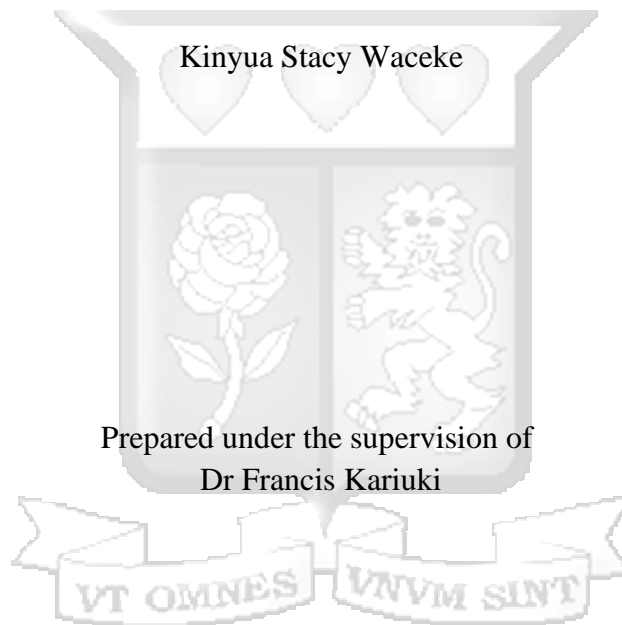


**BALANCING PARTICIPATION AND CONSENT: EVALUATING THE RIGHTS OF
INDIGENOUS COMMUNITIES IN KENYA REGARDING DEVELOPMENT
PROJECTS BY EXTRACTIVE INDUSTRIES ON COMMUNITY LANDS**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By



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Table of Contents

Declaration.....	vi
Abstract.....	vii
List of Abbreviations	viii
List of Cases.....	ix
List of Legal Instruments	x
CHAPTER 1:	1
INTRODUCTION TO STUDY	1
1.0 Background.....	1
1.2 Statement of Problem.....	5
1.3 Research Objectives.....	5
1.4 Research Questions.....	6
1.5 Hypothesis.....	6
1.6 Justification of study.....	6
1.7 Conceptual Framework.....	7
1.8 Literature Review.....	10
1.9 Methodology	18
1.10 Chapter Breakdown	18
CHAPTER 2:	20
LEGAL FRAMEWORK FOR PARTICIPATION CONSULTATION AND CONSENT OF INDIGENOUS COMMUNITIES IN KENYA	20
2.1 Introduction.....	20
2.2 The Legal Framework.....	20
2.2.1 International Legal Framework	20
i) International Covenant on Civil and Political Rights (ICCPR).....	20
ii) United Nations Declaration on the Rights of Indigenous Peoples	21
iii) United Nations International Labour Organization Convention on Indigenous and Tribal Peoples	22
2.2.2 Regional Legal Framework	24
i) African Charter on Human and Peoples' Rights (African Charter)	24
2.2.3 Domestic Legal Framework	26
i) Constitution of Kenya.....	26
ii) The Community Land Act.....	28
iii) The Mining Act	33

iv) Environmental Management and Co-ordination Act	40
2.2.4 Conclusion	45
CHAPTER 3:	46
BEST PRACTICES OF PARTICIPATION, CONSULTATION AND CONSENT OF INDIGENOUS COMMUNITIES	46
3.0 Introduction.....	46
3.1 Best Practices	46
3.1.1 Importance of the best practices to Kenya.....	46
3.1.2 Guidelines by Food and Agriculture Organization (FAO)	47
3.1.3 The Roundtable on Sustainable Palm Oil Guidelines (RSPO)	50
3.1.4 General criticism of the best practices	51
3.2 Project Identification	52
3.2.1 Identify the indigenous peoples concerned and their representatives.....	52
3.2.2 Document Geographic and Demographic Information through Participatory Mapping	55
3.3 Project Formulation	56
3.3.1 Design A Participatory Communication Plan And Carry Out Iterative Discussions Through Which Project Information Will Be Disclosed In A Transparent Way (Negotiation)	57
3.3.2 Reach Consent, Document Indigenous Peoples’ Needs That Are to Be Included into The Project, And Agree on A Feedback and Complaints Mechanism	58
3.4 Project Implementation	60
3.4.1 Designing a method of monitoring and evaluating the agreements together with having a feedback and dispute resolution mechanism.	58
a) Monitoring and evaluation of the agreement.....	61
b)Feedback and Complaints Mechanism	62
c)Dispute Resolution Mechanisms and Remedies.	62
3.5 Project Closure	64
3.5.1 Verification to assessing the level of compliance to the FPIC requirements and examining the fulfilment in implementing their obligations under the negotiated agreement	64
3.5.2 Documenting the lessons learned.....	65
3.6 Conclusion	66
CHAPTER 4	67
GUIDING PRINCIPLES AND CONCEPTS TO CONSIDER WHEN DEFINING PARTICIPATION OF INDIGENOUS COMMUNITIES	67

4.0 Introduction.....	67
4.1 The Common Principles underlying Participation and Consultation of Indigenous Communities.....	67
4.1.1 Self-Determination.....	67
4.1.2 Free Prior and Informed Consent (FPIC).....	69
4.1.3 Participation and Consultation.....	73
4.1.4 Integration of the needs of Indigenous Persons in Law and Policy.....	77
4.2 Conclusion.....	78
CHAPTER 5.....	80
FINDINGS, RECOMMENDATIONS AND CONCLUSIONS.....	80
5.0 Introduction.....	80
5.1 Findings.....	80
5.1.1 The status of participation, consultation, and consent of indigenous communities in Kenya.....	80
5.1.2 The optimal procedures endorsed by international institutions for indigenous communities to provide Free, Prior, and Informed Consent.....	81
5.1.3 Principles that underlie equitable participation and consultation of indigenous communities in Kenya in granting consent on matters related to their land during participation based on the best practices.....	82
5.2 Recommendations.....	82
5.3 Conclusion.....	83
5.3.1 Objective i.....	84
5.3.2 Objective ii.....	84
5.3.3 Objective iii.....	84
5.3.4 Hypothesis.....	84
Bibliography.....	85

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Declaration

I, KINYUA STACY WACEKE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

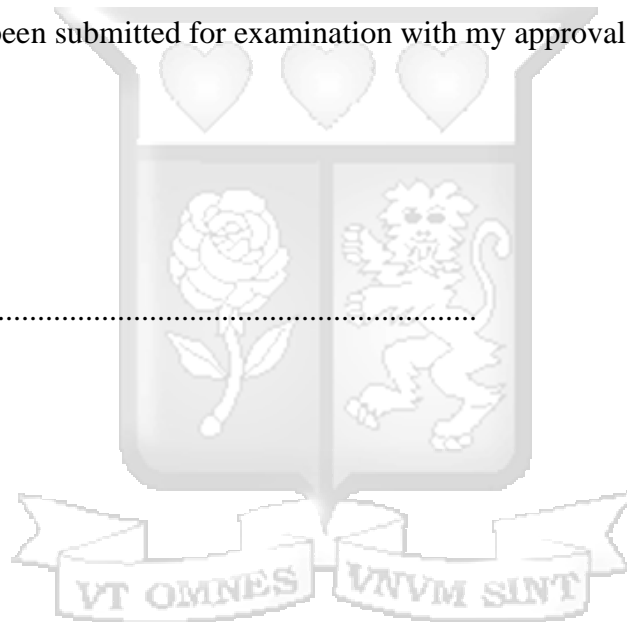
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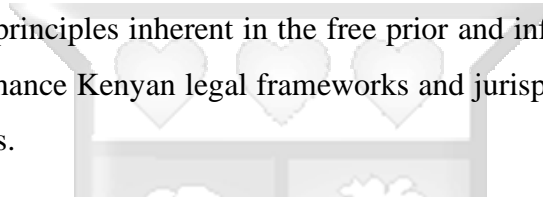
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Dr Francis Kariuki



Abstract

The Kenyan constitution recognizes indigenous communities as integral parts of marginalized groups, granting them entitlement to participation in governance issues and affirmative action. This study examines the current legal framework concerning the participation, consultation, and consent of indigenous communities. It reveals a deficiency in legislation and procedural support for indigenous community involvement, compounded by significant state interference during implementation. Employing qualitative methods, the research explores optimal practices for involving and consulting indigenous communities in Kenya. It concludes that prioritizing a process guided by the principle of free prior and informed consent effectively safeguards the rights of indigenous communities, aligning with international instruments and Kenya's constitutional mandate to protect marginalized groups. The study identifies key principles inherent in the free prior and informed consent approach, which can inform and enhance Kenyan legal frameworks and jurisprudence, as demonstrated within the study's findings.



List of Abbreviations

ACHPR-African Charter on Human and Peoples' Rights

CEACR - Committee of Experts on the Application of Conventions and Recommendations

EBRD - Economic Bank for Reconstruction and Development

EIA- Environmental Impact Assessment

FAO- Food and Agriculture Organization

FPIC – Free Prior and Informed Consent

HCV- High Conservation Values

ILO- International Labour Organisation

IFC -International Finance Corporation

ICCPR- International Covenant on Civil and Political Rights

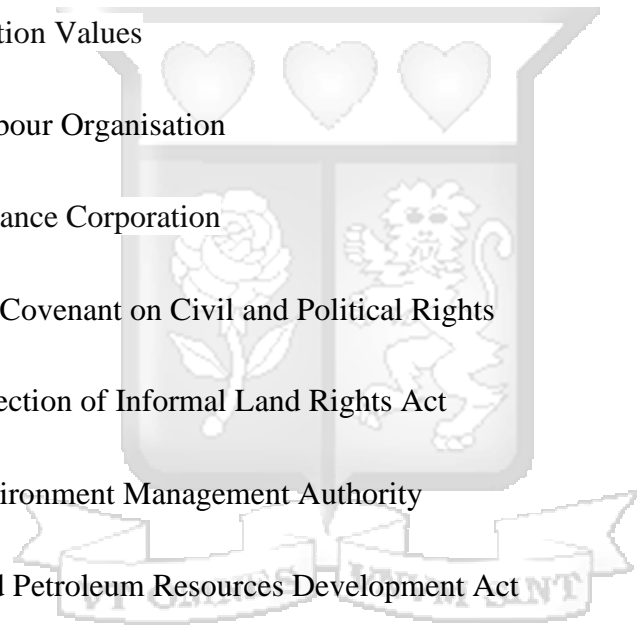
IPLRA- Interim Protection of Informal Land Rights Act

NEMA- National Environment Management Authority

MPRDA- Mineral and Petroleum Resources Development Act

NGO's- Non-Governmental Organisations

RSPO-Roundtable on Sustainable Palm Oil Guidelines



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Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya ACmHPR Comm 276/2003, Activity Report (2010).

County Government of Turkana v National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 others (2020) eKLR.

Maledu v Itereleng Bakgatla Mineral Resources (2018) Constitutional Court of South Africa.

Mohamed Ali Baadi and others v Attorney General & 11 others (2018) eKLR

Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (2015) eKLR.

Save Lamu & Others v National Environmental Management Authority (NEMA) & another (2019) eKLR.

William Sipai & Noah Kitarpei Matunge v Attorney General and two others (2022) eKLR

List of Legal Instruments

African Charter on Human and People's Rights June 27, 1981.

Community Land Act (2016).

Constitution of Kenya (2010).

Environmental Management and Co-Ordination Act (Act No 8 of 1999).

Environmental (Impact Assessments and Audit) Regulations 2003.

International Covenant on Civil and Political Rights 16 December 1966, Treaty Series, 999.

Mining Act (Act No 12 of 2016).

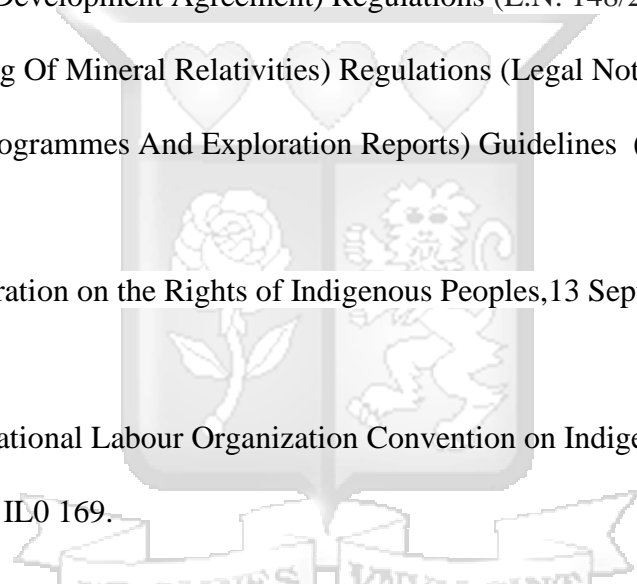
Mining (Community Development Agreement) Regulations (L.N. 148/2017).

The Mining (Reporting Of Mineral Relativities) Regulations (Legal Notice 152 Of 2017).

The Mining (Work Programmes And Exploration Reports) Guidelines (Legal Notice 85 Of 2017).

United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/RES/61/295.

United Nations International Labour Organization Convention on Indigenous and Tribal Peoples 27 June 1989 ILO 169.



CHAPTER 1: INTRODUCTION TO STUDY

1.0: Background

Community land is defined as land that is lawfully held, managed or used by specific communities such as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities and lawfully held as trust land by the county governments.¹ Communities are defined as a *consciously distinct and organised group of users of community land* who are citizens of Kenya and *share* any of the following attributes; *common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest; ecological or ethnicity.*²

Kenya considers international law as one of its sources of law.³ Internationally, the definition of indigenous people has similar key elements with that of communities in Kenya.⁴ They share similarities in the key aspects of their *socio-economic and cultural circumstances and institutions* being *different* from *other parts of the national populace.*⁵ Furthermore, both their status is regulated wholly or partially by their own customs and traditions. They also occupy specific geographical locations within a country.⁶ Therefore communities as recognized in Kenya fits the criteria of indigenous communities recognized internationally.⁷

It is recognized that such peoples have a unique crucial bond to their land that is important to their day to day living and identity.⁸ Therefore, it has been established as an international requirement that their consent be sought before any projects take place on the land they

¹ Article 63 (d), *Constitution of Kenya*, (2010).

² Section 2, *Community Lands Act* (Act No 2 of 2016).

³ Article 2 (5), *Constitution of Kenya*, 2010.

⁴ Section 2, *Community Lands Act* (Act No 2 of 2016); Article 1, *Indigenous and Tribal Peoples Convention*, 27th June 1989, C169.

⁵ Section 2, *Community Lands Act* (Act No 2 of 2016); Article 1, *Indigenous and Tribal Peoples Convention*, 27th June 1989, C169.

⁶ Article 1, *Indigenous and Tribal Peoples Convention*, 27th June 1989, C169.

⁷ Section 2, *Community Lands Act* (Act No 2 of 2016); Article 1, *Indigenous and Tribal Peoples Convention*, 27th June 1989, C169.

⁸ Gilbert J and Doyle C 'A new dawn over the land: Shedding light on collective ownership and consent' in Allen S and Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous People* Hart Publishing, Bloomsbury, 2011, 289.

occupy.⁹ This is in order to protect their crucial right to self-determination.¹⁰ Self-determination is critical as communities in Kenya which include pastoralists, hunters and gatherers, and farmers have a profound relationship with their land, territory and resources. These factors form a core basis of their spiritual, economic, and political life.¹¹ Their understanding of land is not that of individual ownership but rather communal ownership, which makes it indispensable for their existence and survival.¹² Therefore, indigenous communities in this study represent vulnerable, marginalized and distinct peoples that reside in community land within Kenya.

Constitutionally, at the moment, an avenue for self-determination for indigenous communities in terms of using their land is Article 56 that provides for minorities and marginalized communities to be accorded the right to participate and be represented in governance and other spheres of life.¹³ Additionally, the Constitution grants individuals and communities the right to acquire and own property, protecting against arbitrary deprivation or discrimination, while also outlining regulations for the vesting and protection of community land.¹⁴ In legislation this has been actualized by the Community Land Act.¹⁵ A body named 'community assemblies'¹⁶ is established where the quorum for decision making shall not be less than two thirds of the community assembly.¹⁷ This then implies that they are responsible for the administration of community land.¹⁸ The Act provides that agreements that have to do with investment on community land should include free, open and consultative process.¹⁹ However, it is not clear as to the question of whether consultation amounts to consent and

⁹ Article 32(2) *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295.

¹⁰ Article 3, 4, 5 *United Nations Declaration on the Rights of Indigenous Peoples*.

¹¹ Shaheed A, '*Indigenous Peoples and The Right to Freedom Of Religion Or Belief*' Kenya National Commission of Human Rights, United Nations (Un) Special Rapporteur On Freedom Of Religion Or Belief 2022, 1.

¹² Shaheed A, '*Indigenous Peoples and The Right to Freedom Of Religion Or Belief*' Kenya National Commission of Human Rights, United Nations (Un) Special Rapporteur On Freedom Of Religion Or Belief 2022, 1.

¹³ Article 56, *Constitution of Kenya*, 2010.

¹⁴ Article 63 and 40, *Constitution of Kenya*, 2010.

¹⁵ Section 15, *Community Lands Act* (Act No 2 of 2016).

¹⁶ 'A gathering of registered adult members of a community convened in accordance with this Act, Section 2, *Community Lands Act* (Act No 2 of 2016).

¹⁷ Section 15(5) *Community Lands Act* (Act No 2 of 2016).

¹⁸ Kariuki F, Ouma S and Ngetich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 333.

¹⁹ Section 36 *Community Lands Act* (Act No 2 of 2016).

thus if there is no clear consent requirement, self- determination and land rights of these communities is questionable.²⁰

In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* ‘effectiveness’ was the test for public participation of local communities.²¹ The model of public participation given was when the indigenous community complained for lack of public participation was ; *innovation and malleability depending on the nature of the subject matter, it must include access to and dissemination of relevant information, it does not dictate that everyone must give their views on an issue of environmental governance, it does not guarantee that each individual’s views will be taken as controlling and lastly it is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*²² The criteria above is broad and not specific to indigenous communities.²³ Moreover, often, the process itself is excluded or minimized, especially when indigenous communities are concerned. ²⁴

Moreover, this criterion was given in the perspective of environmental governance and conservation and did not have an element of the right of property, culture and self-determination of the indigenous communities.²⁵ Simply put, communities that own the land are not a core determinant in the decision-making process of a project that will affect them.²⁶ Furthermore, it cannot be ignored that at times if the party that has interest in the community land is the state, then they can forgo the need to ask for consent and decide to compulsorily acquire the land.²⁷ Usually compulsory acquisition violates the proprietary

²⁰ Section 36 *Community Lands Act* (Act No 2 of 2016).

²¹ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR.

²² *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR.

²³ Muigua K, *Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya*,1(1) *Nairobi University Press*,2019, 16.

²⁴ Muigua K ‘Towards Meaningful Public Participation in Natural Resource Management in Kenya’ *University of Nairobi Press*, 2014, 19.

²⁵ *Article 60 and 63 Constitution of Kenya*, 2010; *Article 11 Constitution of Kenya*, 2010; Article 1, *Indigenous and Tribal Peoples Convention*, 27th June 1989, C169; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR;

²⁶ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR.

²⁷ *Article 40 (3) Constitution of Kenya*,2010; Section 107 *Land (Act No. 6 of 2012)*; Section 40 *Mining Act* (Act No.12 of 2016).; Section 22, *Community Lands Act*.

rights of the community, and many times leaves the affected community less compensated.²⁸This once more disrupts the self-governance and existence of the indigenous communities as land which is crucial to them is taken away from them without adequate compensation during compulsory acquisition. Both the decision-making process, of public participation and compulsory acquisition without sufficient compensation, violate article 40, 56 and 63 of the constitution of Kenya.²⁹

As stated earlier, Kenya considers international law as one of its sources of law.³⁰ The idea of free, informed and prior consent (FPIC) for indigenous communities started in the International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries.³¹ Consent with the criteria of free, prior and informed³² aspect, is defined as communities having a real choice, to affirm if there is a good flow of benefits and development opportunities to them, or to deny if they are not satisfied with the deal, and that there is a workable mechanism for determining whether there is widespread consent in the community as a whole and not just a small elite group within the community.³³ Furthermore, since communities are the center of decision making when it comes to projects on their land through FPIC, issues such as compensation are adequately discussed.³⁴ It is a thorough, elaborated and fully collaborative process.³⁵

In Kenya, law provides for Free Prior and Informed Consultation, but it is questionable on if the notion of effective participation of indigenous communities emulates this principle.³⁶ Additionally, issues such as whether consultation and public participation in of themselves can constitute consent that promotes self-determination and security of land rights

²⁸ Muigua K, Maximizing the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya, 1(1) *Nairobi University Press*, 2019, 16.

²⁹ Article 40, 56, 63 *Constitution of Kenya*, 2010.

³⁰ Article 2 (5), *Constitution of Kenya*, 2010.

³¹ Article 16, Indigenous and Tribal Peoples Convention, on the 27th June 1989, C169.

³² United Nations Permanent Forum on Indigenous Issues (UNPFII) at its Fourth Session in 2005, UN-REDD *Programme Guidelines on Free, Prior and Informed Consent (FPIC)*.

³³ Vanclay F, and Esteves AM 'Current issues and trends in social impact assessment' (ed) *New directions in social impact assessment: conceptual and methodological advances*, Edward Elgar Publishing, Cheltenham, 2011, 6-7.

³⁴ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent An indigenous peoples' right and a good practice for local communities' Manual for Project Practitioners 2016, 13.

³⁵ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016, 4- 5.

