both physical and financial) and lastly, power to organise with others into groups to maximise their access to economic opportunities.⁴¹² Ultimately, in the words of Sandra Day O'Connor, "As women achieve power, the barriers will fall.

⁴¹² Perezniето P and Taylor G, 'A review of approaches and methods to measure economic empowerment of women and girls' 22 (2) *Gender & Development*, 2014, 236.

As society sees what women can do, as women see what women can do, there will be more women out there doing things, and we'll all be better off for it.”⁴¹³



⁴¹³ O'Connor SD, 'Women in power' Speech addressed to the Sixteenth Annual Olin Conference at Washington University, St. Louis, Missouri, November 1990.

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APPENDICES

APPENDIX 1: ETHICS CLEARANCE REPORT

RHInnO Ethics - SU-IERC1154/21 - 1 of 1

Final Decision

This document certifies that the study:

\\\"IMPACT OF KENYA'S UPSTREAM OIL AND GAS SECTOR ON WOMEN'S RIGHTS: THE RIGHT TO ACCESS EQUAL ECONOMIC OPPORTUNITIES\\\"

Principal Investigator: Ms. Arrumm, Christina Achieng

Reference number: SU-IERC1154/21

Was reviewed and received the following status:

\\\"done\\\"

Additional Comments: Final decision: **approved**

Comments sent:

Reviewer #1:

'This is a good study as it calls for a gendered approach in formulating laws

APPENDIX 2: PLAGIARISM REPORT





Document Information

Analyzed document	Women's Economic Empowerment in the Upstream Petroleum Sector Assessment of the Right to Access Equal Economic Opportunities in Kenya.docx (D116748703)
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Submitted by	
Submitter email	Christina.Arrumm@strathmore.edu
Similarity	3%
Analysis address	library.strath@analysis.orkund.com

Sources included in the report

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