³⁶ Article 10, 232(1) (d), 52, 40, 63 *Constitution of Kenya*, 2010.; Section 15(5) *Community Lands Act (Act No 2 of 2016)*. Together with cases cited in the previous footnote.

of the indigenous communities is a question that is quite arguable. Moreover, fundamental questions such as whether the indigenous communities have a real chance at opposing private and state interest while trying to pursue self-determination, taking into consideration the power dynamics, remain undetermined.³⁷ Lastly, how to mitigate the inevitable conflict of state and private interest and right of indigenous communities to self-determine when it comes to natural resources on indigenous land is unclear, and mostly favours the state.³⁸

1.2 Statement of Problem

Minorities and marginalized communities such as indigenous communities ought to be accorded the right to property, land, participation and representation in governance and other spheres of life.³⁹ Currently one of the ways in which indigenous communities can protect their land rights and right to self-determination is through participation in proposed development projects.⁴⁰ However, the model of public participation used is general and unspecific to indigenous communities. It also assumes consultation is equivalent to consent. This study will therefore assess whether how participation of indigenous communities takes place in Kenya is an adequate and realistic standard of consent for indigenous communities when it comes to exploitation of their land by private or state actors and if it promotes their right to self-determination. It will also explore possibly better and alternative methods of obtaining indigenous community consent.

1.3 Research Objectives

- i) To examine the legal framework of participation of indigenous communities in Kenya
- ii) To evaluate the optimal procedures endorsed by international institutions for indigenous communities to provide Free, Prior, and Informed Consent during participation
- iii) To propose a method that promotes equitable participation of indigenous communities in Kenya

³⁷ Nelson F and Agrawal A 'Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa' CBNRM Reform in Sub-Saharan Africa 557.

³⁸ Nelson F and Agrawal A 'Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa'

³⁹ Article 56, *Constitution of Kenya*, 2010.

⁴⁰ Section 15(5) *Community Lands Act* (Act No 2 of 2016).

1.4 Research Questions

- i) What is the legal framework of participation of indigenous communities in Kenya

- ii) What are the best practices internationally for indigenous communities in granting Free Prior and Informed Consent

- iii) How can the incorporation of the best practices of Free, Prior, and Informed Consent be ensured in the participation of indigenous communities in Kenya

1.5 Hypothesis

Indigenous communities are a distinct vulnerable group, and thus they can easily be marginalized. It is therefore important to consciously preserve implementation of their fundamental rights and freedoms, including their right to culture which is intrinsically tied to their right to use and manage their land. The constitution and certain laws have attempted to safeguard their land rights by providing them forums for participation where developers may have an interest in their land.

The participation that takes place is usually in a manner that is substandard with no particular criteria that caters for the unique needs of the indigenous communities. It also just seems to be an item on the checklist for the developers to do in order not to break the law with no particular interest of how their project would impact the socio-political life of the indigenous communities' lives.

This method of participation therefore infringes on both the land security rights and the right to self-determination of the indigenous communities. Therefore, the hypothesis is that mere participation is not an adequate standard of consent for indigenous communities in Kenya when it comes to use and exploitation of their land.

1.6 Justification of study

This study is useful to the indigenous communities as it will explore participation that incorporates not only their environmental needs but also their socio-economic and political needs by having a more active precise role in management of their land, thus protecting their future generations and culture. Furthermore, this research will assist courts in grappling with

the question of whether there was effective participation of indigenous communities from a more thorough and meticulous lens when it comes to development projects. Additionally, this study will be serviceable to lawmakers in guiding them on how they can amend the law to suit the needs and rights of indigenous communities living in areas where there are natural resources that developers would like to exploit. Lastly, the study would be resourceful to researchers working on the rights of indigenous communities.

1.7 Conceptual Framework

1.7.1 Indigenous Communities as Autonomous Persons.

Indigenous peoples describe themselves ‘original people’ (the legitimate owners of the land) or nations, demanding restitution of their rights and ancestral sovereignty over their territories⁴¹. From the previous statement one can see that indigenous people have their own autonomy.⁴² Autonomy is defined as the political independence of a nation; the right (and condition) of self-government.⁴³ Autonomy is rooted in the right to self-governance.⁴⁴ It includes letting an agent control their affairs in accordance with their beliefs.⁴⁵ This understanding of autonomy can be tied together with the fact that throughout the world indigenous people make the same undertaking to retain culture, independence and territorial integrity.⁴⁶ Hence, it speaks directly to the right of self-determination that is afforded to indigenous communities by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁴⁷ It encompasses the right to freely determine their political status and freely pursue their economic, social and cultural development.⁴⁸ Therefore, it can be drawn that indigenous communities ought to be active participants in arenas that concern their territories and natural resources through the autonomy they possess.

⁴¹ Ulloa A, ‘The Politics of Autonomy of Indigenous Peoples of the Sierra Nevada de Santa Marta, Colombia: A Process of Relational Indigenous Autonomy’ 6(1) *Latin American and Caribbean Ethnic Studies*, 2011, 80.

⁴² Ulloa A, ‘The Politics of Autonomy of Indigenous Peoples of the Sierra Nevada de Santa Marta, Colombia: A Process of Relational Indigenous Autonomy’ 6(1) *Latin American and Caribbean Ethnic Studies*, 2011, 80.

⁴³ Black’s Law Dictionary 2ND Ed.

⁴⁴ Beauchamp TL ‘Autonomy and Consent’ in Miller F and Wertheimer (Eds) *The Ethics of Consent; Theory and Practice* Oxford University Press, 2010, 55.

⁴⁵ Beauchamp TL ‘Autonomy and Consent’ 61.

⁴⁶ Champagne D ‘The Indigenous People’s Movement; Theory Policy and Practice’ 39th Annual Sorokin Lecture, University of Saskatchewan, 2008, 1.

⁴⁷ Article 3, *United Nations Declaration on the Rights of Indigenous Peoples*.

⁴⁸ Article 3, *United Nations Declaration on the Rights of Indigenous Peoples*.

A foundational component that displays the vital ethical principle of autonomy is that of voluntariness.⁴⁹ It is popularly accepted to mean “if he or she wills the action without being under the control of another’s influence.”⁵⁰ It can also be defined as “a situation specific experience of willed action with freedom from coercion or control by others in decision-making”⁵¹ Thus, it can be deduced that, even as indigenous communities participate in discussions and decision making, it should be done in an environment where they do not feel intimidated, and where they have sufficient time to discuss in their own language, and in a culturally appropriate way, on matters affecting their rights, lands, natural resources, territories, livelihoods, knowledge, social fabric, traditions, governance systems, and culture or heritage (tangible and intangible).⁵²

As previously stated, Article 56 of the Kenyan Constitution outlines the importance of participation as a method through which minorities and marginalized communities can engage in the realm of governance.⁵³ This provision aims to enhance their autonomy and self-determination.⁵⁴ Indigenous communities in Kenya are deemed to fall under the categories of minorities and marginalized groups.⁵⁵ Consequently, participation plays a pivotal role in upholding their self-determination and autonomy and eventually is an avenue of giving consent.⁵⁶ Therefore, it is imperative that the process of participation adheres to the principle of free, prior, and informed consent.⁵⁷ This is particularly vital because the participation

⁴⁹ Mamotte N and Wassenaar D, ‘Measuring Voluntariness of Consent to Research: An Instrument Review’ 10(2) *Journal of Empirical Research on Human Research Ethics*, 2015, 121.

⁵⁰ Mamotte N and Wassenaar D, ‘Measuring Voluntariness of Consent to Research: An Instrument Review’ 121.

⁵¹ Mamotte N and Wassenaar D, ‘Measuring Voluntariness of Consent to Research: An Instrument Review’ 10(2) *Journal of Empirical Research on Human Research Ethics*, 2015, 127.

⁵² Food and Agriculture Organisation of the United Nations ‘Free Prior and Informed Consent An indigenous peoples’ right and a good practice for local communities’ *Manual for Project Practitioners* 2016,13.

⁵³ Article 56, *Constitution of Kenya*, 2010.

⁵⁴ Centre for Minority Rights Development (CEMIRIDE), William Sipai & Noah Kitarpei Matunge v Attorney General and two others (2022) eKLR (para. 67,185); Cottrel-Ghai J, Ghai Y, Sing’Oei K and Wanyoike W, ‘Taking diversity seriously: minorities and political participation in Kenya’ *Minority Rights Group International*, 2013,2.

⁵⁵ Article 260, *Constitution of Kenya*, 2010. Centre for Minority Rights Development (CEMIRIDE), William Sipai & Noah Kitarpei Matunge v Attorney General and two others (2022) eKLR (para.11 which references the fourth periodic International Covenant on Civil and Political Rights (ICCPR) report submitted to the United Nations Human Rights Committee (UNHRC) by CEMIRIDE),

⁵⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Republic of Kenya* (2009)

⁵⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Republic of Kenya* (2009)

process involves making significant decisions that directly impact the land of indigenous people.⁵⁸

This conceptual framework of autonomy will hence be used to assess, whether the avenues of participation for indigenous communities in Kenya gives these communities a sufficient chance, to make decisions and grant consent as independent communities.

1.7.2 The Responsibility of States to Protect Human Rights

States have the legal obligation to protect and promote human rights, and that to make sure people realize these rights without discrimination.⁵⁹ In the past, sovereignty of states was understood as unlimited exclusive territorial jurisdiction where states could violate the human rights of their citizens with impunity.⁶⁰ Two decades later, after grave human rights violations⁶¹, that concept of state sovereignty evolved to not only mean territorial jurisdiction but also to include the protection and enforcement of human rights of their nationals the state.⁶² This applies in Kenya as the constitution recognizes the fundamental duty of the state and every state organ to observe, respect, promote and fulfil the rights and fundamental freedoms in the bill of rights.⁶³

These fundamental rights and freedoms are afforded to both individuals and communities in order to preserve their dignity and promote social justice and the realisation of the potential of all human beings.⁶⁴ This includes marginalized and minority groups, where indigenous communities fall under.⁶⁵ One of the principal rights that the state has to shield is the right to

⁵⁸ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Republic of Kenya* (2009)

⁵⁹ Article 2, International Covenant on Economic, Social and Cultural Rights, 16 December 1996, 2200A (XXI).

⁶⁰ Donnelly J 'State Sovereignty and International Human Rights' 28(2) *Carnegie Council for Ethics in International Affairs*, 2014, 225, 229.

⁶¹ Genocidal ethnic conflict in the former Yugoslavia, genocide in Rwanda, ethnic cleansing in Kosovo and later Ad hoc criminal tribunals were established for the former Yugoslavia and Rwanda. In , the Rome Statute established a permanent International Criminal Court (ICC), which began operating in with a mandate to prosecute individuals, especially state officials, responsible for genocide, crimes against humanity, and war crimes. In 1999, UN Secretary-General Kofi Annan nicely captured, and helped to consolidate, the new understanding of sovereignty reflected in these changes: "States are now widely understood to be instruments at the service of their peoples, and not vice versa- all from Donnelly J 'State Sovereignty and International Human Rights' 28(2) *Carnegie Council for Ethics in International Affairs*, 2014, 225,- 230.

⁶² Donnelly J 'State Sovereignty and International Human Rights' 28(2) *Carnegie Council for Ethics in International Affairs*, 2014, 225, 230.

⁶³ Article 21(1), *Constitution of Kenya* (2010).

⁶⁴ Article 19, *Constitution of Kenya* (2010).

⁶⁵ Article 21(3) *Constitution of Kenya* (2010); Article 260 *Constitution of Kenya* (2010).

property.⁶⁶ This is to say, even though states have territorial rights over land as well as the power to compulsorily acquire land, they have the obligation to preserve the rights of its citizens.⁶⁷ The conceptual framework of The Responsibility of States to Protect Human Rights will be used to critique Kenya's approach on how it conducts participation of indigenous communities and if it promotes their self-determination. This is useful in examining whether the principle of free prior and informed consent is incorporated into the participation model for indigenous communities in Kenya.

1.8 Literature Review

Participation for indigenous communities living in community land in Kenya

Currently, in Kenya participation is a vital means through which indigenous communities have to air their views on the use of their land.⁶⁸ A landmark case that is discussed by most scholars when it comes to participation of indigenous communities is the *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Republic of Kenya (Endorois)* (herewith referred to as the 'Endorois Case').⁶⁹ There seems to be a general agreement among scholars that the court was right in upholding the rights of the Endorois community when it came to the question of ownership of their ancestral land and utilisation of their natural resources.⁷⁰ It was ruled that there was not enough consultation or any use of the FPIC.⁷¹ However, as recognized by Ndlovu, despite this milestone of a case the impact is questionable in Kenya, as there has been a number of concerns on how public participation takes place in light of indigenous communities.⁷²

Although Muigua and Ndlovu generally appreciate the metric of public participation set out in the *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of*

⁶⁶ Article 40 *Constitution of Kenya* (2010).

⁶⁷ Article 21(3) *Constitution of Kenya* (2010).

⁶⁸ Article 10, *Constitution of Kenya* (2010). Section 15 Section 15(5) *Community Lands Act* (Act No 2 of 2016).

⁶⁹ African Commission on Human and People's Rights 276/2003.

⁷⁰ Ndlovu N, Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and OgieK 66 (2) *Journal of African Law*, 2022, 202. Muigua K, Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya, 1 *Nairobi University Press*, 2019, 7. ; Barelli M 'Free Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead' 16 *The International Journal of Human Rights* 1, 2012, 29-31. African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, 'REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP ON INDIGENOUS POPULATIONS/COMMUNITIES' 2010 ,44-45.

⁷¹ African Commission on Human and People's Rights 276/2003.

⁷² Ndlovu N, Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and OgieK 66 (2) *Journal of African Law*, 2022, 202;

Energy & 17 case, they acknowledge that the guidelines given in the ruling are the bare minimum standards when it comes to public participation.⁷³ Hence, they opine that, the standards set are only a step to the attainment of free prior and informed consent of indigenous communities.⁷⁴ Muigua raises concerns such as the quality of public participation and Ndlovu describes the process as ‘fragmented’.⁷⁵ This can be implied to mean that there are many loopholes that still need to be considered in order to make sure the interests of the indigenous communities are protected during public participation. Muigua also generally looks at public participation for indigenous communities as important because of natural resource management and posits that traditional knowledge is vital for sustainability of natural resources including forests, water, and agro-ecosystems across landscape continuum spanning from households through farms, village, commons and wilderness.⁷⁶ However, despite natural resources being an important factor to consider during participation of indigenous communities, it does not consider the communities’ right to self-determination but only values them for their traditional knowledge in sustainable development.⁷⁷

In the exploitation of natural resources, Muigua posited that there are two types of participation; consultative participation and empowered participation. For consultative participation, government provides citizens and their representatives with a chance to be heard, with *no guarantee* that participation will be heeded since the decision makers have the freedom to agree with citizens or not. For empowered participation, the participants are invested with decision-making power and influence, such as having citizen representatives on boards that oversee local public service delivery and the citizens may participate through local associations, social movements and normally an obligation to give the reasons for why they agree or disagree.⁷⁸ Due to the nature of guidelines allotted to public participation in the

⁷³ Muigua K, *Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya*, 1(1) *Nairobi University Press*, 2019, 16. Ndlovu N, *Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and OgieK 66 (2) Journal of African Law*, 2022, 202.

⁷⁴ Muigua K, *Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya*, 1(1) *Nairobi University Press*, 2019, 16. Ndlovu N, *Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and OgieK 66 (2) Journal of African Law*, 2022, 225-227.

⁷⁵ Ndlovu N, *Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and OgieK 66 (2) Journal of African Law*, 2022, 202; 227.

⁷⁶ Kariuki M ‘*Towards Meaningful Public Participation in Natural Resource Management in Kenya*’ University of Nairobi Press, 2014, 6.

⁷⁷ Kariuki M ‘*Towards Meaningful Public Participation in Natural Resource Management in Kenya*’ University of Nairobi Press, 2014, 6.

⁷⁸ Kariuki M ‘*Towards Meaningful Public Participation in Natural Resource Management in Kenya*’ University of Nairobi Press, 2014, 5.

Mui case, the public participation that occurs in Kenya falls under a consultative type of public participation rather than an empowered type of participation.⁷⁹ If that is the case, this study seeks to find out how the consent of indigenous communities, which is paramount in the protection of their land rights and development and self-determination, comes into play within that model of public participation.

Moreover, as far as involvement of indigenous communities is concerned, Kariuki observes that the introduction of community assemblies and land management committees in participation in Kenya might dilute traditional governance systems for land and resources, especially in communities identified based on ethnicity or shared cultures like pastoralism or hunting and gathering.⁸⁰ He further posits, and seconded by Okoth Ogendo that the law's disregard for existing traditional governance systems and its establishment of new formal institutions indicate a persistent effort, to appropriate common property regimes.⁸¹ This a stark contrast from South Africa where Ombella notes that there is specific legislation which requires that every traditional community registers and specifies the mechanism of how their consultation is to take place.⁸² Additionally, Ombella notes that with regard to development planning, traditional communities are entrusted to deal with the general affairs of their community including planning for their development, through their Traditional Council, and Consultation with the government and other development stakeholders on the strategies and relevant intervention as to their needs are shared.⁸³ Kariuki is a proponent of this approach and further asserts that that type of structure should be used in granting FPIC.⁸⁴

⁷⁹ * The last guideline of public participation as per the Mui case is that ; it is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand. This means at the end of the day; the office holders will make the decision and the work of the participants is to mostly cross fertilize and enrich views and not to decision make. This means this approach is more consultative Participation more than empowered participation.

⁸⁰ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018, 155.

⁸¹ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya', 163.

⁸² ⁸² Ombella J 'Regulation of Natural Resources Located in Indigenous Communities Territory under the Principles of Consultation and Free, Prior-Informed Consent: Perspectives in Selected Countries' *African Journal of International and Comparative Law*, 29(4),2021, 514.

⁸³ ⁸³ Ombella J 'Regulation of Natural Resources Located in Indigenous Communities Territory under the Principles of Consultation and Free, Prior-Informed Consent: Perspectives in Selected Countries' *African Journal of International and Comparative Law*, 29(4),2021, 515.

⁸⁴ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya', 163.

Manifestations of Free Prior and Informed Consent for indigenous communities

Public Participation is one of the processes that can be shown to emulate FPIC, however there are different ways that FPIC can be promoted. Some authors allude that one way to promote FPIC and safeguard the interests of indigenous communities is by joining certain treaties which would promote their FPIC.⁸⁵ Nderi and Ongaro submit that Kenya should prioritize signing on to global standards and conduct legislative and policy reforms as a commitment to integrate transparency and accountability in its extractive industry as it will incentivize the government into better governance for the indigenous people.⁸⁶ Ombella notes that these approach is effective as some countries such as Canada, which is a home to many indigenous communities, embrace this method and it balances rights of the state, companies and indigenous communities⁸⁷ He notes that the aboriginal rights are reportedly to be recognized and preserved under the aboriginal treaties which are referred to under the Canadian Charter of Rights and Freedoms. Furthermore, he notes that generally, the global north utilize Community Development Agreements (CDA's) and the Impact and Benefits Agreements (IBA's) to protect indigenous communities' interests. He categorically notes that global south countries do not employ these methods.⁸⁸ This is clearly made out when Nderi and Ongaro discuss the Extractive Industries Transparency Initiative (EITI) which is a global standard that aims to promote open and accountable management of oil, gas and mineral resources. They commented that although the EITI Multi-Donor Trust Fund has made efforts to bring Kenya onboard, Kenya is yet to commit to EITI.⁸⁹

Usually in global south countries, more specifically in African countries, the county government usually holds community land in trust for the indigenous communities.⁹⁰ This

⁸⁵ Anyango B And Nderi A, 'The Relevance Of Access To Information And Its Role In Ensuring Good Governance In Kenya's Extractives Industry' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018, 116.

⁸⁶ Anyango B And Nderi A, 'The Relevance Of Access To Information And Its Role In Ensuring Good Governance In Kenya's Extractives Industry' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018, 116.

⁸⁷ ⁸⁷ Ombella J 'Regulation of Natural Resources Located in Indigenous Communities Territory under the Principles of Consultation and Free, Prior-Informed Consent: Perspectives in Selected Countries' *African Journal of International and Comparative Law*, 509.

⁸⁸ Ombella J 'Regulation of Natural Resources Located in Indigenous Communities Territory under the Principles of Consultation and Free, Prior-Informed Consent: Perspectives in Selected Countries' *African Journal of International and Comparative Law*, 510.

⁸⁹ Anyango B And Nderi A, 'The Relevance Of Access To Information And Its Role In Ensuring Good Governance In Kenya's Extractives Industry' Kenya's Extractives Industry' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018, 120.

⁹⁰ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya', 166.

means they have a fiduciary duty to the indigenous communities. However, there is a tendency for private investors and the national government to get consent from county government public officials with the exclusion of the participation of indigenous communities themselves, despite their right to land and protection.⁹¹ This has colonial underpinnings where the public officials that were chosen were usually under the whims of the government and did not consider the rights of communities they are from.⁹² Here consent of indigenous communities has been interpreted to mean permission from relevant public officials.⁹³ Though authors such as Muigua question this by posing the question of which safeguards will ensure that the decision-makers in the county are not driven by their selfish interests to grant such consent?⁹⁴ He poses many crucial questions throughout the paper on consent of indigenous communities in Kenya with no definitive answer. Moreover, Ambani acknowledges that more often than not the government officials charged with the realisation of the people's wellbeing are greedy and liaise with the multinationals that only care about profits. In the end, he concludes that the indigenous peoples' dignity is undermined, returns on investment are wasted, property rights suffer, and the environment is polluted. He notes that this is further exacerbated by the fact there are natural calamities like drought and systematic discrimination.⁹⁵

However, Agrwal believes that the only reason consent of indigenous communities is important is because it is a form of decentralization of the state's authority over — and benefits from — land and natural resources to local actors.⁹⁶ Muigua, may be partly of this opinion as he raised concerns and prescribed that when compulsory acquisition of land takes place, the meaning of 'unreasonable withholding of consent by communities' needs to be given a meaning so the state does not take advantage⁹⁷. Aside from that Muigua asserted that

⁹¹ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya', 166.

⁹² Huiyenga D, 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC)' *The Extractive Industries and Society* 6, 2019 ,715.

⁹³ Huiyenga D, 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC)' *The Extractive Industries and Society* 6, 2019 ,716.

⁹⁴ Muigua K, Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya,1 *Nairobi University Press*,2019,19.

⁹⁵ Ambani J 'Resource Curse' To 'Mis-Rule Penalty'? An Introduction' Industry' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018,3.

⁹⁶ Nelson F and Agrawal A 'Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa'39(4) *Development and Change* ,2008 ,558.

⁹⁷ Muigua K, Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya,1 *Nairobi University Press*,2019, 18.

FPIC is a method of the state to acknowledge that its decision-making processes must bring on board those people who are either to benefit or are likely to suffer from implementation of certain projects. This alludes to self-determination but does not explicitly go into what it means for the indigenous communities, especially in light of public participation.⁹⁸

Despite there being an attempt to decentralize the state's power as alluded to by Agrwal and Muigua above, there is a general misgovernance when it comes to natural resources and indigenous communities in Africa.⁹⁹ Ambani likens this to a phenomenon called 'the resource curse' which he explains to be when African countries with large deposits of resource-wealth have often faced more economic, social and political turbulences than they have benefited from their natural endowments.¹⁰⁰ However he clarifies this and says it false perception that it is the presence of resources rather than poor and failed leadership institutions that is responsible for the messy situation.¹⁰¹ Ombella and Inman concur by stating that African states do not only deny the existence of indigenous peoples but also do not provide frameworks for their protection despite them.¹⁰²

Filer, Mahanty and Potter explain FPIC from the point of view of foreign investors. They assert that Foreign investors in developing countries have embraced the Free, Prior, and Informed Consent (FPIC) principle, partly influenced by the translation of the International Finance Corporation's (IFC) 'performance standards' into the Equator Principles.¹⁰³ These principles serve as safeguard policies for banks and insurance companies, ensuring

⁹⁸ Muigua K, Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya,1 *Nairobi University Press*,2019, 19.

⁹⁹ Ambani J 'Resource Curse' To 'Mis-Rule Penalty'? An Introduction' Industry'In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018,1-2.

¹⁰⁰ Ambani J 'Resource Curse' To 'Mis-Rule Penalty'? An Introduction' Industry'In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018,1-2.

¹⁰¹ Ambani J 'Resource Curse' To 'Mis-Rule Penalty'? An Introduction' Industry'In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018,1-2.

¹⁰² Inman D, Cambou D and Smis S, 'Evolving Legal Protection for Indigenous Peoples in Africa: Some Post-UNDRIP Reflection', *African Journal of International and Comparative Law* (2018) 363-364; Ombella J 'Regulation of Natural Resources Located in Indigenous Communities Territory under the Principles of Consultation and Free, Prior-Informed Consent: Perspectives in Selected Countries' *African Journal of International and Comparative Law*, 516.

¹⁰³ Filer C, Mahanty S and Potter L ' The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea', MDPI, Basel, Switzerland, 4.

compliance with corporate clients.¹⁰⁴ Companies, in turn, adopt these principles to meet shareholder expectations.¹⁰⁵ Additionally, they argue that the FPIC principle has been incorporated into specific industry guidelines, catering to the demands of consumers, particularly in developed nations. They give an instance where , guidelines by organizations like the Forest Stewardship Council (FSC) and the Roundtable on Sustainable Palm Oil (RSPO) have integrated FPIC principles.¹⁰⁶ They conclude that this method of implementation aligns with a 'market governance paradigm' rather than a 'corporate responsibility paradigm,' assuming a connection between consumers, shareholders, and stakeholders through various forms of communication. Therefore, they conclude that FPIC in that this context is seen only as a means to gain financial aid and approval of shareholders.¹⁰⁷

On the general issue of FPIC, Abebe is of the opinion that consent requirements for indigenous people absolutely tilt the balance towards them as they can veto projects that impact their rights. He further posits that this perspective has posed a challenge to the incorporation of consent in domestic laws.¹⁰⁸ This view seems to suggest that consent for indigenous communities should be done away with altogether. However, some authors are of the opinion that the concept of consent should be adjustable. For example, Bareilli is of the opinion that a flexible interpretation excludes that indigenous communities can veto in matters affecting their land and at the same time affirms that when a development project is likely to have a negative impact on the cultures and lives of indigenous people States must obtain consent of the indigenous people.¹⁰⁹ Still on adjustability, Ombella puts forward the concept of judicial limitation when it involves the concept of consent of indigenous communities stating that the extent of consent should be done on an ad hoc basis and the

¹⁰⁴Filer C, Mahanty S and Potter L ' The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea', MDPI, Basel, Switzerland, 4.

¹⁰⁵ Filer C, Mahanty S and Potter L ' The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea', MDPI, Basel, Switzerland, 4.

¹⁰⁶ Filer C, Mahanty S and Potter L ' The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea', MDPI, Basel, Switzerland, 4.

¹⁰⁷ Filer C, Mahanty S and Potter L ' The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea', MDPI, Basel, Switzerland, 4.

¹⁰⁸ Adem Abebe, 'Limitations to the Rights of Indigenous Peoples in Africa: A Model for Balancing National Interest in Development with the Rights of Indigenous Peoples?', *African Journal of International Comparative Law* 2012, 419.

¹⁰⁹ Barelli M 'Free Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead' 16 *The International Journal of Human Rights* 1, 2012, 31-32.

court should be the key determinant.¹¹⁰ Dutfield emphasizes that while Free, Prior, and Informed Consent (FPIC) is essential, it alone is not enough to ensure fair benefit-sharing agreements. This fairness can only be achieved if FPIC is obtained through procedures that are effective, culturally suitable, transparent, and adaptable.¹¹¹

Ideally, as Kariuki submits the requirement for Free, Prior, and Informed Consent (FPIC) from local communities is essential both before and after mining operations. FPIC entails obtaining consent for an activity after providing complete information about its purpose, procedures, potential risks, benefits, costs, and possible alternatives. The consent request must be in writing, in the local language, and include details such as the identity of those involved, benefits, costs, risks, and commercial interests. FPIC grants communities the right to stop or halt an activity. Unlike Environmental Impact Assessments (EIAs), FPIC involves more than just information provision or consultation. However, merely having FPIC is not enough for fair benefit sharing; it must be acquired through effective, culturally appropriate, transparent, and flexible procedures.¹¹² This is the stance the study seeks to enhance, by going specifically into one of the procedures of FPIC, which is public participation of indigenous communities in Kenya.

Contribution

An avenue in which indigenous communities in Kenya can air their views, and subsequently give or withhold consent is through participation. Unfortunately, being a marginalized and systematically discriminated group, the participation process done is usually scanty with no genuine concern as to their wellbeing. Hence, this research aims to utilize the free, prior, and informed consent standard to assess the framework of participation and consultation and consent of indigenous communities in Kenya. This study intends to refine this framework to establish a more transparent approach for participation, consultation and obtaining consent from indigenous communities in Kenya.

¹¹⁰ Ombella J 'Regulation of Natural Resources Located in Indigenous Communities Territory under the Principles of Consultation and Free, Prior-Informed Consent: Perspectives in Selected Countries' *African Journal of International and Comparative Law*, 29(4),2021, 517.

¹¹¹ Dutfield G, 'Protecting the rights of Indigenous Peoples: Can Prior Informed Consent help?' in Rachel W, Doris S and Roger C, *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case*, Dordrecht: Springer, 2009, 60

¹¹² Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya', 151.

1.9 Methodology

The nature of this study is mainly qualitative.

Firstly, a doctrinal method will be used where the study will use primary sources such as the Constitution, Acts of parliament such as Community Land Act, Mining Act, Land Act, Environmental Management and Coordination Act, and relevant case law to analyze and assess whether the manner in which participation of indigenous communities is conducted in Kenya can positively amount to consent. Secondary materials such as books, chapters in books, reports and journal articles will be relied on as well to critique and analyze the primary sources. These materials will document the various opinions of scholars' indigenous communities land rights, their participation and consent of the same . The method of induction will therefore be relied on.

Next, this study will look at the different institutions have interpreted the best practice of the standard of free prior and informed consent. Key guidelines that promote FPIC will be used to elaborate on how consultations of indigenous communities should be conducted. Primary sources will be used to assess whether Kenya adheres to these standards practically and theoretically.

Eventually, these guidelines will be used to pick out general principles that can be applied in Kenya that will reliably count as promoting adequate participation, consultation and consent for indigenous communities in Kenya. This will be done in depth in the next chapter where the study will eventually propose an approach where indigenous communities have a fair method of participation and granting consent.

1.10 Chapter Breakdown

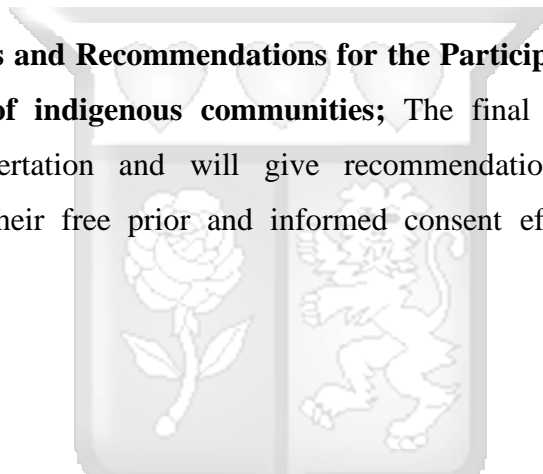
Chapter 1: Introduction to the study: This chapter is an introduction and lays the foundation of the research design of this study with parts such as the background, research objectives, research questions hypothesis, conceptual framework, preliminary literature review and methodology.

Chapter 2; An analysis of the legal framework for participation, consultation and consent of indigenous communities in Kenya; This chapter will examine and critique the legal framework of participation consultation and consent of indigenous communities in Kenya.

Chapter 3; An analysis of the best practices of FPIC This chapter will assess the best practices Free Prior and Informed Consent of indigenous communities as recommended by different international institutions and flesh out what is common across all the institutions. It will also assess if the best practices are being implemented in Kenya.

Chapter 4; An analysis of principles to be considered in the participation of indigenous communities; This chapter will go over some principles that can be used in guiding participation of indigenous communities in a way that is fair and equitable for them. An assessment will then be made on if these principles are present in Kenyan laws, policies and practices.

Chapter 5 ; Conclusions and Recommendations for the Participation, Consultation and Consent framework of indigenous communities; The final chapter will serve as a conclusion to the dissertation and will give recommendations on how indigenous communities can give their free prior and informed consent effective participation and consultation.



CHAPTER 2:
LEGAL FRAMEWORK FOR PARTICIPATION CONSULTATION AND CONSENT
OF INDIGENOUS COMMUNITIES IN KENYA

2.1 Introduction

This chapter evaluates the legal framework for public participation, consultation and consent of indigenous communities in Kenya. It will attempt to do this by analysing the international, regional and national framework of Kenya on the same. The objective of this chapter is to consider whether the aforementioned framework prioritizes the requirements and perspectives of the indigenous communities.

2.2 The Legal Framework

2.2.1 International Legal Framework

The Constitution of Kenya recognizes the general rules of international law and any treaty or convention ratified by Kenya as forming parts of the law of Kenya.¹¹³ International law upholds the rights of indigenous peoples regarding their lands, knowledge, cultural preservation, and human security.¹¹⁴ This is due to a declaration passed by the United Nations, which, while not binding on states, often receives widespread support that its principles are deemed part of customary international law and or part of the general principles of law recognized by civilized nations.¹¹⁵ These declarations, together with international treaties and conventions, aid indigenous peoples in their struggle to preserve physical and cultural survival in the face of economic development projects imposed upon them.¹¹⁶

i) International Covenant on Civil and Political Rights (ICCPR).

Kenya became a state party to the ICCPR on 1st May 1972, committing to protect the civil and political rights of all Kenyans.¹¹⁷ In its preamble it recognizes that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political

¹¹³ Article 2(5) and 2(6), *Constitution of Kenya*, 2010.

¹¹⁴ Phillips J 'The rights of indigenous peoples under international law' 26(2) *Tandfonline*, 2015, 120.

¹¹⁵ Phillips J 'The rights of indigenous peoples under international law' 26(2) *Tandfonline*, 2015, 121.

¹¹⁶ Phillips J 'The rights of indigenous peoples under international law' 26(2) *Tandfonline*, 2015, 121.

¹¹⁷ United Nations Human Rights Treaty Bodies 'Treaty Bodies Database' <
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en> on 11th
January 2024.

rights, as well as his economic, social and cultural rights.¹¹⁸ Furthermore, it considers the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.¹¹⁹

Also importantly, it provides that all peoples have the right of self-determination.¹²⁰ By virtue of that right people ought to freely determine their political status and freely pursue their economic, social and cultural development.¹²¹ Additionally, it requires those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities ought not to be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹²² This and all the stipulations earlier stated can be related and linked to the right of indigenous persons to self-determine and participate in matters that involve them and their land and practices politically, economically and socially.¹²³

ii) United Nations Declaration on the Rights of Indigenous Peoples

This is a declaration by the United Nations general assembly that vindicates and validates the existence, identity and protection of indigenous communities.¹²⁴ In terms of participation of indigenous communities, they not only have a right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, but to also while doing this, to participate fully in the political, economic, social and cultural life of the State.¹²⁵ Further, indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.¹²⁶ The participation process ought also not to be shallow but to be a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems. It ought also to recognize and

¹¹⁸ Preamble, International Covenant on Civil and Political Rights, 16 December 1966, Treaty Series, 999, 171.

¹¹⁹ Preamble, International Covenant on Civil and Political Rights, 16 December 1966, Treaty Series, 999, 171.

¹²⁰ Article 1, *International Covenant on Civil and Political Rights*.

¹²¹ Article 1, *International Covenant on Civil and Political Rights*.

¹²² Article 27, *International Covenant on Civil and Political Rights*.

¹²³ Article 7(1), *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples* 27 June 1989 ILO 169.

¹²⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/ 61/295.

¹²⁵ Article 5 *United Nations Declaration on the Rights of Indigenous Peoples*,

¹²⁶ Article 18 *United Nations Declaration on the Rights of Indigenous Peoples*,

adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.¹²⁷

In terms of consent, the declaration is against forceful and unfair evictions of indigenous communities from their land.¹²⁸ In fact, the declaration requires that before indigenous people move from their territory, their free, prior and informed consent is to be sought.¹²⁹ It further dictates that should consent be granted, it should be after an agreement on just and fair compensation and, where possible, with the option of return to their territories.¹³⁰ It also places a positive obligation on the state to prevent any activity that would strip their cultural identity as distinct people or dispossessing them of their lands, territory or resources.¹³¹ However, Phillips argues that the declaration can be interpreted as requiring only consultation of peoples and not consent, except in cases of forced relocation.¹³² This can be deemed to be because relocation means that the indigenous peoples have to move to another territory which may affect them greatly and therefore the threshold is not just effective consultation but also consent.¹³³

Kenya has not adopted the declaration, however, despite the non-adopting status quo of Kenya, some domestic laws of Kenya allude to recognizing the principles enshrined in the declaration as will be discussed later in the chapter.¹³⁴

iii) United Nations International Labour Organization Convention on Indigenous and Tribal Peoples

This convention applies to ancestral peoples that reside in independent countries and have distinguishable social, cultural and economic conditions.¹³⁵

As regards to participation, the government is tasked with the responsibility of not only participation of the indigenous peoples but also to ensure coordinated and systematic action

¹²⁷ Article 27 *United Nations Declaration on the Rights of Indigenous Peoples*,

¹²⁸ Article 7(2) *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61/295.

¹²⁹ Article 32(2) *United Nations Declaration on the Rights of Indigenous Peoples*.

¹³⁰ Article 10 *United Nations Declaration on the Rights of Indigenous Peoples*.

¹³¹ Article 32(3) *United Nations Declaration on the Rights of Indigenous Peoples*.

¹³² Phillips J 'The rights of indigenous peoples under international law' 26(2) *Tandfonline*, 2015, 122.

¹³³ International Labour Office '*Understanding the indigenous and Tribal People's Convention*, 1989 (No.169)' Handbook for ILO Tripartite Constituents, Geneva 2013, 16.

¹³⁴ *Constitution of Kenya*, 2010., *Community Lands Act* (Act No 2 of 2016)., *Minning Act* (Act No 12 of 2016).

¹³⁵ Article 1, *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples* 27 June 1989 ILO 169

to protect the rights of these peoples and to guarantee respect for their integrity.¹³⁶ There are further pointers on how to do this like guaranteeing that indigenous peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population, encouraging the full realization of the social, economic and cultural rights of these peoples.¹³⁷ Participation and total protection of rights and integrity of the indigenous communities is highlighted heavily throughout the convention.¹³⁸

The convention goes on to establish that communities have a right to self-determination in the fact that they have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.¹³⁹ These goals and right is to be furthered by participation in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.¹⁴⁰ Additionally, benefit sharing within indigenous communities must be present when there is economic development in their lands and that impact assessments be completed as well.¹⁴¹

In instances where a state maintains ownership of mineral or sub-surface resources, or other rights related to land resources, governments are required to establish or uphold consultation procedures with indigenous peoples.¹⁴² Where possible Indigenous groups should participate in the benefits and should receive fair compensation for any damages caused by such activities.¹⁴³ There is concern for the future generations of the indigenous peoples as there is a requirement that there be education for indigenous communities that focuses on equipping children with the necessary knowledge and skills to fully engage and contribute to both their

¹³⁶ Article 2 *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

¹³⁷ Article 2, *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

¹³⁸ Article 5,6 ,7,15, 23, *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

¹³⁹ Article 7(1), *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

¹⁴⁰ Article 7(1) *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

¹⁴¹ Article 7 (2) (3) *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

¹⁴² Article 15(2) *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

¹⁴³ Article 15(2), *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples.*

own community and the broader national community, ensuring equal participation opportunities.¹⁴⁴

In relation to the issue of consent of the indigenous people, consultation with them must be done in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement.¹⁴⁵ As a general rule peoples concerned should not be removed from the lands which they occupy.¹⁴⁶ However, free prior and informed consent is needed is when indigenous communities are required to relocate.¹⁴⁷ When the consent cannot be obtained then relocation can only take place after proper procedures established by national laws and regulations, which ought to include public inquiries to ensure the effective representation of the affected communities.¹⁴⁸

Kenya and a handful of other countries have not ratified the treaty due to a fear that recognizing the indigenous people's rights would threaten their state sovereignty, because indigenous communities have their own territories and political organization.¹⁴⁹ Despite this possibly being a setback, many national and international organizations and courts utilize the Convention when interpreting duties of states towards indigenous peoples, even if the respective states have not ratified the Convention.¹⁵⁰ Therefore, the vital provisions of the convention can be considered customary law and are thus binding despite non ratification by a state.¹⁵¹

2.2.2 Regional Legal Framework

i) African Charter on Human and Peoples' Rights (African Charter)

¹⁴⁴ Article 29 *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples*.

¹⁴⁵ Article 6(2) *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples*.

¹⁴⁶ Article 16(1), *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples*.

¹⁴⁷ Article 16 (2) *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples*.

¹⁴⁸ Article 16 (2) *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples*.

¹⁴⁹ Keal P 'Indigenous Self-Determination and the Legitimacy of Sovereign States' *Palgrave Journals, Australia*, 2007, 44.

¹⁵⁰ Göcke K 'Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription' 22.

¹⁵¹ Göcke K 'Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription' 22.

The African Charter champions for all peoples to have the rights to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.¹⁵² This was interpreted by the African court to mean indigenous peoples have the right to self-determine and be consulted in programs affecting them.¹⁵³ Additionally, the right to property has been guaranteed.¹⁵⁴ The right to property has been interpreted in the *Ogiek case* as envisioned in the United Nations General Assembly Declaration on the Rights of Indigenous Peoples that indigenous peoples have the right to own, use develop and control their lands and the state ought to give legal recognition and protection to these lands and territories together with their traditions and customs.¹⁵⁵

Furthermore, every citizen has the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.¹⁵⁶ Additionally, all peoples have the right to develop economically, socially and culturally and the state has a duty to uphold this right.¹⁵⁷ The African Commission opined in the *Endorois case* featuring indigenous people, that fulfilling the right to development requires five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.¹⁵⁸ It added that Article 2(3) of the UN Declaration on Development notes that the right to development includes “active, free and meaningful participation in development”.¹⁵⁹

Although the charter does not explicitly cover in a special manner indigenous communities, the interpretation of the treaty in judicial cases that involve indigenous communities uphold

¹⁵² Article 22, African Charter on Human and People’s Rights June 27, 1981.

¹⁵³ African Commission on Human and Peoples' Rights V. Republic of Kenya ACmHPR Comm Application No. 006/2012 2017, 61-64.

¹⁵⁴ Article 14, African Charter on Human and People’s Rights June 27, 1981.

¹⁵⁵ African Commission On Human And Peoples' Rights V. Republic Of Kenya ACmHPR Comm Application No. 006/2012 2017, 35- 36.

¹⁵⁶ Article 13 African Charter on Human and People’s Rights

¹⁵⁷ Article 22 *African Charter on Human and People’s Rights*.

¹⁵⁸ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya ACmHPR Comm 276/2003, Activity Report (2010) 73.*

¹⁵⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya ACmHPR Comm 276/2003,75.*

the rights of the indigenous communities to participate, to be consulted, and to enjoy their, civil, socio-economic and political rights which are connected to their land.¹⁶⁰

2.2.3 Domestic Legal Framework

i) Constitution of Kenya

The constitution of Kenya is the supreme law of the land.¹⁶¹ Within it, it enshrines public participation one of its as national values and principles.¹⁶² Public participation is important because it gives the people a sense of control over their lives and thus it puts in practice democratic ideals, and ultimately legitimizes eventual government decisions.¹⁶³ Equally, minorities and marginalized communities are to be accorded the right to participate and be represented in governance and other spheres of life.¹⁶⁴ It is important to highlight these groups because they are often dominated by majority groups on issues that are important to them.¹⁶⁵ It is no different for indigenous communities that fall under the category of marginalized groups.¹⁶⁶ Usually, they are by looked on decisions about their land which is questionable to their autonomy, and which poses many human rights violations.¹⁶⁷

In Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission, the court quoted *Rangal Lemeiguran & others v Attorney General & others* where the High Court affirmed the existence of indigenous peoples in Kenya and ruled that they had the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves.¹⁶⁸ Moreover, it quoted the

¹⁶⁰ Endorois Welfare Council v. Kenya ACmHPR Comm 276/2003,; African Commission on Human and Peoples' Rights V. Republic of Kenya ACmHPR Comm.

¹⁶¹ Article 2, *Constitution of Kenya*, 2010.

¹⁶² Article 10, *Constitution of Kenya*, 2010.

¹⁶³ Bobbio L ' Designing effective public participation' POLICY AND SOCIETY 38(1) 2019 42.

¹⁶⁴ Article 56, *Constitution of Kenya*, 2010.

¹⁶⁵ REPORT OF THE ACHPR WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES 20 Shaheed A, 'Indigenous Peoples and The Right to Freedom Of Religion Or Belief' Kenya National Commission of Human Rights, United Nations (Un) Special Rapporteur On Freedom Of Religion Or Belief 2022, 4-5.

¹⁶⁶ Article 260, *Constitution of Kenya*, 2010.

¹⁶⁷ Shaheed A, 'Indigenous Peoples and The Right to Freedom Of Religion Or Belief' Kenya National Commission of Human Rights, United Nations (Un) Special Rapporteur On Freedom Of Religion Or Belief 2022,4-5.

¹⁶⁸ *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission* (2022) eKLR

case of *Independent Electoral and Boundaries Commission & Others v The National Super Alliance & Others*, where the court strongly affirms that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable, and public participation qualifies as one of such values.¹⁶⁹ Additionally, since the realization of this value is immediate, a violation of article 10 can find a cause of action either on its own or in conjunction with other constitutional Articles.¹⁷⁰ Furthermore, the court ruled that there is a duty on the State to ensure that there are affirmative action programs aimed at ensuring that minorities and marginalized groups are not thereby disadvantaged.¹⁷¹

To further this point *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* was quoted where it was ruled that affirmative action is necessary because it creates an obligation that minority should be given preference to make up for a history of discrimination that has placed them at an unfair disadvantage and that it is primarily a benefit to the recipient and seeks to distribute the benefit in a way that compensates for past injustices and its lingering effects.¹⁷² Article 174(c) of the constitution states that one of the objectives of devolution is to enhance the participation of the people in making decisions affecting them and to enable communities to govern their affairs and manage their development¹⁷³

The Endorois case established five prerequisites for effective public participation: the state must accept and disseminate information, maintain continuous communication with stakeholders, conduct all consultations in good faith, adhere to culturally appropriate procedures during consultations, and strive for consensus to achieve an amicable agreement.¹⁷⁴ Additionally, *Save Lamu & Others v National Environmental Management Authority (NEMA) & another* established that a crucial aspect of a public participation initiative lies in adhering to the subsidiarity principle, which emphasizes that individuals

¹⁶⁹ *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission* (2022) eKLR

¹⁷⁰ *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission* (2022) eKLR.

¹⁷¹ *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission* (2022) eKLR.

¹⁷² *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission* (2022) eKLR.

¹⁷³ 3 Article 174(c) Constitution of Kenya (2010).

¹⁷⁴ *Centre for Minority Rights Development and Minority Rights Group International (on Behalf of Endorois Welfare Council) v Kenya ACmHPR Comm.276/2003, 288.*

most impacted by legislation, policy, action, or activity should wield greater influence, with deliberate efforts made to solicit their perspectives.¹⁷⁵

Indigenous communities have a special bond with their land, which means they have not only an economic linkage to their land but cultural, social political and religious connections.¹⁷⁶ This means it encompasses almost all-important aspects of their lives.¹⁷⁷ The constitution highlights protection social, economic, and cultural rights of every person.¹⁷⁸ Hence this can imply that in order for social cultural and economic rights to be adhered to, indigenous communities have to reign over their land and decisions made over it through participation due to the unique ties and impact to their land as reasoned in the cases above.

Additionally, the constitution advocates for the right to access information and especially if the information pertains to fundamental human rights.¹⁷⁹ This is particularly important because of high illiterate levels and language barriers within the community, information especially about their land may not be adequately disseminated to them and therefore will be disadvantaged when decisions about their land is made.¹⁸⁰

In Kenya, our Constitution is the backbone of our legal system, and it emphasizes on participation and protection of marginalised groups. This includes groups like indigenous communities, who have often been overlooked in the past. Legal precedents affirm their rights to influence policy and be heard, with affirmative action programs aimed at addressing historical injustices.

ii) The Community Land Act

This piece of legislation was enacted to breathe life into article 63 of the Constitution; which bestows the recognition, protection and registration of community land rights.¹⁸¹ Article 63 of the constitution also acknowledges ancestral and traditional lands as part of community land.

¹⁷⁵ *Save Lamu & Others v National Environmental Management Authority (NEMA) & another* [2019] eKLR African Commission on Human and Peoples' Rights, *REPORT OF THE ACHPR WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES*, 2005, 25.

¹⁷⁷ African Commission on Human and Peoples' Rights, *REPORT OF THE ACHPR WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES*, 2005, 21.

¹⁷⁸ Article 43 and 44, *Constitution of Kenya*, 2010.

¹⁷⁹ Article 35, *Constitution of Kenya*, 2010.

¹⁸⁰ Article 260 *Constitution of Kenya*, 2010.

¹⁸¹ Long Title *Community Lands Act* (Act No 2 of 2016).

This Act firmly upholds customary land rights by indicating that it has equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer.¹⁸² This provision of the Act allude to giving power to the indigenous community members and their custom and practices by respecting customary land rights which is a vital part of their culture.¹⁸³

Customs are further upheld when traditional dispute conflict resolution is prioritized when it comes to solving disagreements in community land.¹⁸⁴ Moreover, unlawful occupants of community land are warned off hence fostering a strong sense of community.¹⁸⁵ This suggests that the practices of the community members are a forefront concern when it comes to how land issues are solved within the community.¹⁸⁶ In the spirit of giving community autonomy, the administration and management of community land is given to the community assembly that consists of all adult members of the community.¹⁸⁷ The quorum for decision making by the community shall not be less than two thirds of the community assembly.¹⁸⁸

The community assembly is then mandated to elect between seven and fifteen members of the community assembly to constitute the community land management committee.¹⁸⁹ This committee has several functions like overseeing daily community functions, managing registered community land, collaborating on land use plans, fostering cooperation among community members on land matters, and establishing rules ratified by the community assembly.¹⁹⁰ However, there is a striking provision that grants the community assembly the power to delineate their land when more than two thirds of the community members agree to do so.¹⁹¹

This structure of administration that gives a model of community participation, has been criticized in two ways. First, there is no requirement that these representatives that are elected have knowledge of customary land law thus weakening the distinctive traditional structures

¹⁸² Section 5, 14 *Community Lands Act* (Act No 2 of 2016).

¹⁸³ Wily LA 'The Community Land Act in Kenya Opportunities and Challenges for Communities' Multidisciplinary Digital Publishing Institute 2018,9.

¹⁸⁴ Section 43, *Community Lands Act* (Act No 2 of 2016).

¹⁸⁵ Section 43, *Community Lands Act* (Act No 2 of 2016).

¹⁸⁶ Section 43, *Community Lands Act* (Act No 2 of 2016).

¹⁸⁷ Section 15(1) *Community Lands Act* (Act No 2 of 2016).

¹⁸⁸ Section 15(2) *Community Lands Act* (Act No 2 of 2016).

¹⁸⁹ Section 15 (3) *Community Lands Act* (Act No 2 of 2016).

¹⁹⁰ Section 15 (4), *Community Lands Act* (Act No 2 of 2016).

¹⁹¹ Section 15 (5) *Community Lands Act* (Act No 2 of 2016).

of governance like council of elders.¹⁹² Secondly, if the community land management committee makes any decision to dispose of or otherwise alienate community land, it shall be binding if it is supported by at least two thirds of the registered adult members of the community. This kind of decision can at times be deemed contrary to the common values and principles of the community, as land is communal¹⁹³

Overall, Kariuki observes that the introduction of community assemblies and land management committees in participation might dilute traditional governance systems for land and resources, especially in communities identified based on ethnicity or shared cultures like pastoralism or hunting and gathering.¹⁹⁴ He further posits, and seconded by Okoth Ogendo that the law's disregard for existing traditional governance systems and its establishment of new formal institutions indicate a persistent effort, to appropriate common property regimes.¹⁹⁵ This observations then begs the question on if this model truly emphasizes the needs and viewpoints of indigenous communities as a priority. However, in an attempt to engage indigenous communities, there is a requirement that an agreement relating to investment in community land shall be made after a free, open consultative process with the community.¹⁹⁶

The agreement also requires that there are arrangements for impact assessments, stakeholder engagement, ongoing monitoring, compensation, land rehabilitation, mitigation measures, community capacity building and technology transfer for local communities to benefit from land investments.¹⁹⁷ Additionally, and despite all these positive reinforcements to protect the indigenous community members in the requirements of the agreement, the standard that has been set by the Act is consultation and not consent of the members.¹⁹⁸ The Community Land Act therefore takes the trajectory that communities should be consulted, and consent as a principle is not considered.¹⁹⁹

¹⁹² Kariuki F, Ouma S and Ngetich R, Property Law, Strathmore University Press, Nairobi, 2016, 333.

¹⁹³ Wily LA 'The Community Land Act in Kenya Opportunities and Challenges for Communities' Multidisciplinary Digital Publishing Institute 2018,4 and 11.

¹⁹⁴ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018, 155.

¹⁹⁵ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya', 163.

¹⁹⁶ Section 36, *Community Lands Act* (Act No 2 of 2016).

¹⁹⁷ Section 36, *Community Lands Act* (Act No 2 of 2016).

¹⁹⁸ Section 36, *Community Lands Act* (Act No 2 of 2016).

¹⁹⁹ Section 15, *Community Lands Act* (Act No 2 of 2016).

In *Abdalla Rhova Hiribae & 3 others v Attorney General & 7 others* [2013] eKLR the court reaffirmed this by stating it is clear that some consultation and participation that involved the petitioners and the communities at the Tana Delta did take place. However, the court was not clear on what is sufficient consultation. Subsequently, the court did not prohibit the respondents from continuing with the project but instead instructed them to provide more information to the communities. From this case, the court allowed the respondents to carry out their project as so long as they were more transparent and gave more information about the project. It is key to note that consultation was deemed to be sufficient as opposed to obtaining consent and there was no guidelines or threshold on how the consultation should have taken place, despite the community complaining of lack of consultation on their resources.²⁰⁰

Lastly, the provision of the Community Land Act that at the core protect indigenous community members are watered down by provisions that give the county and national governments substantially more power.²⁰¹ The county government has the duty of holding all unregistered land on behalf of the community with no procedure of consultation with the community members when decisions are being made about the unregistered land.²⁰² Therefore, the county governments can act arbitrarily and often act against the best interest of the indigenous community members by selling away community land and being corrupt and thus dispossessing communities of their land.²⁰³ Commonly, private investors and the central government tend to engage county government officials for consent, overlooking the direct engagement of indigenous communities, despite their rightful land ownership and protections.²⁰⁴ This echoes colonial practices where chosen public officials often prioritized government interests over the rights of their own communities.²⁰⁵ Self-determination is once more compromised on.

²⁰⁰ *Abdalla Rhova Hiribae & 3 others v Attorney General & 7 others* (2013) eKLR.

²⁰¹ Section 6, *Community Lands Act* (Act No 2 of 2016); Section 38(2), *Community Lands Act* (Act No 2 of 2016).

²⁰² Section 6, *Community Lands Act* (Act No 2 of 2016).

²⁰³ Wily LA 'The Community Land Act in Kenya Opportunities and Challenges for Communities' Multidisciplinary Digital Publishing Institute 2018,14.

²⁰⁴ Kariuki F 'Land Rights Issues in The Extractives Sector In Kenya' 166.

²⁰⁵ Huizenga D, 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC)' *The Extractive Industries and Society*, 2019 ,715.

Another instance of government encroachment in community participation is the rule that states that the management of community land relating to land use, fishing, hunting and gathering, protection of animals and wildlife, water use, forestry, environment, energy and exploitation of minerals and natural resources shall be subject to national and county government laws.²⁰⁶ This is a wide scope which is vital to communities and these restrictions undermine the systems and laws of the community.²⁰⁷ These warnings where communities are reminded, they are subject to national and county laws are several which demonstrate that their self-governance is questionable.²⁰⁸ More problems come in when the State lays claims to some of their communal areas because while it allows a community “to reserve a portion of land for communal purposes”, it adds that “any land which has been used communally, for public purpose, before the commencement of this Act shall be deemed to be public land vested in the national or county government.”²⁰⁹ These provisions ultimately make the Act self-contradictory by using formalization of community land rights as a policy instrument where governing elites assert territorial control in Kenya, which therefore basically takes away power from the indigenous community members to participate in their own land decisions.²¹⁰

Apart from that, even though some regulations are commendable, they might be expensive to implement for indigenous community members. For example, present draft Regulations require advertisement of notice of meetings of the Community Assembly be given in at least one national newspaper and radio station and auditors are required to be appointed to approve a community’s accounts.²¹¹ In addition, with a general historic overview of how this Act was created, the process was a journey fraught with ambushes, as political players devised all manner of strategies, even blatant hijacking, to exert control over legislative processes in matters to do with community land.²¹² This resulted in a Community Land Act that is discouraging to the Kenyan indigenous communities as most management is state led

²⁰⁶ Section 38(2), *Community Lands Act* (Act No 2 of 2016).

²⁰⁷ Wily LA ‘*The Community Land Act in Kenya Opportunities and Challenges for Communities*’ Multidisciplinary Digital Publishing Institute 2018,15.

²⁰⁸ Wily LA ‘*The Community Land Act in Kenya Opportunities and Challenges for Communities*’ Multidisciplinary Digital Publishing Institute 2018,15.

²⁰⁹ Section 13(2), *Community Lands Act* (Act No 2 of 2016).

²¹⁰ Matteo FD ‘*Imagining the Kenyan Commons: The Stakes of State Control Over Land in the Formulation of the Community Land Act (2011-2016)*’ 58 (8) *The Journal of Development Studies* 2022, 1562.

²¹¹ Wily LA ‘*The Community Land Act in Kenya Opportunities and Challenges for Communities*’ Multidisciplinary Digital Publishing Institute 2018,13.

²¹² Matteo FD ‘*Imagining the Kenyan Commons: The Stakes of State Control Over Land in the Formulation of the Community Land Act (2011-2016)*’ 1556.

and infested with corruption with a guise of community participation.²¹³ At the end, the social justice-oriented interpretation of community land inscribed in the Constitution, recognizing the ancestral heritage of pastoral and hunter-gatherer communities which would have entailed repossession of private and public land, was lost in the legislation making process.²¹⁴

In conclusion, although the act attempts to bring about participation and inclusion through the community assemblies and the community land management committee there are major setbacks to this participation such as an overwhelming ill involvement of the state that prevents the bodies from performing their roles due to corruption and greed. Another setback is practicalities of matters such as illiteracy, costs and general disregard of customs and traditional leadership. Further, the threshold given is free prior and informed consultation of the community. Thus, it is left vague on if it is enough that the if community assemblies and the community land management committee created are adequately consulted by discussing a potential investment brought to them, whether or not they agree to the investment project taking place. Once again, there is no express mentioning of consent of indigenous communities mentioned anywhere in the Act or in its subsidiary legislation. Lastly, key definitions such as consultation have not been defined neither has its scope been given in the context of indigenous communities. An analysis of this Act puts into question both the autonomy of the indigenous communities and state responsibility.

iii) The Mining Act

This Act is important because usually minerals are frequently found where indigenous communities live in their traditional and ancestral lands.²¹⁵ A community under this Act is defined as a group of people living around an exploration and mining operations area; or a group of people who may be displaced from land intended for exploration and mining

²¹³ Matteo FD 'Imagining the Kenyan Commons: The Stakes of State Control Over Land in the Formulation of the Community Land Act (2011-2016)' 1562.

²¹⁴ Matteo FD 'Imagining the Kenyan Commons: The Stakes of State Control Over Land in the Formulation of the Community Land Act (2011-2016)' 1563.

²¹⁵ Ambani J 'Resource Curse' To 'Mis-Rule Penalty'? An Introduction' Industry' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press , Nairobi, 2018,4.

African Commission on Human and Peoples' Rights, *REPORT OF THE ACHPR WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES*, 2005, 20.

operations.²¹⁶ Usually, after minerals are found in indigenous communities land, exploration and displacement can take place hence indigenous communities can fall under the definition of communities given.²¹⁷

Mineral rights for private land require express consent of the private landowner however this is not the same for community land.²¹⁸ In community land there is no requirement for express consent from the community.²¹⁹ Instead, consent that is to be obtained is from the authority obligated by the law relating to administration and management of the community land or the National Land Commission in relation to community land that is unregistered.²²⁰ This is problematic due to the nuances that were discussed under the Community Land Act like; no requirement that these representatives or authorities that are elected have traditional knowledge that will uphold customary land law, lack of procedural clarity on how community members can participate in land matters for both registered and unregistered land and state organs or actors in charge of community land acting against the best interests of the community members.²²¹

Furthermore, the Cabinet Secretary may take steps under the law relating to the compulsory acquisition of land where the consent required under community land is unreasonably withheld.²²² Igbayiloye and Bradlow posit that this is an indication that the state cannot veto their power over landowners as this regulation alludes to a chance of withholding consent under community land as long as it is reasonable.²²³ This means that open and meaningful dialogue between companies and affected communities must take place in all

²¹⁶ Section 4 *Mining Act* (Act No 12 of 2016).

²¹⁷ Ambani J 'Resource Curse' To 'Mis-Rule Penalty'? An Introduction' Industry' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press, Nairobi, 2018,4.

²¹⁸ Section 37 *Mining Act* (Act No 12 of 2016).

²¹⁹ Section 38 *Mining Act* (Act No 12 of 2016).

²²⁰ Section 38 *Mining Act* (Act No 12 of 2016).

²²¹ Kariuki F, Ouma S and Ngetich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 333; ²²¹

Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press, Nairobi, 2018, 155; Huizenga D, 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC)' *The Extractive Industries and Society* 6, 2019, 715. ²²¹ Matteo FD 'Imagining the Kenyan Commons: The Stakes of State Control Over Land in the Formulation of the Community Land Act (2011-2016)' 58 (8) *The Journal of Development Studies* 2022, 1562.

²²² Section 40 *Mining Act* (Act No 12 of 2016).

²²³ Igbayiloye OB and Bradlow D 'An Assessment Of The Regulatory Legal And Institutional Framework Of The Mining Industry In South Africa And Kenya For Effective Human Rights Protection: Lessons For Other Countries' *African Human Rights Law Journal* 2021,380.

cases.²²⁴ However, it is also crucial to note that the meaning of ‘unreasonably withheld’ has not been provided nor the scope given within the act or in the subsidiary legislation.²²⁵ This can still prove to be disadvantageous to the indigenous community members as that is a vague provision and leaves them vulnerable to exploitation as their very unique grievances and concerns might not be considered as there is no metric to determine ‘unreasonably withheld.’²²⁶

It is definitely an issue of concern on if indigenous communities can engage in meaningful dialogues with mining companies due to the power imbalances.²²⁷ The international standards require companies that interfere with the land of indigenous people ought to engage in a good faith conversation with them and eventually obtain their free, prior and informed consent.²²⁸ However, if this is not adhered to courts can step in the gap. South African Cases will be relied upon as their court is progressive and firm in the issues of indigenous communities participation, consultation and consent and are aiming to follow through with international standards.²²⁹ In South Africa Interim Protection of Informal Land Rights Act (IPILRA) and the Mineral and Petroleum Resources Development Act (MPRDA), are used to protect the informal and customary rights of indigenous communities in terms of consulting with them and obtaining their consent.²³⁰ South African Courts have then used these provisions to protect indigenous communities from unfairness and exploitation from private mining companies and the government.²³¹

For example in *Maledu v Itereleng Bakgatla Mineral Resources* an eviction order and interdict granted by the High Court of South Africa against Grace Masele Mpane Maledu and other community members of the Lesetlheng village community regarding a farm. The respondents, who held a mining right, sought access to conduct mining operations on the

²²⁴ Igbayiloye OB and Bradlow D ‘An Assessment of The Regulatory Legal And Institutional Framework Of The Mining Industry In South Africa And Kenya For Effective Human Rights Protection: Lessons For Other Countries’ African Human Rights Law Journal 2021,380.

²²⁵ Section 4 *Minning Act* (Act No 12 of 2016).

²²⁶ Muigua K, Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya, 1 *Nairobi University Press*, 2019, 18.

²²⁷ Mukweho N ‘The evolution and development of the principle of free, prior and informed consent in South Africa’ 38(1-2) *South African Journal on Human Rights* 2022,155.

²²⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61/295.

²²⁹ Mukweho N ‘The evolution and development of the principle of free, prior and informed consent in South Africa’ 158

²³⁰ Mukweho N ‘The evolution and development of the principle of free, prior and informed consent in South Africa’ 154 and 157.

²³¹ Mukweho N ‘The evolution and development of the principle of free, prior and informed consent in South Africa’ 158

farm, but the applicants, as owners, refused them access. The Constitutional Court overturned the High Court's decision that favoured the respondent, and instead emphasized that consent is required under the Interim Protection of Informal Land Rights Act (IPILRA). It opined that the community land owners were not consulted in accordance with the MPRDA, which requires consultation before mining operations can proceed on their land. While the Court didn't directly address the Free, Prior, and Informed Consent (FPIC) principle, it acknowledged its relevance and cited international law obligations regarding consent. Therefore, courts have the ability to protect customary land rights of indigenous communities against private mining companies and can balance out the power imbalances.²³²

The court can also do the same in balancing out the power between the state and indigenous people. In *Baleni v Minister of Mineral Resources, the Department of Mineral Resource* the respondents argued that community consent was not required before a mining right could be granted and as per the law only consultation of the indigenous community is required. The court ruled that the full and informed consent of the indigenous community as holders of rights in land is to be obtained, prior to granting any mining right to any entity as in accordance with IPILRA and MPRDA. The court added that this was in accordance to international law standards.²³³

In the case of *County Government of Turkana v National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 others [2020] eKLR*, the county government of Turkana was opposing the compulsory acquisition of community land by the National Land Commission.²³⁴ The court ruled that a court of law has jurisdiction to inquire on the legality of compulsory acquisition and prohibit the same if it was a violation of the rights of the communities in occupation. However, it evaded the conflict completely by stating that this was a conflict between the county government and national government.²³⁵ Hence it should be solved by Alternative Dispute Resolution as provided for by the Intergovernmental

²³² *Maledu v Itereleng Bakgatla Mineral Resources* (2018) Constitutional Court of South Africa.

²³³ *Baleni v Minister of Mineral Resources, the Department of Mineral Resource* (2019) High Court of South Africa.

²³⁴ *County Government of Turkana v National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 others* (2020) eKLR.

²³⁵ *County Government of Turkana v National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 others* (2020) eKLR.

Relations Act. This left the question of the legality of compulsory acquisition of indigenous community land unanswered.²³⁶

Another requisite is that the Cabinet Secretary shall, on receipt of the application to mine, give notice in writing of the pending application for the grant of a mineral right to landowner or community.²³⁷ The cabinet secretary also ought to publish notice of the pending application in a newspaper of wide circulation at the applicant's expense.²³⁸ A person or community may object to the grant of a license within twenty-one days in the case of an application for a prospecting license; and within forty-two days in the case of an application for a mining license.²³⁹ Despite an attempt to engage the community by informing them of prospects of what could happen to their land it has faced some criticism. It is argued that the duration provided for notification and objection is inadequate.²⁴⁰ Additionally, interested parties (communities) should be afforded sufficient time and opportunities to familiarize themselves with the project and respond appropriately.²⁴¹ This is important as access to essential information is crucial for them to make informed decisions about consenting to the use of their land for mining purposes.²⁴²

In spite of all of the above, supplementary laws seem to be inclusive of indigenous communities. One piece of such legislation is the Mining (Community Development Agreement) Regulations. Its main purpose is to ensure shared benefits that aligns with community sustainability, contributes to improved wellbeing, and maintains accountability and transparency in community development in mining activities.²⁴³ This piece of legislation governs drafting of the Community Development Agreement and provides that it shall be prepared in Kiswahili and English and where possible in the local language of the

²³⁶ *County Government of Turkana v National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 others* (2020) eKLR.

²³⁷ Section 34(2) *Mining Act* (Act No 12 of 2016).

²³⁸ Section 34(2) *Mining Act* (Act No 12 of 2016).

²³⁹ Section 34(4) *Mining Act* (Act No 12 of 2016).

²⁴⁰ Igbayiloye OB and Bradlow D 'An Assessment of The Regulatory Legal And Institutional Framework Of The Mining Industry In South Africa And Kenya For Effective Human Rights Protection: Lessons For Other Countries' 380.

²⁴¹ Igbayiloye OB and Bradlow D 'An Assessment of The Regulatory Legal And Institutional Framework Of The Mining Industry In South Africa And Kenya For Effective Human Rights Protection: Lessons For Other Countries' 380.

²⁴² Igbayiloye OB and Bradlow D 'An Assessment of The Regulatory Legal And Institutional Framework Of The Mining Industry In South Africa And Kenya For Effective Human Rights Protection: Lessons For Other Countries' *African Human Rights Law Journal* 2021,380.

²⁴³ Section 3 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

community; and have charts and schedules to reflect activities, timelines and other information.²⁴⁴ The agreement is necessitated to address the following issues ;the role of the county government, educational and employment opportunities, supporting infrastructure development, assisting small-scale enterprises, implementing special programs for marginalized groups, promoting agriculture, environmental protection, cultural heritage, and sports, and overseeing funding and dispute resolution in agreed-upon areas.²⁴⁵

These agreements are to be made by a Community Development Agreement Committee. This committee consists of a governor or an appointed representative, the National Government's administration representative, the local County Assembly representative, one elected women's representative, one village elder representative, two youth representatives, one civil society representative in extractives, one representative of marginalized groups, one representative of persons with disabilities, the community's Member of Parliament, and three representatives from the mining holder.²⁴⁶ While this committee is useful it does not address its relationship with the community land management committee that is also a representative of the indigenous community members and play a central role in management of community land.²⁴⁷ It also underrepresents indigenous community members as there is only one village elder.²⁴⁸

Moreover, consultation and not consent of the communities is provided for.²⁴⁹ Notwithstanding this, there is an attempt to describe how the consultations are to take place by stating that the schedule and evaluation and monitoring of the obligations should be within the agreement.²⁵⁰ In spite of this, the Cabinet Secretary in consultation with the County Government and the National Environmental Management Authority shall notify the holder within ninety days from the receipt of the petition, whether the community should be identified as a party to the Agreement.²⁵¹ This is an interesting provision, as if the land belongs to the community, why would they be excluded from upcoming agreements? And

²⁴⁴ Section 8 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁴⁵ Section 8 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁴⁶ Section 7 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁴⁷ Section 7 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁴⁸ Section 7 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁴⁸ Section 7 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁴⁹ Section 10 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁵⁰ Section 10 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

²⁵¹ Section 5(5) *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

why is this choice of exclusion being given to the County Government and the National Environmental Management Authority? This can be an example of state power overshadowing the community and their autonomy yet again.

In a landmark case, *the Mui Coal Basin Local Community* that discusses public participation of communities where mining was to take place, the court held that public participation ‘is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.’²⁵² An interpretation of this can be that while the views of the community matter, at the end of the day they are only to be consulted and ultimately the office holders will make the final decision.²⁵³ A further analysis can reveal that this mirrors how the laws are written as most times state authority prevails through executive bodies or compulsory acquisition over the voice of the indigenous communities.²⁵⁴

Regardless, practically in Kenya the rights of communities to access information and participate are violated by mining companies when they are denied crucial details about mining projects or excluded from the decision-making process regarding the development of mineral resources on their land.²⁵⁵ For instance, it has been reported that many communities complain about mining companies consulting only with their traditional leaders, entering agreements without the community's awareness, and without any apparent benefits for the community.²⁵⁶

In conclusion, the level of participation provided in the Act may not suffice as communication between indigenous communities and investors in a meaningful way. In fact, consent is obtained by ‘relevant authorities’ and not indigenous communities. There are also still traces of coercive state power in the regulations. Lastly, the standard given is explicitly

²⁵² *The Mui Coal Basin Local Community* [2015] eKLR

²⁵³ Kariuki M ‘*Towards Meaningful Public Participation in Natural Resource Management in Kenya*’ University of Nairobi Press, 2014, 5.

²⁵⁴ Kariuki M ‘*Towards Meaningful Public Participation in Natural Resource Management in Kenya*’ University of Nairobi Press, 2014, 5.

²⁵⁵ Igbayiloye OB and Bradlow D ‘*An Assessment of The Regulatory Legal And Institutional Framework Of The Mining Industry In South Africa And Kenya For Effective Human Rights Protection: Lessons For Other Countries*’, 367.

²⁵⁶ Igbayiloye OB and Bradlow D ‘*An Assessment of The Regulatory Legal And Institutional Framework Of The Mining Industry In South Africa And Kenya For Effective Human Rights Protection: Lessons For Other Countries*’ 369.

of consultation and not free prior and informed consent. On a positive note, there is the presence of Community Development Agreements that can safeguard the interests of the indigenous communities.

iv) Environmental Management and Co-ordination Act

This Act was enacted for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.²⁵⁷ A discussion of this Act is important as it governs Environmental Impact Assessments.²⁵⁸ An Environmental Impact Assessment (EIA) refers to a systematic assessment which is conducted to determine whether or not a program, activity or project will have negative impacts on the environment.²⁵⁹ EIA is applied in decision-making throughout the life cycle of proposed development projects and actions that may have potentially significant impacts on biophysical and socio cultural environments.²⁶⁰ The instrument provides for citizen participation in screening, scoping, environmental impact identification and evaluation, prior to development of Environmental and Social Management plans.²⁶¹ As already established indigenous communities are often found to be near resources that would trigger development projects and hence EIAs are required.²⁶² Hence EIAs are crucial to indigenous communities if any project is going to be conducted on their land in order to know its potential impacts.

The Environmental (Impact Assessments and Audit) Regulations provide for “economic analysis” which means the use of analytical methods which take into account economic, socio-cultural, and environmental issues in an integrated manner in the assessment of projects.²⁶³ It also defines ‘social analysis’ to mean assessing or estimating in advance the

²⁵⁷ Long Title, *Environmental Management and Co-Ordination Act* (Act No 8 of 1999).

²⁵⁸ *Environmental Management and Co-Ordination Act* (Act No 8 of 1999).

²⁵⁹ Section 2 *Environmental Management and Co-Ordination Act* (Act No 8 of 1999).

²⁶⁰ Ngetich JK and Ndiema AC ‘Challenges and opportunities in environmental impact assessment and environmental audit practice in Kenya’ 13(3) *Journal of Geography and Regional Planning* 2020, 70.

²⁶¹ Ngetich JK and Ndiema AC ‘Challenges and opportunities in environmental impact assessment and environmental audit practice in Kenya’ 13(3) *Journal of Geography and Regional Planning* 2020, 70.

²⁶² Ambani J ‘Resource Curse’ To ‘Mis-Rule Penalty’? An Introduction’ *Industry* In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press, Nairobi, 2018,4.

African Commission on Human and Peoples’ Rights, *REPORT OF THE ACHPR WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES*, 2005, 20.

²⁶³ Section 2 *Environmental (Impact Assessments and Audit) Regulations* 2003.

social consequences from specific policy actions or project development including social justice and equity, social uncertainty, social cohesion, social networks and interactions, social status and gender desegregation.²⁶⁴ Another key definition is the ‘strategic environment assessment’ that means the process of subjecting public policy, programmes and plans to tests for compliance with sound environmental management.²⁶⁵ Throughout the definitions there is a common thread not only environmental consequences but of social and cultural consequences together with an emphasis on decision making and public participation. This is important for indigenous communities as the land which might be used for project development might not have only environmental consequences but social and cultural consequences.²⁶⁶

The National Environment Management Authority (NEMA) established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of government in the implementation of all policies relating to the environment.²⁶⁷ One of its functions is to undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education, public awareness and public participation.²⁶⁸ In the general principles of environmental governance, the Environment and Land Court ought to consider; the principle of public participation in the development of policies, plans and processes for the management of the environment and the cultural and social principles traditionally applied by any community.²⁶⁹ In addition, it has to put into account the principle of international co-operation in the management of environmental resources shared by two or more states; and the principles of intergenerational and intragenerational equity.²⁷⁰ Therefore, public participation is a principle that is specially enumerated through in the act.

During the process of conducting an environmental impact assessment study, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by

²⁶⁴ Section 2 *Environmental (Impact Assessments and Audit) Regulations 2003*.

²⁶⁵ Section 2 *Environmental (Impact Assessments and Audit) Regulations 2003*.

²⁶⁶ African Commission on Human and Peoples’ Rights, *REPORT OF THE ACHPR WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES*, 2005, 25.

²⁶⁷ Section 9(1) *Environmental Management and Co-Ordination Act (Act No 8 of 1999)*.

²⁶⁸ Section 9(2)(m) *Environmental Management and Co-Ordination Act (Act No 8 of 1999)*.

²⁶⁹ Section 3(5)(a) *Environmental Management and Co-Ordination Act (Act No 8 of 1999)*.

²⁷⁰ Section 9(5)(d) *Environmental Management and Co-Ordination Act (Act No 8 of 1999)*.

the project.²⁷¹ While doing this the proponent ought to inform the potential affected members by posting posters, publishing notices and making announcements in both official and local language.²⁷² Apart from that they should ensure at least three public meetings with the affected parties and to receive their comments, all the while including a suitably qualified translator.²⁷³ In preparation of a project report there must be a strategic communication plan to ensure inclusive participation during the study and provide a summary of issues discussed at the public participation forum.²⁷⁴

The Authority (NEMA) shall, within fourteen days of receiving the environmental impact assessment study report, invite the public to make oral or written comments on the report.²⁷⁵ It is also required to publish for two successive weeks in the Gazette and in a newspaper with a nation-wide circulation and in particular with a wide circulation in the area of the proposed project; a public notice once a week inviting the public to submit oral or written comments on the environmental impact assessment study report; and make an announcement of the notice in both official and local languages at least once a week for two consecutive weeks in a radio with a nationwide coverage.²⁷⁶ Then after that a public hearing may be conducted depending on if the authority deems it necessary.

The public hearing should be presided over by a suitably qualified person appointed by the Authority, and the date and venue ought to be publicized.²⁷⁷ On the conclusion of the hearing, the presiding officer shall compile a report of the views presented at the public hearing and submit the report to the Director-General within fourteen days from the date of the public hearing.²⁷⁸ The authority shall then give its decision on the EIA after three months.²⁷⁹ In its decision it is also to consider the report of the presiding officer compiled after a public hearing.²⁸⁰ The decision of the Authority shall be in writing; however, it is only given to the

²⁷¹ Section 17(1) *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷² Section 17(2)(a) *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷³ Section 17(2) (b) (c) *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷⁴ Section 7 *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷⁵ Section 20 *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷⁶ Section 21 *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷⁷ Section 22 *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷⁸ Section 22(7) *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁷⁹ Section 23(1) *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁸⁰ Section 23(3) *Environmental (Impact Assessments and Audit) Regulations* 2003.

proponent within fourteen days. There is no requirement that the participants in the public participation get the decision of the authority.²⁸¹

Mohammed Ali Baadi & Others vs The Attorney General (supra) where the respondent intended to build a port and mega city where Lamu indigenous people reside (*LAPSSET Project*). The court observed that the state has an active role to ensure that the public likely to be affected by a proposed project, plan or development are provided with all relevant information pertaining to it, including the environmental impact assessment report which must contain all relevant information necessary for the competent authority to consider the application. Further it ordered that the respondents ought to consider the culture of the indigenous Lamu people when creating their plans. It then ordered that *the Project Proponents should include a demonstrably specific program for consultation with the Petitioners and the other Lamu Island residents about the impact the LAPSSET Project is likely to have on their culture as a distinct indigenous community.*²⁸²

Further it ordered that *NEMA should reconsider the EIA license given to the respondent and should only issue one once the respondent design a specific, measurable and actionable plan in consultation with the Lamu Island residents on how to protect the cultural identity of the region during and after the construction of the Lamu Port and mega-city.* From this case it can be deduced that courts themselves can discontinue projects when EIA regulations are not followed including cultural considerations when it comes to indigenous communities. Moreover, the court regulated NEMA's discretion, by requesting it to reconsider the license until the respondents have fulfilled their EIA obligations that secure the indigenous people's rights by compelling the respondents to look into a plan in conjunction with indigenous community members that will mitigate harms to the community. This once more proves that courts can be a recourse when there is injustice.²⁸³

All through the analysis it is fair to conclude that there is a robust legal framework of public participation and protection of social -cultural uses of environment in the Act.²⁸⁴

²⁸¹ Section 23(2) *Environmental (Impact Assessments and Audit) Regulations* 2003.

²⁸² *Mohamed Ali Baadi and others v Attorney General & 11 others* (2018) eKLR.

²⁸³ *Mohamed Ali Baadi and others v Attorney General & 11 others*[2018] eKLR

²⁸⁴ Okello N, Beevers L, Douven W and Leentvaar 'The doing and un-doing of public participation during environmental impact assessments in Kenya' 27(3) *Impact Assessment and Project Appraisal* 2009, 219.

Nevertheless, it is doubtful whether these rules are effectively complied with.²⁸⁵ One drawback is that, there is a resistance by many in authority to make accessible the information available to the public.²⁸⁶ This is unfortunate as EIA are the cornerstone of public participation²⁸⁷. Moreover, it is noted that public participation in environmental assessment in Kenya was often ‘adversarial’ in nature with non-governmental organisations (NGOs) and sectoral representatives often lobbying and petitioning the government on environmental and sustainability issues.²⁸⁸ This can be interpreted to mean that public opinion of indigenous people is not adequately considered without the assistance of more ‘vocal’ groups.²⁸⁹

Additionally, although it is important to define who the public is, the Act defines neither public participation nor the public.²⁹⁰ Further, English as a language dominates pamphlets, posters, photos and maps used in public participation events yet often the message is lost because of inadequate interpretation.²⁹¹ Consequently, there is inadequate explanation of background and technical material that may help the public to contribute effectively in EIA deliberation.²⁹² The lack of public awareness of their roles in environmental decision making often translates into forgoing justice, as citizens who do not know their roles and rights may not adequately claim them.²⁹³ In conclusion, understanding the barriers and the current situation regarding the application of the EMCA is therefore vital for any attempt to improve public participation, including in the indigenous communities’ participation and consent requirements.²⁹⁴

²⁸⁵ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 219.

²⁸⁶ Ngetich JK and Ndiema AC *‘Challenges and opportunities in environmental impact assessment and environmental audit practice in Kenya’* 75.

²⁸⁷ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 219.

²⁸⁸ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 220.

²⁸⁹ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 220.

²⁹⁰ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 220.

²⁹¹ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 222.

²⁹² Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 222.

²⁹³ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 224.

²⁹⁴ Okello N, Beevers L, Douven W and Leentvaar *‘The doing and un-doing of public participation during environmental impact assessments in Kenya’* 224.

In terms of consent, the legislation provides a strong legal framework for the public to be able to actively participate in decision making when there is a project that could potentially affect their lives, environmentally, culturally, socially or even generationally. However, how the process itself is conducted is poor with weak willpower from the state actors and private investors. Eventually, the National Environment Management Authority is the body responsible for granting consent and not indigenous communities, despite a rather inadequate public participation process that takes place. Therefore, the participation of the public is almost scant and therefore indigenous consent to projects despite an environmental impact assessment is quite disputable. Moreover, there is no mention of consent of the indigenous communities, but simply the principle of public participation is being enumerated.

2.2.4 Conclusion

Generally, there are some provisions that cater to the participation of indigenous communities including in matters to do with their land which is crucial to their existence. Despite this there seems to be an overarching theme of state bodies interfering with the participation of the indigenous communities. Apart from that how the participation takes place does not cater to the indigenous communities in the right ways as at times it is expensive or non-inclusive by using English to communicate to them. Moreover, the laws of Kenya tend to lean towards consultation of the indigenous communities and not acquiring of their consent. Additionally, consultation takes the shape of public participation, albeit even though it might be done in a shallow manner. In conclusion, the voice and needs of the indigenous communities when it comes to decision making especially when it comes to land issues may not be carefully regarded for and are most times suppressed. Notwithstanding, Kenya has not ratified any instrument internationally that protects indigenous communities, yet these instruments set clear regulations on how indigenous communities ought to be handled.

CHAPTER 3: BEST PRACTICES OF PARTICIPATION, CONSULTATION AND CONSENT OF INDIGENOUS COMMUNITIES

3.0 Introduction

The previous chapter analysed the legal framework of participation, consultation, and consent for indigenous communities in Kenya. This chapter seeks to investigate the best practices of participation, consultation and consent of indigenous communities. The Kenyan legal framework will then be measured against the best practices.

3.1 Best Practices

Free, prior, informed consent (FPIC) is now widely accepted as a fundamental principle in law and procedure that companies must adhere to when seeking to conduct operations on lands inhabited by indigenous peoples.²⁹⁵ It is a procedural requirement whose purpose is to adequately shield the human rights of indigenous peoples and allow ‘self-determined development’ in the context of industrial projects.²⁹⁶ The discussion has shifted from questioning if FPIC should be implemented in extractive projects occurring in indigenous lands to determining what would be best methods for its application in such situations.²⁹⁷ Therefore, the two guidelines below attempt to answer how the best practices of FPIC can be achieved in the context of indigenous communities.

3.1.1 Importance of the best practices to Kenya

In Kenya, these guidelines would be important in the context of participation of indigenous communities because of the requirement of affirmative action for marginalised communities.²⁹⁸ These manuals bring about elaborate and meticulous and unique steps of going about participation, consultation and even seeking consent of indigenous communities

²⁹⁵ Tomlinson K ‘*Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC*’ 23(5) *International Journal on Human Rights*, 2019, 880.

²⁹⁶ Tomlinson K ‘*Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC*’ 880.

²⁹⁷ Tomlinson K ‘*Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC*’ 881.

²⁹⁸ Article 56 and 260 *Constitution of Kenya* (2010)

as they are a marginalized group.²⁹⁹ This aligns with the vision of affirmative action for indigenous communities in Kenya as these steps give a special procedure tailor suited for indigenous communities.³⁰⁰ Apart from that, these steps give life to the theoretical principle of participation by giving real practical steps of how the participation, consultation and eventual consent of indigenous persons can happen.³⁰¹ Furthermore, these steps although are guidelines can assist greatly in improving legislation to do with participation, consultation and consent seeking from indigenous communities as there is a detailed procedure on how to go about the same.³⁰²

Consequently the guidelines highlighted above take into consideration constant sidelining and disregard of the territories and culture of indigenous communities which violates their self-determination and right to development.³⁰³ Therefore, the intent of these manuals is to have a clear, simple and practical process of including indigenous communities in projects happening in their territories.³⁰⁴ This intent is in line with the United Nations Declaration on the Rights of Indigenous Peoples, recognizing their rights and making specific mention of Free, Prior and Informed Consent (FPIC) as a prerequisite for any activity that affects their ancestral lands, territories and natural resources.³⁰⁵

3.1.2 Guidelines by Food and Agriculture Organization (FAO)

The 'Free Prior and Informed Consent; An indigenous People's Rights and Good Practice for Local Communities' Manual for Project Practitioners are guidelines provided by Food and

²⁹⁹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 4,5 11; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022.9

³⁰⁰ Article 56 and 260 *Constitution of Kenya* (2010).

³⁰¹ Article 10 *Constitution of Kenya* (2010); Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' and Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022.

³⁰² Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 11

³⁰³ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016, 4-5 ; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022.12

³⁰⁴ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016, 4,; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022.9.

³⁰⁵ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016, 5

Agriculture Organization of the United Nations.³⁰⁶ The reason these guidelines are relevant is because this organisation has worked closely for several years with indigenous peoples in incorporating their views in areas such as food security, nutrition, forestry, fisheries, and climate change.³⁰⁷ The purpose thus that the organization created formulated these guidelines was to create a more practical and systematic method of respecting indigenous communities rights.³⁰⁸

It does this by putting Free Prior and Informed Consent (FPIC) of indigenous communities at the forefront throughout the process in which it recommends as per the requirements in United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the International Labour Organization Convention 169.³⁰⁹ The implementation of its process involves six vital steps that must be considered. They are as follows³¹⁰;

Project Identification

- 1) This stage involves identification of indigenous communities and determining their concerns and representatives. This is in order to is to get to acquainted to the indigenous communities that the project will be interacting with, and the decision-making structure in the community, and if they are likely to accept the project.
- 2) Recording geographical and demographic data using participatory mapping techniques. The aim of this stage is to gather information about the residential area of the indigenous communities, the land and natural resources they inhabit, their utilization patterns, and the customary rights.

Project Formulation

- 3) Developing a participatory communication strategy and conduct ongoing dialogues to ensure transparent disclosure of project information. The goal is to transparently

³⁰⁶ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016.

³⁰⁷ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 5.

³⁰⁸ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 5.

³⁰⁹ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 11.

³¹⁰ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 19;

inform the concerned indigenous Peoples on the project plans which allows them to freely shape the FPIC agreement.

- 4) Achieving consent, documenting the needs of Indigenous Peoples that are to be integrated into the project, and establish a feedback and complaints system through mutual agreement. This establishes that before commencing activities, appropriate consent is sought from all involved parties in the project.

Project Implementation

- 5) Engage in participatory monitoring and evaluation of the agreement. The point of this stage to ensure transparent and effective monitoring and evaluation of the agreement by all interested parties.

Project Closure

- 6) Capture insights gained and share details of project accomplishments. This is important because it is crucial to document lessons learned from the FPIC process to enhance future actions, minimizing risks and fostering trust with the indigenous community.³¹¹

These steps guide project managers on how to follow through with FPIC when dealing with indigenous communities.³¹² It also illustrates the benefits of FPIC and provides the regulatory framework to be used when mainstreaming indigenous peoples' rights within organizations' policies and standards.³¹³ This manual recognizes that FPIC is not just an outcome but a process in of itself.³¹⁴ A human rights approach is also taken where self-determination of indigenous communities is recognized and their exploitation is discouraged.³¹⁵ However, there is a concern that although this human rights approach pushes for meaningful participation and eventual decision making by affected communities, the duty bearer to

³¹¹ ³¹¹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 19;

³¹² International Institute for Sustainable Development 'FAO and NGOs Launch FPIC Manual' < <https://sdg.iisd.org/news/fao-and-ngos-launch-fpic-manual/> > on 11 October 2016.

³¹³ International Institute for Sustainable Development 'FAO and NGOs Launch FPIC Manual' < <https://sdg.iisd.org/news/fao-and-ngos-launch-fpic-manual/> > on 11 October 2016.

³¹⁴ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 13.

³¹⁵ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 12.

ensure that this happens can at times shift from the state to non-state actors such as private sector companies, NGOs and transnational corporations.³¹⁶

3.1.3 The Roundtable on Sustainable Palm Oil Guidelines (RSPO)

The Roundtable on Sustainable Palm Oil Free Prior and Informed Consent Guide is an agreement by RSPO which is a worldwide nonprofit organization comprising voluntary members.³¹⁷ These members entail stakeholders from various points along the palm oil supply chain to establish and execute universal standards for sustainable palm oil.³¹⁸ What is unique about these standards is that these rules were made by mostly private stakeholders as opposed to being created by an NGO or international body.³¹⁹ Their goal is to be sustainable and ethical even as palm oil is being extracted.³²⁰ Therefore environmental and social criteria that companies must comply with was created.³²¹ The principle of FPIC is also enumerated throughout the guidelines because it gives life to the right of self-determination which is in accordance international human rights law and business best practices.³²²

These guidelines give five mainstages for the implementation of the FPIC process.³²³

1) Preparation and investigation

Here there should be picking out and engaging with any affected indigenous peoples, local communities and any other users together with early consultations.

2) Assessments

This includes recognizing prior rights to land and other resources by conducting land tenure and use assessments, social and environmental impact assessment, and any other necessary assessment.

3) Negotiation

³¹⁶ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 884.

³¹⁷ Roundtable on Sustainable Palm Oil 'Who We Are' < <https://rspo.org/who-we-are/> > accessed on 26 February 2024.

³¹⁸ Roundtable on Sustainable Palm Oil 'Who We Are' < <https://rspo.org/who-we-are/> > accessed on 26 February 2024.

³¹⁹ Roundtable on Sustainable Palm Oil 'Who We Are' < <https://rspo.org/who-we-are/> > accessed on 26 February 2024.

³²⁰ Roundtable on Sustainable Palm Oil 'What We Stand For' < <https://rspo.org/who-we-are/what-we-stand-for/> > accessed on 26 February 2024.

³²¹ Roundtable on Sustainable Palm Oil 'Who We Are' < <https://rspo.org/who-we-are/> > accessed on 26 February 2024.

³²² Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 15.

³²³ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 21.

Where consultations are done in good faith that end in signed negotiated agreements between involved parties together with a documented system for compensation.

4) Implementation and Monitoring

This stage requires participatory monitoring, a grievance and dispute resolution mechanism.

5) Verification

An internal assessment of compliance by involved companies and stakeholders is required.³²⁴

The RSPO guidelines have been formed by voluntary members that are mostly from the private sector hence it is a testament to civil societies pressuring the private sector to take responsibility and to endorse and apply FPIC in their projects, even without state support.³²⁵

The pressure yielded further results in the banking sector where international financial institutions like the Economic Bank for Reconstruction and Development (EBRD) and the International Finance Corporation (IFC) updated their social performance standards to incorporate FPIC.³²⁶ This endorsement by international financial bodies regarding FPIC within projects situated on indigenous territories carries weight due to the substantial contribution of international financing to investments in the extractive industry.³²⁷

3.1.4 General criticism of the best practices

FPIC is instrumental in attempting to empower indigenous people against exploitative companies and governments, yet the implementation of FPIC poses a major struggle.³²⁸ This is because of overlooking some critical aspects such as intricacies and uncertainties within the political dynamics of indigenous communities, shaped by their unique histories and relationships with the state, can sometimes be bypassed.³²⁹ Similarly, there is a tendency to underestimate the internal complexities of companies and their interactions with governments, which play a decisive role in determining the fate of projects.³³⁰

³²⁴ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 21.

³²⁵ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 884.

³²⁶ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 884.

³²⁷ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 884.

³²⁸ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 881.

³²⁹ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 881.

³³⁰ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 881.

Hence, a difficulty arises because the success of the FPIC process heavily relies on the strength of indigenous communities governance structures and the support they receive.³³¹ In addition, for many companies, especially in contexts where indigenous peoples rights are poorly realized, implementing FPIC effectively requires them to play an active role in advancing their rights, thus becoming involved in a complex political dynamics.³³² In spite of this, FPIC is a step forward in redressing the power imbalances indigenous peoples experience, as well as the problems they face in the context of projects taking place on their lands.³³³ It also assists in mitigation of negative effects industry projects on indigenous lands that is essential for their wellbeing.³³⁴

The four major steps that can be drawn out from both manuals are i) Project Identification ii) Project Formulation iii) Project Implementation and iv) Project Closure.³³⁵

3.2 Project Identification

3.2.1 Identify the indigenous peoples concerned and their representatives

At this stage, the project managers ought to actively seek out which indigenous communities would be affected by the project.³³⁶ Tools such as interviews, inquiring about the indigenous communities using self-governance entities; community based organisations; national or regional confederations, councils and organisations; universities and research institutions; non-profit organisations and NGOs; and official national censuses can be used in finding out about the indigenous community in a certain area.³³⁷ The interviews and inquiries should be

³³¹ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 881.

³³² ³³² Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 881.

³³³ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 880.

³³⁴ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 882.

³³⁵ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 19; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022, 21.

³³⁶ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20.

³³⁷ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20

to find out and understand the language ,culture, customs, land usage patterns and rights of indigenous peoples within the territory.³³⁸

In the research, identification of the representatives of indigenous people, their self-governance systems and traditional leaders is paramount in order to recognize the people that are accountable and legitimate leaders to the indigenous people.³³⁹ Identification of leaders does not throw out broad community participation.³⁴⁰ Participation in gathering information on the indigenous community should include women, elderly and disabled people who might be sidelined within the community.³⁴¹ Additionally, project managers are required to survey on the existence of mobile communities that migrate seasonally, for example pastoralists indigenous communities and cater to them in their planning.³⁴² There is a criticism to this where project managers are often given the contradictory guideline to be both respectful of indigenous governments, while at the same making sure that the FPIC process is inclusive of all groups despite some groups like women being excluded the self-governing system of indigenous communities.³⁴³

Throughout this first stage that requires research, the project manager is obligated to let the community know what the company would like to undertake in their territory and a declaration to include them in every step of the decision making process that would involve or affect them.³⁴⁴ Indigenous communities can be reached out to by broadcasting information through their common radio stations, writing notices on community notice boards and where there is sufficient level of literacy through local gazettes.³⁴⁵ Special effort has to be put in order for the information to be presented in languages of the indigenous communities.³⁴⁶

³³⁸ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20

³³⁹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20

³⁴⁰ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20

³⁴¹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20

³⁴² Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20

³⁴³ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 889.

³⁴⁴ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20

³⁴⁵ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 26-27.

³⁴⁶ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022.26-27.

Moreover, independent third parties such as lawyers, non-governmental organisations and religious bodies can be mutually agreed on by the communities and project managers that they be present.³⁴⁷ These independent third parties can assist not only information sourcing and sharing but also, legal and paralegal support, capacity building and generally be effective intermediaries through-out the process.³⁴⁸ It is highlighted that it is key to formalise the relationship between the third parties and the community through a memorandum of understanding that clarifies the role of the third parties and the extent of their mandate. This strengthens the accountability and legitimacy of the third parties.³⁴⁹

Further, indigenous communities should be notified that participation in the consultation does not automatically mean consent.³⁵⁰ By the end of this stage, the project managers should be equipped with knowledge of affected indigenous communities through engaging and researching them. Additionally, there has to be documentation on all the information found, and it also should be shared to the stakeholders and affected communities. The aim of this stage is to get to acquainted to the indigenous communities that the project will be interacting with, and the decision-making structure in the community(ies), and if they are likely to accept the project.³⁵¹

In Kenya, the traditional governance structures such as the Njuri Ncheke have been supplanted by formalized community assemblies and management committees, leading to a lack of clarity on their roles and relationships.³⁵² This complexity complicates the task of project managers in identifying suitable negotiation counterparts on behalf of indigenous

³⁴⁷ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 15.

³⁴⁸ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 14.

³⁴⁹ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 14.

³⁵⁰ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 26-27

³⁵¹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 20.

³⁵² Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press, Nairobi, 2018, 155; Section 15(1) *Community Lands Act* (Act No 2 of 2016); Section 7 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

communities, raising questions about effective representation and decision-making processes.³⁵³

Moreover, while international best practices emphasize the proactive understanding and identification of affected communities by project managers, Kenyan regulations lean towards mere notification of intentions with limited engagement.³⁵⁴ The ultimate determination of community involvement lies with governmental bodies, diverging from the standards of direct engagement and consent seen in global norms.³⁵⁵

Also, in contrast to international best practices which prioritize disseminating information in indigenous languages, some regulations in Kenya allow for notices in English, Kiswahili, and optionally in local dialects, while others make it mandatory to use local language.³⁵⁶ This lack of uniformity on which language to communicate with leads to predominant usage of English, often failing to effectively reach indigenous communities.³⁵⁷ However, Kenyan law aligns with best practices in recognizing the rights of migrating communities, women, and the elderly, emphasizing their inclusion through special attention and separate meetings, enforcing non-discrimination and ensuring equal access to community land for all members.³⁵⁸



3.2.2 ii) Document Geographic and Demographic Information through Participatory Mapping



Participatory mapping, also known as "community mapping," emerges as a pivotal tool in this process, enabling Indigenous communities to express their local knowledge and

³⁵³ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press, Nairobi, 2018, 155; Section 15(1) *Community Lands Act* (Act No 2 of 2016); Section 7 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

³⁵⁴ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent: An indigenous peoples' right and a good practice for Local Communities' 20 ; Section 5 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017);) *Environmental (Impact Assessments and Audit) Regulations* 2003.

³⁵⁵ Section 38 *Mining Act* (Act No 12 of 2016); Section 23(2) *Environmental (Impact Assessments and Audit) Regulations* 2003.

³⁵⁶ Section 8 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017); Section 21 *Environmental (Impact Assessments and Audit) Regulations* 2003.

³⁵⁷ Okello N, Beevers L, Douven W and Leentvaar 'The doing and undoing of public participation during environmental impact assessments in Kenya' 222

³⁵⁸ Section 30, *Community Lands Act* (Act No 2 of 2016).

perspectives through simple maps.³⁵⁹ By engaging community members directly, valuable insights into customary rights, spiritual practices, and traditional ethical codes are garnered. Moreover, identification of High Conservation Values (HCVs) such as sacred sites and burial bases ensures the respectful treatment of culturally significant areas within the landscape.³⁶⁰ Additionally, a thorough land tenure assessment involving skilled individuals, organizations, and local government departments helps uncover legal rights in the area.³⁶¹ Project managers are also urged to look out for demonstrable rights.³⁶² These rights pertain to informal rights that lack official recognition and are best confirmed through direct engagement with Indigenous Peoples.³⁶³ This approach provides indigenous communities with sufficient chances to substantiate their claims and is optimally carried out through participatory mapping.³⁶⁴

In Kenya, the Community Land Act legally recognizes customary land rights, affirming their equal validity with other forms of land tenure.³⁶⁵ Challenges can arise from dispossession and exploitation indigenous community land by governmental bodies however the presence of demonstrable rights as envisaged by the best practices can assist in managing this.³⁶⁶ Furthermore, the obligation of project managers to consider customary rights and cultural practices aligns with Kenyan legal precedents emphasizing the importance of cultural and impact assessments.³⁶⁷ There is also integration of social and environmental factors in project assessments in Kenyan law, thus echoing the principles of international best practices.³⁶⁸

3.3 Project Formulation

³⁵⁹ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 32.

³⁶⁰ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 34. ; Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 22.; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 29.

³⁶¹ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 29;

³⁶² Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 30.

³⁶³ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 30.

³⁶⁴ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 29.

³⁶⁵ Section 5, 14 *Community Lands Act* (Act No 2 of 2016).

³⁶⁶ Wily LA 'The Community Land Act in Kenya Opportunities and Challenges for Communities' Multidisciplinary Digital Publishing Institute 2018,14.; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 30.

³⁶⁷ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR

³⁶⁸ Section 2 *Environmental (Impact Assessments and Audit) Regulations* 2003.

3.3.1 Design A Participatory Communication Plan And Carry Out Iterative Discussions Through Which Project Information Will Be Disclosed In A Transparent Way (Negotiation)

Following the initial information-gathering steps, the consultation phase marks a pivotal stage in engaging indigenous communities, where decisions are made based on the available information.³⁶⁹ The principle of good faith is central in ensuring effective and direct engagement with indigenous communities.³⁷⁰ It is also paramount to consider varying literacy levels and technical interests within the consultation process³⁷¹ Project managers must also collaborate with indigenous peoples to determine the most suitable time and place for discussions, hence prioritizing safety, maximum participation, and implementing a communication plan to transparently communicate decision-making progress through various media channels.³⁷²

Further, timely and inclusive consultations are imperative, ensuring no project plans proceed without proper engagement, and indigenous communities are informed of their rights to decline or express uncertainty.³⁷³ Education on options to accept, reject, or abstain from opinions is to be provided to indigenous communities, with reassurance of ample time for deliberation.³⁷⁴ Moreover, the involvement of interpreters and intermediary third parties chosen by the communities is crucial for effective assistance.³⁷⁵ Furthermore, documentation of proceedings and outcomes is essential, ensuring transparency and accessibility of information to all parties involved in the consultation process.³⁷⁶

³⁶⁹ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23.

³⁷⁰ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23.

³⁷¹ Roundtable on Sustainable Palm Oil *'Free Prior and Informed Consent (FPIC) Guide'* 2022. 43; Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23-24.

³⁷² Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23-24.

³⁷³ ³⁷³ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23-24.

³⁷⁴ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23-24.

³⁷⁵ Roundtable on Sustainable Palm Oil *'Free Prior and Informed Consent (FPIC) Guide'* 2022. 43.

³⁷⁶ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23-24.

In Kenya, mining regulations define consultation as a process involving community dialogue at the village level, aligning with best practices by emphasizing direct engagement with indigenous communities that is accessible and ensuring majority participation.³⁷⁷ Additionally, while the Community Development Agreement Committee is tasked with negotiating agreements on behalf of indigenous communities, its composition lacks adequate community representation, raising concerns about inclusivity and representation of indigenous persons in decision-making processes.³⁷⁸ Furthermore, in Environmental Impact Assessments, public hearings are conducted to gather community input, yet there's a lack of explicit assurance for community autonomy and decision-making during consultations as executive bodies make decisions, highlighting areas for improvement in aligning Kenyan law with international standards.³⁷⁹

3.3.2 Reach Consent, Document Indigenous Peoples' Needs That Are to Be Included into The Project, And Agree on A Feedback and Complaints Mechanism

a) Consent



Following consultations, decisions must be made with mutual consent recognized by the indigenous communities, employing customary means such as voting or ritual ceremonies to finalize agreements.³⁸⁰ The documented outcome of these agreements should be accessible in languages understood by all community members, detailing the decision-making process and outcomes, including any areas of opposition that may require adjustment or abandonment.³⁸¹ Furthermore, it is essential to understand and respect reasons for denial of consent, exploring conditions for potential renegotiation while honoring the indigenous peoples' right to decline any further negotiation.³⁸² It is important to acknowledge that proposals may be accepted, amended or countered by the indigenous communities³⁸³

³⁷⁷ Section 2 Mining (*Community Development Agreement*) Regulations (L.N. 148/2017).

³⁷⁸ Section 7 Mining (*Community Development Agreement*) Regulations (L.N. 148/2017).

³⁷⁹ Section 22 *Environmental (Impact Assessments and Audit) Regulations* 2003.

³⁸⁰ Food and Agriculture Organization of the United Nations '*Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities*' 25-26.

³⁸¹ Food and Agriculture Organization of the United Nations '*Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities*' 25-26.

³⁸² Roundtable on Sustainable Palm Oil '*Free Prior and Informed Consent (FPIC) Guide*' 2022,44.

³⁸³ Roundtable on Sustainable Palm Oil '*Free Prior and Informed Consent (FPIC) Guide*' 2022,44.

In Kenya, obtaining consent from indigenous communities is primarily governed by the Mining Act and the Environmental Impact Assessment (EIA) regulations, where approval is required from designated authorities rather than directly from community members.³⁸⁴This system often overlooks indigenous perspectives and concerns, leading to conflicts between legislative and executive mandates and undermining indigenous community autonomy.³⁸⁵ The disparity in both legal requirements and practical implementation in Kenya highlights a deviation from international best practices, despite consent being crucial for recognizing indigenous rights and ensuring meaningful participation in decision-making processes.

From the position in the best practices and what is happening in Kenya, there is an ongoing debate on if consent should come from indigenous people themselves in order to honour their rights or if it should come from the government in order to balance ‘the rights and interests of different groups in society’ when it comes to ‘matters of public policy and development decision-making.’³⁸⁶Moreover there are concerns on who should be seeking the consent between the state and the companies as this seems to be a political matter.³⁸⁷However, it is argued that if state legislation is firm in protecting the rights of indigenous communities, then automatically companies would be forced to do the same, vice versa is true as well which removes politicization of companies from the equation.³⁸⁸

b) Agreements

Best practices advocate for signing parties and or customary practices that will be utilized to finalize the agreement.³⁸⁹ The agreement should specify the chosen representatives, their role in the community, how they were chosen, their responsibility and role as representatives; and mutually agreed substantive evidence of consent.³⁹⁰Further, a summary of project information

³⁸⁴ Section 38 *Mining Act* (Act No 12 of 2016).; Section 23(3) and (2) *Environmental (Impact Assessments and Audit) Regulations* 2003.

³⁸⁵ Section 23(3) and (2) *Environmental (Impact Assessments and Audit) Regulations* 2003.

³⁸⁶ Tomlinson K ‘Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC’ 23(5) *International Journal on Human Rights*, 2019, 887.

³⁸⁷ Tomlinson K ‘Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC’ 23(5) *International Journal on Human Rights*, 2019, 887.

³⁸⁸ Tomlinson K ‘Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC’ 23(5) *International Journal on Human Rights*, 2019, 888.

³⁸⁹ Food and Agriculture Organization of the United Nations ‘*Free Prior and Informed Consent; An indigenous peoples’ right and a good practice for Local Communities*’ 26.

³⁹⁰ Food and Agriculture Organization of the United Nations ‘*Free Prior and Informed Consent; An indigenous peoples’ right and a good practice for Local Communities*’ 26.

such as duration, area of influence and objectives have to be included.³⁹¹ Generally, all parties have to understand what they are signing and the terms and implications contained therein.³⁹²

Apart from this, there has to be vital provisions in the contract addressing identification of those relinquishing their rights in exchange for compensation, outlining the benefits offered and the compensation process, strategies to prevent, reduce, or compensate for negative effects, protocols in case of ownership or funding alterations, mechanisms for dispute resolution involvement of communities in implementing and overseeing the agreement, including participatory monitoring and evaluation are all paramount and should be included in the agreement.³⁹³

The Community Land Act in Kenya stipulates that agreements should address continuous monitoring of investment impacts, compensation and royalties, land rehabilitation post-project, mitigation measures, capacity building, and other aspects related to community benefits.³⁹⁴ Similarly, the Mining Community Regulations outline agreements covering roles of the County Government, educational and employment opportunities, infrastructure support, assistance for small businesses, environmental protection, cultural heritage, and dispute resolution, among other area.³⁹⁵ This satisfies the requirements of what should be included in the agreement as per the best practices.

3.4 Project Implementation

3.4.1 Designing a method of monitoring and evaluating the agreements together with having a feedback and dispute resolution mechanism.

At this point, the project setup and contract arrangements have already been completed. However, the FPIC process extends beyond the signing of an agreement between the project leads and the affected communities.³⁹⁶ After all relevant parties have signed the agreement,

³⁹¹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 26.

³⁹² Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 44.

³⁹³ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 44.

³⁹⁴ Section 36, *Community Lands Act* (Act No 2 of 2016).

³⁹⁵ Section 3 *Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

³⁹⁶ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 46.

annual monitoring is necessary to ensure the effective implementation of FPIC.³⁹⁷ This step is to guide on what is to take place when a project is presently taking place and how the indigenous communities are still involved.³⁹⁸

a) Monitoring and evaluation of the agreement

Monitoring and evaluation of the agreement allows for any necessary adjustments to take place as development activities progress.³⁹⁹ Indigenous communities ought to be involved in the development of the monitoring strategy, the activities earmarked for monitoring, the chosen monitoring techniques, the methods for soliciting diverse perspectives, and the procedures for recording and disseminating results to the broader community.⁴⁰⁰ The persons chosen to monitor and evaluate should be independent and acceptable to all parties and there should be the insurance of representation of various voices among rights-holders and stakeholders, including marginalised groups like women, the impoverished, landless individuals, and youth.⁴⁰¹ In addition, the chosen monitors and evaluators could be offered anonymity, and maintain anonymity when requested.⁴⁰²

Additionally, there should be clear details on how issues will be tackled and when grievance procedures will be initiated if problems arise during monitoring.⁴⁰³ The different issues that can be monitored are legal arrangements, provision of negotiated compensation and services, monitoring of resource plans, timely infrastructure delivery, and fulfilment of employment promises.⁴⁰⁴ It also oversees smallholding agreements for fairness; prompt identification and resolution of issues which is necessary to prevent their escalation into grievances or disputes and maintenance of an open channel of communication which fosters trust and sustains positive relations between parties involved.⁴⁰⁵

³⁹⁷ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 46.

³⁹⁸ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 46.

³⁹⁹ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 46.

⁴⁰⁰ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 26.

⁴⁰¹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 26.

⁴⁰² Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 26.

⁴⁰³ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 26.

⁴⁰⁴ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022,47.

⁴⁰⁵ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 47.

The free prior and informed consent is an ongoing process that places a positive obligation on the project manager to ensure regular communication with the communities impacted by the project, providing updates on its progress and offering frequent opportunities for them to inquire, voice concerns, and inspect activities occurring on their land.⁴⁰⁶

b) Feedback and Complaints Mechanism

In an FPIC process, a feedback and complaints mechanism is vital for Indigenous Peoples to exercise their right to consent during project implementation. It allows organisations to promptly address concerns and supporting quality project management⁴⁰⁷ Efficient feedback and complaint resolution systems must promptly and equitably handle issues, employing a clear and transparent procedure that aligns with cultural norms and is easily accessible to all parties involved.⁴⁰⁸ This process should be provided at no charge and without fear of retaliation or hindrance to other administrative or legal solutions.⁴⁰⁹

To effectively implement a feedback and complaint mechanism within Indigenous Peoples' communities, consensus should be reached on methods for receiving and recording feedback and complaints, ensuring accessibility for all community groups while respecting existing customary mechanisms.⁴¹⁰ There ought to be an agreement on how to review and investigate complaints alongside agreements on resolution options that satisfy all parties This feedback mechanism should also be publicised for the indigenous communities in order to make access easier.⁴¹¹

c) Dispute Resolution Mechanisms and Remedies.

A conflict resolution mechanism refers to a system to diffuse, resolve and remediate disagreements, confrontations and tensions between the stakeholders, indigenous people, and

⁴⁰⁶ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 26.

⁴⁰⁷ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 26.

⁴⁰⁸ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 26-27.

⁴⁰⁹ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 26-27.

⁴¹⁰ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 27.

⁴¹¹ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 27.

other users (individuals/groups) in a practical and constructive manner.⁴¹² This is key because it gives an avenue in which actors who feel other parties have violated their rights can find a remedy.⁴¹³ Indigenous Peoples, and other stakeholders should be familiar with and consent to conflict resolution procedures beforehand. This enables them to reject any procedures they do not endorse.⁴¹⁴

Additionally, disputes can be solved through dialogue and if that fails mediation can take place. If those do not solve the issue, arbitration and adjudication can be sought after⁴¹⁵. The remedies that can be available are firstly, restitution which involves restoring conditions to their state prior to the development activity, such as returning disputed lands to communities or negotiating new agreements with full community involvement.⁴¹⁶ Further, compensation entails providing appropriate compensation, either monetary or non-monetary, to recognize and address losses and damages, which could include payments for land use, livelihood losses, or various forms of assistance.⁴¹⁷ Moreover, formal guarantees of non-repetition and measures to prevent future social harm, such as implementing mechanisms and reviewing operational procedures.⁴¹⁸ In addition, acknowledging breaches, expressing regret, offering formal apologies, or other suitable actions, such as making public apologies or ceasing ongoing violations.⁴¹⁹

Most importantly, establishing an exit strategy in advance by delineating the circumstances that would prompt the cessation of activities and departure from the project area. The agreement should also outline the method of halting the project if feasible (whether gradually

⁴¹²Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 47-48.

⁴¹³ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 27.

⁴¹⁴ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 48.

⁴¹⁵ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 48-49.

⁴¹⁶ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 27; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022, 52.

⁴¹⁷ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 27; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022, 52.

⁴¹⁸ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 27; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022, 52.

⁴¹⁹ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 27; Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022, 52.

or abruptly), how to ensure that the cessation occurs as agreed upon, and the process for potentially revisiting and resuming the project in the future.⁴²⁰

In Kenya, the laws state that monitoring, evaluation, feedback, dispute resolution and remedies mechanisms should be present within an agreement.⁴²¹ However, going into the intricate details of what this would comprehensively entail is not present.⁴²² Moreover most of these tasks are passed on to executive bodies such as NEMA and Community Development Agreement Committee.⁴²³ Despite this the Community Land Act prioritizes traditional dispute and conflict resolution when it comes to use of community land.⁴²⁴ It prioritises mediation, then arbitration and finally judicial proceedings which aligns with the best practices.⁴²⁵ For EIA, if there is any grievance it is to be taken to a tribunal.⁴²⁶ An important thing to note is that in Kenyan law there is no provision of an exit strategy for indigenous communities in case of any unacceptable circumstance or action as the project continues in Kenya.⁴²⁷ In conclusion, although these requirements of monitoring, evaluation, feedback dispute resolution and remedies mechanisms are mentioned within the relevant acts, it is without any keenness on procedure or minimum standards of the same.⁴²⁸

3.5 Project Closure

3.5.1 Verification to assessing the level of compliance to the FPIC requirements and examining the fulfilment in implementing their obligations under the negotiated agreement

This stage is internal evaluation of how much of the FPIC process was followed through and it is mostly through documentary evidence.⁴²⁹ For the first stage of project identification

⁴²⁰ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 27.

⁴²¹ Sec 40 and 41 Environmental (Impact Assessments and Audit) Regulations 2003; Section 36 Community Lands Act (Act No 2 of 2016).; Section 7 Mining (Community Development Agreement) Regulations (L.N. 148/2017).

⁴²² Sec 40 and 41 Environmental (Impact Assessments and Audit) Regulations 2003., section 36 Community Lands Act (Act No 2 of 2016).; Section 7 3 Mining (Community Development Agreement) Regulations (L.N. 148/2017).

⁴²³ Section 7 Mining (Community Development Agreement) Regulations

⁴²⁴ Section 39, Community Lands Act (Act No 2 of 2016).

⁴²⁵ Section 39, Community Lands Act (Act No 2 of 2016).

⁴²⁶ Sec 46 Environmental (Impact Assessments and Audit) Regulations 2003.

⁴²⁷ Sec 40 and 41 Environmental (Impact Assessments and Audit) Regulations 2003., section 36 Community Land Act; Section 7 Mining (Community Development Agreement) Regulations

⁴²⁸ Sec 40 and 41 Environmental (Impact Assessments and Audit) Regulations 2003., section 36 Community Land Act; Section 7 Mining (Community Development Agreement) Regulations

⁴²⁹ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 54-56.

documents such as those that prove social survey, land tenure study, records of meetings, participatory maps, social and impact reports can illustrate how through the FPIC process was followed for this stage.⁴³⁰ As for the Project Formulation stage documents such as Letter of Intent, Memorandum of Understanding, Records of meetings and consultations, draft(s) of negotiated agreements, list of individuals/groups within the affected communities entitled to compensation and benefits and final and signed agreement would show how meticulous that step was. Lastly, for the project implementation stage the relevant documents to show compliance with FPIC would be documentation and proof of compensation and benefits provided to individuals/groups within the Affected Communities entitled to compensation; grievance mechanism and supporting documents; conflict resolution and supporting documents; records of the communities' acceptance of the conflict resolution mechanism and a documented social remediation plan.⁴³¹

This benchmark is good for accountability.⁴³² In Kenya there are reports that are required by project managers to show some level of compliance.⁴³³ However they are not tailor specific to the FPIC process as illustrated by the best practices which are made specifically with the aim of safeguarding indigenous communities.⁴³⁴

3.5.2 Documenting the lessons learned

It's crucial to document lessons learned from the FPIC process to improve future actions, and reducing risks.⁴³⁵ This documentation demonstrates respect for Indigenous Peoples' rights and strengthens trust.⁴³⁶ Collaboration with the community to record insights at each stage is vital, fostering closure and paving the way for future collaborations.⁴³⁷

⁴³⁰ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 54-56.

⁴³¹ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 54-56.

⁴³² Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 54-56.

⁴³³ Section 16, *Mining (Community Development Agreement) Regulations*, The Mining (Work Programmes And Exploration Reports) Guidelines [[Legal Notice 85 Of 2017](#)]; The Mining (Reporting Of Mineral Relativities) Regulations [[Legal Notice 152 Of 2017](#)] 41 Environmental (*Impact Assessments and Audit Regulations* 2003.

⁴³⁴ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022. 56-54.

⁴³⁵ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 30.

⁴³⁶ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 30.

⁴³⁷ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' 30.

In Kenya there is no such legislation however the intent of this step is to protect marginalised communities and safeguard their rights which the constitution upholds as well.⁴³⁸ Therefore encouraging this among project managers and stakeholders will promote a culture of equal partnership between stakeholders and indigenous communities.⁴³⁹

Additionally, since FPIC is still gradually taking shape, it is recommended that more case studies are necessary to document various outcomes of FPIC processes, considering the intricate socio-economic contexts and internal dynamics of companies.⁴⁴⁰ These studies should encompass instances where companies have successfully reached agreements with indigenous groups through FPIC, cases where consent was not attained despite the process being implemented, and situations where companies' claims of FPIC implementation are disputed.⁴⁴¹ This accumulation of knowledge from diverse case studies will serve to hold companies and governments accountable in instances where genuine efforts to secure consent from affected indigenous peoples are lacking.⁴⁴²

3.6 Conclusion

This chapter has illustrated that Kenyan law has in some ways met the standards of best practice for example in requirements for social and environmental impact assessments, how benefit agreements should contain, encouraging consultation and ensuring equal rights for all community members. However, Kenyan law fails in other crucial areas like allowing community members to make decisions (consenting), taking care of indigenous communities after the project by not having elaborate procedures on how to monitor and evaluate. Lastly, Kenyan law can improve by encouraging project managers to be more accountable in their actions by doing internal evaluations of how they carried out projects within indigenous communities' territories.

⁴³⁸ Article 260 *Constitution of Kenya* (2010).

⁴³⁹ Roundtable on Sustainable Palm Oil '*Free Prior and Informed Consent (FPIC) Guide*' 2022. 54-56.

⁴⁴⁰ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) *International Journal on Human Rights*, 2019, 893.

⁴⁴¹ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) *International Journal on Human Rights*, 2019, 893.

⁴⁴² Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) *International Journal on Human Rights*, 2019, 893.

CHAPTER 4

GUIDING PRINCIPLES AND CONCEPTS TO CONSIDER WHEN DEFINING PARTICIPATION OF INDIGENOUS COMMUNITIES

4.0 Introduction

As has been discussed in the previous chapters, although participation of indigenous communities in Kenya is somewhat catered for, there are some problems that face the legal rules and processes of the same such as implementation and legal gaps. This chapter seeks to evaluate some principles and concepts that ought to be considered when it comes to participation, consultation and consent of indigenous communities. An attempt will be made to this by deriving the common principles that are repeatedly alluded to from documents that give guidelines on the best practices of indigenous communities' participation and consultations. Further, these principles will be examined in the Kenyan Context.

4.1 The Common Principles underlying Participation and Consultation of Indigenous Communities

4.1.1 Self-Determination

Before colonization, indigenous peoples already qualified in the conditions of recognition of sovereignty which are; political organisation, a certain territory and independence.⁴⁴³ However, their land which is of grave importance to the indigenous communities was considered terra nullius meaning it was no man's land.⁴⁴⁴ This resulted in state officials ignoring their right to land, culture and self-determination and forcefully occupying and use of their land.⁴⁴⁵

However, there was increasing opposition of this view by national courts around the world where courts reasoned and recognized that indigenous communities once held sovereignty and a legal personality.⁴⁴⁶ Hence the courts acknowledged that indigenous communities had a

⁴⁴³ Göcke K *'Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription'* Open Edition Books, 2017,23.

⁴⁴⁴ Göcke K *'Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription'* Open Edition Books, 2017,24-25.

⁴⁴⁵ Göcke K *'Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription'* Open Edition Books, 2017,24.

⁴⁴⁶ Göcke K *'Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription'* Open Edition Books, 2017,25.

right to self-determination and eventually this was actualised through the Declaration on the Rights of Indigenous Peoples.⁴⁴⁷ Through this declaration, subsequent conventions and eventually international human rights committees recognized their inherent right to self-determination, their status to be able to claim their lands, languages and culture and subsequently live the same out.⁴⁴⁸ This means that states were not to grant or fail to grant indigenous peoples their rights but rather they are charged to recognise and uphold the inherent rights of indigenous communities including the right to self-determine.⁴⁴⁹

Hence the right and principle of self-determination can be practically actualised by participation and consultation of indigenous communities as they are given power over decision making on what happens in their lands.⁴⁵⁰ This right to self-determination connects with free prior and informed consent as through this principle indigenous communities are able to be autonomous together with being able to make decisions voluntarily, inclusively and meaningfully about their lands.⁴⁵¹

It is important to address that although indigenous communities are highly dependent on their land the state in most cases reserves the ownership over mineral, sub-surface or other resources where indigenous communities reside.⁴⁵² Despite this, the ILO convention, which has been argued to have international customary law status, has safeguards such as sufficient consultation, participation, fair compensation of the indigenous communities which can all be encompassed in the free prior and informed consent principle.⁴⁵³ Additionally, governments

⁴⁴⁷ Göcke K *Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription* Open Edition Books, 2017,25.

⁴⁴⁸ Göcke K *Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription* Open Edition Books, 2017,25.

⁴⁴⁹ Göcke K *Indigenous Peoples in International Law: Culture and Entitlements between Heteronomy and Self-Ascription* Open Edition Books, 2017,25.

⁴⁵⁰ Food and Agriculture Organization of the United Nations *Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities* Manual for Project Practitioners 2016,12.

⁴⁵⁰ International Labour Office *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents* 2013, 14.

⁴⁵¹ Food and Agriculture Organization of the United Nations *Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities* Manual for Project Practitioners 2016,12.

⁴⁵² International Labour Office *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents* 2013, 22.

⁴⁵³ International Labour Office *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents* 2013, 22-23.

are required to ensure mechanisms, laws and systems where the rights of indigenous communities are upheld, including land and participatory rights.⁴⁵⁴

In Kenya, the legislation recognizes that indigenous communities are marginalised and have a right to participate and affirmative action.⁴⁵⁵In this way the autonomy of the indigenous community seems to be upheld by giving them special consideration and the right to participate.⁴⁵⁶However, when it comes to decision making practically this might not be the same case. From research it can be observed that decision making is usually done by executive bodies and takes away from the self-determination of the indigenous communities.⁴⁵⁷Although as discussed earlier in chapter three, there is an argument that at the end of the day it is up to the government to balance the rights and benefits of its citizens and thus is the one to give or deny consent.⁴⁵⁸ However in the context of indigenous communities, including those in Kenya, they have a right to have a say, and influence in what is to be decided in their lands due to their right to self-determination.⁴⁵⁹

4.1.2 Free Prior and Informed Consent (FPIC).

This principle accords indigenous people a chance to have internal deliberations and make choices that will be shaped by their traditions, customs and systems of organisation.⁴⁶⁰This means that they have some autonomy in that they have the capacity to shape how a project is going to be outlined, carried out and eventually evaluated.⁴⁶¹ ‘Free’ means that the consent given is in the absence of coercion, domination or exploitation.⁴⁶² It can be interpreted to mean that the rights holders who are the indigenous communities are the centre of the decision making process without frustrating their efforts to participate, be heard or their

⁴⁵⁴ International Labour Office ‘*Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents*’ 2013, 6.

⁴⁵⁵ Article 260 *Constitution of Kenya*, 2010; Article 56, *Constitution of Kenya*, 2010.

⁴⁵⁶ Article 260 *Constitution of Kenya*, 2010; Article 56, *Constitution of Kenya*, 2010.

⁴⁵⁷ Section 38 *Mining Act* (Act No 12 of 2016).; Section 23(3) and (2) *Environmental (Impact Assessments and Audit) Regulations* 2003.

⁴⁵⁸ Tomlinson K ‘Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC’ 23(5) *International Journal on Human Rights*, 2019, 887.

⁴⁵⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, 3 September 2007, 61/295.

⁴⁶⁰ Roundtable on Sustainable Palm Oil ‘*Free Prior and Informed Consent (FPIC) Guide*’ 2022, 12.

⁴⁶¹ Food and Agriculture Organization of the United Nations ‘*Free Prior and Informed Consent; An indigenous peoples’ right and a good practice for Local Communities*’ Manual for Project Practitioners 2016

⁴⁶² Food and Agriculture Organization of the United Nations ‘*Free Prior and Informed Consent; An indigenous peoples’ right and a good practice for Local Communities*’ Manual for Project Practitioners 2016, 15.

requests to be accommodated.⁴⁶³ Prior means that indigenous communities ought to be engaged with at the initial stages of a project and not when it is too late so as to infringe on their autonomy and rights.⁴⁶⁴

Informed refers to the substance of the engagement in terms of which information was provided, how it was provided and if it was effectively communicated to the indigenous communities to a point where consent can be obtained from them.⁴⁶⁵ It has to be done in a manner that fully includes the indigenous community in question by being transparent and using dialects that they can understand.⁴⁶⁶ Consent can be defined as the communal decision that was made by the indigenous communities over their land concerning the project.⁴⁶⁷ Consent can mean an express yes, or yes with some conditions or no because of some non-negotiables from the indigenous community members.⁴⁶⁸ A scope that has been given is that where the impact of a certain project or activity is drastic then the more significant the need for consent from the indigenous communities.⁴⁶⁹ This is opposed to where activities may have negligible non-lasting consequences hence the threshold for consent is much lower.⁴⁷⁰ Where relocation of indigenous communities is required, consent is an indispensable and exceptional measure as relocation is a drastic impact.⁴⁷¹

Consent of indigenous communities is not only human rights related but also related to ethical business practices as observed by Filer, Mahanty and Potter.⁴⁷² Companies gain credibility from the investors when they demonstrate that they care about the environment,

⁴⁶³ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,15.

⁴⁶⁴ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,15

⁴⁶⁵ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,15

⁴⁶⁶ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,16.

⁴⁶⁷ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,16.

⁴⁶⁸ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,16.

⁴⁶⁹ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 16

⁴⁷⁰ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 16.

⁴⁷¹ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 16.

⁴⁷² Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,37.

sustainability and preservation of the indigenous communities through consent and consultation.⁴⁷³ Therefore the Equator Principles that promote FPIC were implemented by the International Finance Corporation's (IFC) 'performance standards'.⁴⁷⁴ Moreover, the Roundtable on Sustainable Palm Oil (RSPO) that aims to sustainably produce oil without land grabs and with protection of indigenous people, have integrated FPIC principles.⁴⁷⁵

FPIC at its core is human rights oriented.⁴⁷⁶ It is a principle that upholds the self-determination of indigenous communities over their ancestral lands despite possible abuse from extractive industries.⁴⁷⁷ It is a requirement where legal customary or user rights to the land are present and are eventually going to be affected.⁴⁷⁸ It is a principle, process and outcome.⁴⁷⁹ FPIC is the all-encompassing principle that states, companies and organisations are required to follow when dealing with indigenous communities.⁴⁸⁰

In Kenya there is no explicit declaration in the law of FPIC fully.⁴⁸¹ The closest is free prior and informed consultation of indigenous communities.⁴⁸² This is problematic because if the state itself is not actively promoting FPIC it puts companies in a confusing position as it forces them to be a political actor in terms of enforcing internationally recognized indigenous rights.⁴⁸³ Moreover, it poses the risk for the projects of the companies to be

⁴⁷³ [1] Filer C, Mahanty S and Potter L 'The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea', MDPI, Basel, Switzerland, 4.

⁴⁷⁴ Filer C, Mahanty S and Potter L 'The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea', MDPI, Basel, Switzerland, 4.

⁴⁷⁵ Roundtable on Sustainable Palm Oil 'RSPO Publishes Free Prior and Informed Consent Guide 2022' <<https://rspo.org/rspo-publishes-free-prior-and-informed-consent-fpic-guide-2022/>> on 5 December 2022.

⁴⁷⁶ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016, 34.

⁴⁷⁷ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016, 11.

⁴⁷⁸ Roundtable on Sustainable Palm Oil 'Free Prior and Informed Consent (FPIC) Guide' 2022, 13.

⁴⁷⁹ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) International Journal on Human Rights, 2019, 881.; Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016.

⁴⁸⁰ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 14.

⁴⁸¹ Community Lands Act (Act No 2 of 2016); Mining Act (Act No 12 of 2016); Environmental Management and Co-Ordination Act (Act No 8 of 1999).

⁴⁸² Section 36, Community Lands Act (Act No 2 of 2016).

⁴⁸³ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 14.

undone when reported by indigenous communities or indigenous communities activists if the national law does not follow FPIC.⁴⁸⁴

Therefore it is important that Kenyan national legislation promotes FPIC, not just partially, but fully and wholly in order to honour its constitution in protecting marginalised groups and affirmative action for them.⁴⁸⁵ In addition, Kenya recognizes international law as forming part of its jurisprudence and the rights of indigenous persons are attaining customary law status.⁴⁸⁶ Therefore, it aligns with Kenya to ratify laws that promote Indigenous rights and FPIC and include FPIC in their legislation.⁴⁸⁷ Enacting national legislation that promotes FPIC will eliminate problems such as politicising companies and industries as they will not have to be the enforcers of FPIC out of their own volition.⁴⁸⁸ Additionally the state will truly be the guardian of the rights of indigenous communities.⁴⁸⁹

Lastly, the FPIC process is very practical and it is still a gradual process that is coming to life.⁴⁹⁰ Hence, civil societies and NGOs that are based in Kenya are urged that instead of spending a lot of energy in opposing extractive industries and states in indigenous areas, they could invest more energy in actualising FPIC in areas where it is already practiced.⁴⁹¹ This is because already practically there are many intricacies where both indigenous communities and project managers would need assistance in .⁴⁹² Additionally, it would increase success

⁴⁸⁴ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 14.

⁴⁸⁵ Article 260 *Constitution of Kenya*, 2010; Article 56, *Constitution of Kenya*, 2010.

⁴⁸⁶ Article 2, *Constitution of Kenya*, 2010; [1] Phillips J 'The rights of indigenous peoples under international law' 26(2) *Tandfonline*, 2015, 121.

⁴⁸⁷ Phillips J 'The rights of indigenous peoples under international law' 26(2) *Tandfonline*, 2015, 121.

⁴⁸⁸ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 14.

⁴⁸⁹ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 14.

⁴⁹⁰ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) *International Journal on Human Rights*, 2019, 891.

⁴⁹¹ Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) *International Journal on Human Rights*, 2019, 891.

⁴⁹² Tomlinson K 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' 23(5) *International Journal on Human Rights*, 2019, 891.

rates in FPIC and more case studies to document successful FPIC processes where other parties can borrow a leaf from.⁴⁹³

4.1.3 Participation and Consultation

International convention and declaration on the rights of indigenous persons do not seem to expressly define what participation and consultation mean.⁴⁹⁴ In Kenya the *Mui Coal Basin Local Community* case the court quoted *Republic vs The Attorney General & Another* and defined participation as “*Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.*” It also quotes *Minister of Health and Another v New Clicks South Africa (Pty) Ltd* and adds that “*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case*”.⁴⁹⁵

As for consultation, it is defined in the mining regulations in Kenya to be ‘*a process of discussion or dialogue involving the community and other interested parties at the village level and conducted in a location that is reasonably accessible to all members of the community and other parties for the purposes of coming to an understanding; and may not necessarily require unanimity but shall be insufficient if held only with a few people or elders of the community.*’⁴⁹⁶ Participation and consultation of indigenous communities is required in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.⁴⁹⁷

⁴⁹³ Tomlinson K ‘Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC’ 23(5) International Journal on Human Rights, 2019, 892.

⁴⁹⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/ 61/295; *United Nations International Labour Organization Convention on Indigenous and Tribal Peoples* 27 June 1989 ILO 169

⁴⁹⁵ *The Mui Coal Basin Local Community* [2015] eKLR

⁴⁹⁶ *7 Mining (Community Development Agreement) Regulations* (L.N. 148/2017).

⁴⁹⁷ Article 18 *United Nations Declaration on the Rights of Indigenous Peoples*,

Participation and consultation seem like almost similar terms; however, the differentiation comes in where participation implies going a mile further from consultation.⁴⁹⁸ Participation involves being assertive and owning up to their proprietary rights and being actively involved in decision making processes. Consultation on the other hand involves merely swaying the direction of the foreign projects that are to be done in their territories without necessarily making the decision.⁴⁹⁹ Nevertheless, both principles are essential for reconciling differing interests while avoiding conflicts and injustices.⁵⁰⁰

Despite, consultation being taken to be more passive, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) interpret that consultation under the Convention means that firstly, consultations must be formal, full and exercised in good faith; there must be a genuine dialogue between governments and indigenous and tribal peoples characterised by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord; secondly, there should be appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances; thirdly, consultations have to be undertaken through indigenous and tribal peoples' representative institutions as regards legislative and administrative measures; and lastly, consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures⁵⁰¹,

Caution has been given that pro forma consultations or shallow non-beneficial information sessions cannot meet the standard of a consultation.⁵⁰² And just in the same vein, consultations do not hand over veto rights to the indigenous communities.⁵⁰³ The point is that constructive conversations have to be had by both the indigenous communities and the party

⁴⁹⁸ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 19.

⁴⁹⁹ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 19.

⁵⁰⁰ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 21.

⁵⁰¹ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 13.

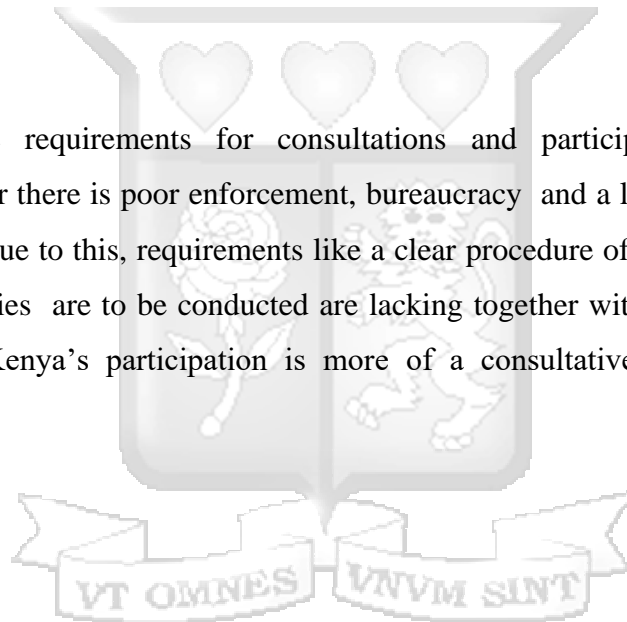
⁵⁰² International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 13.

⁵⁰³ International Labour Office *'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents'* 2013, 13.

that would like to start a project in a way that both understand each other and each make different concessions all in good faith.⁵⁰⁴

Participation and consultation are intrinsic foundations of inclusive participation.⁵⁰⁵ They are also the bedrocks of the Convention No. 169 that also enumerates the FPIC principle. Constant marginalization and the distinct culture and livelihoods of indigenous people is the reason the government should take on specialized measures to ensure their participation and consultation in decision making when it comes to their lands.⁵⁰⁶ Any spokesperson should be chosen by the indigenous people themselves.⁵⁰⁷ If there is any institution that is consulted, and it is proven before the relevant international supervisory bodies that it does not truly represent the indigenous communities, the decision made by that institution will be illegitimate⁵⁰⁸

In Kenya there are requirements for consultations and participation of indigenous communities, however there is poor enforcement, bureaucracy and a limited political will to implement them.⁵⁰⁹ Due to this, requirements like a clear procedure of how consultations of indigenous communities are to be conducted are lacking together with the element of good faith.⁵¹⁰ Generally, Kenya's participation is more of a consultative type rather than an



⁵⁰⁴ International Labour Office 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents' 2013, 16.

⁵⁰⁵ International Labour Office 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents' 2013, 11.

⁵⁰⁶ International Labour Office 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents' 2013, 13.

⁵⁰⁷ International Labour Office 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents' 2013, 14.

⁵⁰⁸ International Labour Office 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents' 2013, 14-15.

⁵⁰⁹ Matteo FD 'Imagining the Kenyan Commons: The Stakes of State Control Over Land in the Formulation of the Community Land Act (2011-2016)' 58 (8) The Journal of Development Studies 2022, 1562.

⁵¹⁰ International Labour Office 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) and HANDBOOK For ILO Tripartite Constituents' 2013, 13.

empowered type as has been illustrated all through.⁵¹¹The latter is more fitting to FPIC as communities actually have decision making power .⁵¹²

Also as a general problem of the practice of participation and consultation in Kenya, at times national legislation has given a specific body the task of representing and negotiating on behalf of the indigenous community.⁵¹³ However the problem arises when indigenous communities reject that representation and prefer their traditional government structures which are often overlooked.⁵¹⁴ In Kenya there is a multiplicity of laws on who should represent the indigenous communities with no particular clarity.⁵¹⁵ Moreover, traditional structures of government of indigenous communities are not included in their representations.⁵¹⁶ In this situation any interested company is encouraged to do due diligence and only consult a body that has legitimate representation of the indigenous communities.⁵¹⁷ Another solution that involves the state is to strengthen the traditional structures of indigenous communities in governance through the law⁵¹⁸This is in order to have more reliable, legitimate and certain representation of the indigenous communities.⁵¹⁹ Even within the traditional structures of governance international standards of inclusivity have to be

⁵¹¹ Muigua K, Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya,1(1) *Nairobi University Press*,2019, 16. Ndlovu N, Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and OgieK 66 (2) *Journal of African Law*,2022, 202; Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016,27.

⁵¹² Muigua K, Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya,1(1) *Nairobi University Press*,2019, 16. Ndlovu N, Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and OgieK 66 (2) *Journal of African Law*,2022, 202.

⁵¹³ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 14.

⁵¹⁴ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 17-18.

⁵¹⁵ Section 38 *Minning Act* (Act No 12 of 2016).; Section 23(3) and (2) *Environmental (Impact Assessments and Audit) Regulations* 2003.

⁵¹⁶ Kariuki F 'Land Rights Issues In The Extractives Sector In Kenya' In Ambani JO (ed) *Drilling Past the Resource Curse? Essays on the governance of extractives in Kenya* Strathmore University Press, Nairobi, 2018, 155.

⁵¹⁷ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 18.

⁵¹⁸ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 18.

⁵¹⁹ FPIC article on strengthening national laws

considered so that women and elderly persons also participate.⁵²⁰ - At the end of the day how participation and consultation is conducted is quite contextual and depends on the indigenous community at hand, thus it is up to project managers to conduct thorough research on the community and then apply FPIC.⁵²¹

4.1.4 Integration of the needs of Indigenous Persons in Law and Policy

In order to fulfil the right of self-determination fully, it is paramount that policy and law is done in a way that is adequately inclusive of indigenous communities' political, social, and economic life.⁵²² In order to do this, measures such as acknowledging the culture, collective rights and customary land tenure while consulting, negotiation and law making in issues regarding indigenous communities is paramount.⁵²³ This for example can be actualised by having local interpreters and having pamphlets and information sufficiently communicated in local dialect, and incorporation of cultural norms and practices when negotiating and making plans for a project.⁵²⁴ Apart from this, the government should make an effort to draft regulations that will not only enhance their ability to engage with indigenous peoples at a national and international level but also include indigenous peoples' issues into normative and operational areas of issues that affect indigenous communities such as traditional agriculture, food and livelihood systems.⁵²⁵

Integration can further be actualised by having accountability systems.⁵²⁶ This can be done by having feedback channels where after having an agreement with indigenous communities, and documentation of their needs, they have the chance to communicate if the project is going according to the negotiations or if they have some complaints on the same.⁵²⁷ If any

⁵²⁰ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 11.

⁵²¹ Operational Guidance on Free, Prior and Informed Consent 'Requirements, best practices, and practical considerations for companies to fulfil their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities' June 2019, 8.

⁵²² Food and Agriculture Organisation 'FAO Policy on Indigenous and Tribal Peoples' 2010, 4-5.

⁵²³ Food and Agriculture Organisation 'FAO Policy on Indigenous and Tribal Peoples' 2010 4-7.

⁵²⁴ Food and Agriculture Organisation 'FAO Policy on Indigenous and Tribal Peoples' 2010, 5.

⁵²⁵ Food and Agriculture Organisation 'FAO Policy on Indigenous and Tribal Peoples' 2010 4-7

⁵²⁶ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016,30.

⁵²⁷ Food and Agriculture Organization of the United Nations 'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities' Manual for Project Practitioners 2016,30.

concern arises they should be dealt with promptly and fairly.⁵²⁸ Hence it is important to have an agreed on dispute resolution method that will help resolve any conflicts.⁵²⁹ This approach of integration of indigenous communities not only builds a trust-based relationship but also upholds the rights of the indigenous communities.⁵³⁰

In Kenya the laws attempt in some aspects to include indigenous communities such as participation.⁵³¹ In spite of this, these laws tend to be simplistic in that they do not sufficiently cater to the special needs of indigenous communities.⁵³² Therefore enforcing laws that strongly encourage sufficient and adequate engagement with the community for example communication to be in local dialect in notices, meetings and written material as mandatory in order to achieve integration.⁵³³ Moreover providence of interpreters and competent third parties that will help meaningfully in including and integrating indigenous communities in the FPIC process.⁵³⁴ Further there can be accountability measures as established in the project closure phase of the best practices under verification and lessons learnt and thus through this there is likely to be a practice and increasing norm of mutual respect and understanding between indigenous communities and states and companies.⁵³⁵

4.2 Conclusion

In conclusion, the participation of indigenous communities in decision-making processes, particularly concerning their lands and resources, can be hinged upon the principles of self-determination, free prior and informed consent (FPIC), participation, consultation, and the integration of indigenous needs in law and policy. These principles underscore the

⁵²⁸ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,27.

⁵²⁹ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,27.

⁵³⁰ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* Manual for Project Practitioners 2016,16.

⁵³¹ Community Lands Act (Act No 2 of 2016) ;

⁵³² Matteo FD *'Imagining the Kenyan Commons: The Stakes of State Control Over Land in the Formulation of the Community Land Act (2011-2016)'* 58 (8) The Journal of Development Studies 2022, 1562.

⁵³³ Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 23-24.

⁵³⁴ United Nations Development Programme *'SES Supplemental Guidance: Frequently Asked Questions (FAQs) on Applying Free Prior Informed Consent (FPIC)'* 2022, 10

⁵³⁵ Roundtable on Sustainable Palm Oil *'Free Prior and Informed Consent (FPIC) Guide'* 2022. 54-56.; Food and Agriculture Organization of the United Nations *'Free Prior and Informed Consent; An indigenous peoples' right and a good practice for Local Communities'* 30. ; Tomlinson K *'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC'* 23(5) International Journal on Human Rights, 2019, 893.

importance of empowering indigenous peoples to assert their rights, make informed decisions, and actively shape the outcomes that affect their lives. While existing legislation in Kenya acknowledges the rights of indigenous communities, there remains a gap in enforcement and implementation, highlighting the need for stronger legal frameworks that explicitly incorporate FPIC and other principles to ensure their genuine engagement. By fostering dialogue, respecting indigenous rights, and promoting equity, governments, companies, and civil society can work together to build a more just and inclusive society where indigenous communities have a meaningful voice in determining their futures.



CHAPTER 5

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.0 Introduction

This chapter presents the findings, recommendations, and conclusion of the research conducted.

5.1 Findings

5.1.1 The status of participation, consultation, and consent of indigenous communities in Kenya

Internationally, Kenya has not ratified key instruments that govern the rights of the indigenous peoples including their right to participate, to be consulted and consent sought in matters to do with their land which is important to them. Nationally, the constitution recognizes public participation as a national principle. It gives a special provision for marginalized communities such as indigenous communities where the state is tasked with putting in place affirmative action programs to ensure participation and representation in governance and other spheres of life for them. In the Community Land Act, the two thirds of the community assembly is the quorum for decision making. However, this is a formalized system that is not inclusive of the traditional structures of government of indigenous persons. Additionally governmental institutions seem to interfere heavily in a manner that curtails the participation and consultation of indigenous persons. The Mining Act and Environmental Impact Assessment Regulations provide for public participation but not in a way that caters to the special needs of the indigenous communities.

As in regard to consent, the Community Land Act gives the threshold to be consultations of the indigenous communities. As for the Mining Act and Environmental Impact Assessments Regulations the power to consent had been passed to executive bodies as opposed to the indigenous communities or their representatives. In addition to that there were many bodies and committees that could be consulted or negotiated with on behalf of the indigenous communities in legislation, yet they were not truly representative of indigenous communities as most members are government officials and not leaders of the indigenous committees. Moreover, these committees do not address their relationship with the community land management committee which is the body that is to be consulted and negotiated with as they

are the committee that overall oversee daily community functions and managing registered community land. All in all, there is a general lack of procedure of how participation, consultation and consent of indigenous communities should be carried out in Kenya.

5.1.2 The optimal procedures endorsed by international institutions for indigenous communities to provide Free, Prior, and Informed Consent.

International instruments that protect indigenous people all promote the free, prior and informed consent principle of indigenous communities when dealing with issues that affect them and their land. Therefore, guidelines on how to achieve FPIC practically were created and have four major steps;

Project Identification begins with the identification of indigenous communities and understanding their concerns and representatives to assess their potential acceptance of the project. This stage also involves gathering geographical and demographic data through participatory mapping techniques to understand the communities' land use and customary rights.

In **Project Formulation**, a participatory communication strategy is developed to transparently disclose project information through ongoing dialogues, allowing indigenous peoples to contribute to the Free, Prior, and Informed Consent (FPIC) agreement. Consent from all involved parties is crucial, along with documenting Indigenous Peoples' needs and establishing a feedback system.

Project Implementation includes engaging in participatory monitoring and evaluation of the FPIC agreement to ensure transparency and effectiveness. This stage focuses on monitoring the agreement's implementation and addressing any concerns or grievances.

Finally, in **Project Closure**, insights gained from the FPIC process are captured, and project accomplishments are shared to document lessons learned, improve future actions, and build trust with the indigenous community.

Finally, in **Project Closure**, insights gained from the FPIC process are captured, and project accomplishments are shared to document lessons learned, improve future actions, and build trust with the indigenous community.

Kenyan law aligns with best practices in certain aspects, such as mandating social and environmental impact assessments, outlining benefit agreements, promoting consultation, and advocating for equal rights among community members, it falls short in critical areas. For instance, it lacks provisions for community decision-making (consenting) and lacks comprehensive regulations for monitoring and evaluating the well-being of indigenous communities' post-project. Furthermore, there is room for improvement by urging project managers to enhance accountability through internal evaluations of their actions within indigenous territories.

5.1.3 Principles that underlie equitable participation and consultation of indigenous communities in Kenya in granting consent on matters related to their land during participation based on the best practices.

There are similar principles that are repeatedly alluded to from documents that give guidelines and promote the best practices of indigenous communities' participation and consultations. Such principles are self-determination, free prior and informed consent (FPIC), participation, consultation, and the integration of indigenous needs in law and policy. These principles are pillars to encouraging and building the rights of indigenous people to participate and make decisions, including in the Kenyan context. Therefore, evaluating these principles has pointed out areas that need to be improved on in Kenyan legislation such as self-determination by strengthening indigenous governance structures and integration of indigenous communities in Kenya by making laws that adequately accommodate indigenous communities. Additionally, the principles can help in assisting in conundrums that come up in the FPIC process such as making sure there is legitimate representation of indigenous communities and not illegitimate representation even though the illegitimate representation is government appointed.

5.2 Recommendations

From the study the following are the recommendations that can be made;

- 1) Ratifying instruments like United Nations Declaration on the Rights of Indigenous Peoples and United Nations International Labour Organization Convention on Indigenous and Tribal Peoples that promote the rights of indigenous communities especially in terms of participation, consultation, and consent. This will align with the vision of the constitution of protection of marginalized groups such as indigenous

communities. It will also assist the government in how to approach indigenous matters in a way that respects their rights and culture, as demonstrated in chapter two.

- 2) Add free prior and informed consent themed procedures into national legislation in matters to do with participation and of indigenous communities. This will first honor the constitutional requirement to have special procedures for marginalized groups such as indigenous communities. Further it will encourage enactment of policies and legislation that promote more elaborate and clear procedures on how to equitably carry out participation consultations and even consent of indigenous communities. as illustrated in chapter 3.
- 3) Incorporate the free prior and informed consent principle into law by strengthening FPIC in national legislation. It will avoid politicizing companies as explained in chapter 3 and 4. Furthermore, with clear and elaborate procedures of FPIC for indigenous communities, coercive state interference can have a possibility of being minimized as illustrated in chapter 4.
- 4) Strengthening the governance system of indigenous communities by promoting the traditional leadership systems in national legislation and adequate representation in governmental committees that make decisions on their land. This will first prevent confusion of who is to represent indigenous communities in negotiation, participation and granting consent as is the case in Kenya. It also advances the right of self-determination and autonomy of indigenous communities. This is as illustrated in chapter 2 and 4 of the chapters.
- 5) Judicial decisions that protect indigenous communities from coercive executive influence (county and national governments) that takes away their rights to participate, be consulted, consent and self-determination, as shown in chapter 2.

5.3 Conclusion

This study has proved its hypothesis, fulfilled the research objectives and has given a response to the problem statement. The objectives of this study were as follows:

- i) To examine the legal framework of participation consultation and consent of indigenous communities in Kenya in relation to their land rights.
- ii) To evaluate the optimal procedures endorsed by international institutions for indigenous communities to provide Free, Prior, and Informed Consent.

iii) To propose a method that ensures equitable participation of indigenous communities in Kenya in granting consent on matters related to their land during participation based on the best practices

5.3.1 Objective i

The study has examined the legislation and judicial decisions on participation, consultation and consent of indigenous communities in Kenya. In doing so ambiguities, inconsistencies and contradictions were highlighted.

5.3.2 Objective ii

Breaking down the guidelines that promote free prior and informed consent has highlighted some best practices when it comes to participation, consultation and consent of indigenous communities. It also showed areas that can be improved on in the consultation and participation of indigenous communities in Kenya. The guidelines also offered direction guidance on how the government and companies can collaborate with the indigenous communities.

5.3.3 Objective iii

The study has highlighted principles that can guide and be considered in participation, consultation and consent of indigenous communities. These principles were drawn from instruments that put the indigenous communities' needs at the forefront of decision making on what happens in matters to do with their land and practices while still offering guidance on how the government and companies can collaborate with the indigenous communities.

5.3.4 Hypothesis

The beginning of the study hypothesized that the current practice of participation, consultation and consent in Kenya of indigenous communities fails to adequately address the unique needs and impacts on indigenous communities, and therefore infringing upon their land security and self-determination rights. The findings in chapter 2 that analyzed how participation, consultation of indigenous communities took place in Kenya which proved that it is inadequate, unfair and contradictory. Chapter 3 and 4 then assessed the different ways this could be improved through analyzing the best practices of participation, consultation, and consent of indigenous communities and together with deriving guiding principles.

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