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**Kenya's Legal Framework for Local Content in Oil and Gas: A Case for a Community
Centred Approach**

Rose Ndanu Mkalama

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



Nairobi, Kenya

December, 2021

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Declaration

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12th November, 2021

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ABSTRACT

Oil and natural gas are essential to the economic development of countries. They ensure that countries have energy security which is vital for their growth. However, this study notes that most countries where oil and gas discoveries are made may not have sufficient financial and technical capacities to exploit these resources. To safeguard the benefits accruing from oil and gas resources, countries have developed local content legislation and policies to guarantee benefits for these countries and their citizens. This study argues that for proper economic development, local content policies must benefit the host state and its citizens, including the communities that live close to where extraction occurs.

The study examines the Kenyan legal framework for local content in oil and gas to assess the sufficiency of the laws in protecting the interests and rights of communities living where extraction takes place. The study reviews international frameworks which lay bare the fact that local content with a community perspective has its underpinnings in international law. Based on the analysis of this study, the Kenyan legal framework is found to be insufficient in providing for local content that protects local communities. The study finds that it is crucial to have local content laws and policies that consider the interest of the host country and its citizens both at the national and local community level for economic and social development.

The study has utilised secondary data to undertake the analysis of local content. The study will be critical in influencing decision-making in developing local content laws and policies that will benefit the country and its citizens. It will also contribute to research as there is scanty literature on local content with a community perspective.

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LIST OF ABBREVIATIONS

CDA	Community Development Agreement
ECOWAS	Economic Community of West African States
EMCA	Environmental Management & Coordination Act
EPRA	Energy & Petroleum Regulatory Authority
FDI	Foreign Direct Investment
FDP	Field Development Plan
GDP	Gross Domestic Product
IFC	International Finance Corporation.
IOCs	International oil companies
LCP	Local content policy
LCR	Local content requirements
MENA	Middle East and North America
MNC	Multi-National Corporations
NRGI	Natural Resource Governance Institute
PPAD	Public Procurement and Asset Disposal Act
PANEL	Participation, Accountability, and Non-discrimination & Equity, Empowerment & Access to information and Legal access to remedy.
PS7	Performance standard 7
PSC	Production Sharing Contract
IBA	Impact Benefit Agreement

LIST OF STATUTES AND POLICIES

Community Land Act, 2016

Constitution of Kenya 2010

Draft local content policy, 2019.

Draft National Energy and Petroleum policy, 2018

Draft Petroleum (Local Content) Regulation, 2019

Energy Act of, 2019(Act No 1 Of 2019)

Environmental Management and Coordination Act

Local Content Bill, 2018

Mining Act, 2016

Model Production Sharing Contract (PSC)

Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016

Natural Resources Sharing Bill, 2014

Nigerian Oil and Gas Industry Content Development Act 2010 Act No. 2(Nigeria)

Petroleum (Exploration and Production) Regulations, 1984

Petroleum (Local Content and Local Participation) Regulation, 2013. (Ghana)

Petroleum Act (Act No. 2 of 2019).

Petroleum Commission Act, 2011 (Ghana)

Petroleum Regulation

Public Procurement and Asset Disposal Act, 2015

LIST OF INTERNATIONAL STATUTES AND PRINCIPLES

African (Banjul) Charter on Human and Peoples' Rights

International Finance Corporation (IFC) Performance Standards on social and environmental sustainability (2006)

Rio Declaration on Environment and Development of 1992

The principles of Participation, Accountability, Non-discrimination & equity, Empowerment & access to information and Legal access to remedy.

United Nations Declaration on the Rights of Indigenous Peoples



LIST OF CASES

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 276/2003, African Commission on Human and Peoples' Rights

Mayagna (Sumo) Awas Tingni Community v Nicaragua IACmHR Case 79 (2001) Court Commission on Human Rights

Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR

Thuku Kirori & 4 others v County Government of Murang'a [2014] eKLR



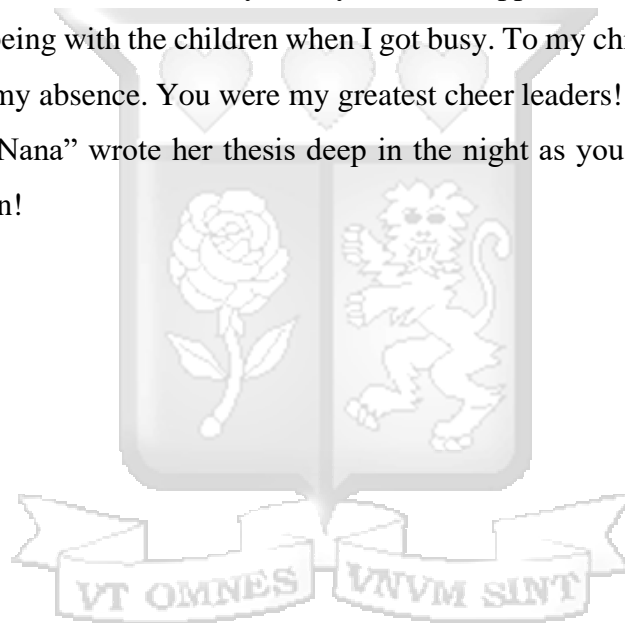
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DEDICATION

I dedicate this thesis to my wonderful family. My husband Ben for your support even during very difficult times. To my children Lynda, Katy and Nathan for finally understanding that the sky is not the limit but the hindrance and to my lovely grandson Sean who kept me going as I wrote this thesis.



CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Background to the study

The extraction of oil and gas presents numerous challenges to states with this natural resource. First, these challenges stem from the capital-intensive nature of the extraction, which most countries with the natural resource may not have. Secondly, the extraction requires skilled and expert labour, which may not be available in the host state.¹ As a result of the technical and financial incapability, host countries find themselves sourcing for foreign direct investment (FDI). However, the host country may not get the total value from the extraction of the resources. Instead, the wealth from these resources may end up benefiting the International Oil Companies (IOCs) more, at the expense of the host country and its citizens. This situation has sometimes resulted in the *resource curse phenomenon* where mineral-rich states experience retarded economic growth.² Lynn Karl has accordingly referred to this inverse relationship between resource abundance and economic development as the “paradox of the plenty.”³ To deal with the resource curse and ensure a maximum benefit derived from the extraction of natural resources and FDI, countries worldwide have developed local content policies and legislation. These policies impose on the IOCs requirements intended to help in the social and economic growth of the host state.⁴

Local Content Policies (LCPs) should ensure that there is a value addition to the host state from the activities that emanate from the petroleum value chain in addition to other sources of revenue that the host country may traditionally have.⁵ LCPs would thus assist the host states in stimulating economic development by creating jobs for locals, developing new industries, and knowledge transfer, among other benefits.⁶ The importance of local content has gained traction the world over. For instance, the Middle East and North Africa region (MENA) countries are the largest oil and gas exporters. These countries include Iran, Iraq, Saudi Arabia, United Arabs

¹ Pereira E, Matthews C, Trischmann H, ‘Local content policies in the petroleum industry: lessons learned’ Oil & Gas, Nat. resources & energy J, 2019, 637.

² Ingilav A, Artemyev A, ‘How to scrutinise a production sharing agreement; a guide for the oil and gas sector based on experience from the Caspian Region’ *Soros Foundation– Kazakhstan*, 2012, 11.

³ Terry L K, ‘The oil trap’, *Transparency International Quarterly Newsletter*, (Sept 2003)

⁴ Ingilav A, Artemyev A, ‘How to scrutinise a production Sharing agreement; a guide for the oil and gas sector based on experience from the Caspian region’ 2012, 16.

⁵ Anyanwu J, ‘Local content in the hydrocarbon sector: lessons of Experience’, Mozambique oil and Gas Seminar in Maputo, Mozambique, (February 27-28, 2013).

⁶ Christopher M, Pereira G et al., ‘Local content policies in the petroleum industry: Lessons learned’ *Oil and Gas* 45, 7 (2019) 4.

Emirates (UAE), Oman, Qatar and Kuwait. Consequently, their economies highly depend on the revenue generated from oil and gas.⁷ *Olawuyi* argues that the fluctuation of international oil prices has compelled countries in the MENA region to find alternative ways of diversifying their domestic economies to keep them competitive. He avers that LCPs, which require IOCs to give preference in the employment of locals, procurement of local goods and services, technology transfer and research, have been embraced by such countries to counter the effects of over-dependence on oil and gas.⁸ LCPs, he further argues, ensure that the host state derives maximum benefits brought by FDI and has a ripple effect on the growth of other industries like manufacturing, technology among others.⁹

Nigeria is an excellent example in Africa that illustrates the importance of having LCPs. Nigeria's economy greatly depends on oil and gas, accounting for 90% of the total revenue.¹⁰ However, instead of the two industries contributing the most significant percentage to the country's GDP, their contribution is well below 30%.¹¹ This disparity arises because there has been high foreign content in the production and distribution of oil resources with very little consumption of local inputs within the local communities and Nigerian companies.¹² This necessitated Nigeria to enact local content legislation to ring-fence and protect local industries from external competition.

Therefore, countries worldwide have developed local content legislation and policies to guarantee their citizens value from the benefits of extracting oil resources found within their borders. Local content provisions provide the legal safeguards used when defining the parameters of local content for compliance by the various parties and stakeholders interested in the project. However, most local content legislation and policies take a national approach in the value addition chain without considering the local communities where the extraction occurs. This has often led to the neglect of these local communities, affecting their social development to a great extent.

⁷ Tagliapietra S, Tagliapietra, Simone: The political economy of the Middle East and North Africa oil exporters in times of global decarbonisation, Bruegel Working Paper, No. 2017/05.

⁸ Olawuyi DS, 'Local content requirements in oil & gas contracts: Regional trends in the Middle East and North Africa.' *Journal of Energy and Natural Resources Law*, (2018), 3.

⁹ Olawuyi DS, 'Local content requirements in oil and gas contracts: regional trends in the Middle East and North Africa', *International Journal of Construction Education and Research*, 2020, 9.

¹⁰ Okafor J, Aniche E, 'A critical appraisal of Enforcement of Nigerian oil and gas industry content development Act, 2010' *Journal of Law Policy and Globalisation*, 31 (2014) 82.

¹¹ National Bureau of Statistics (NBS), Nigerian Statistical Fact sheets, (2008)

¹² Izeze, I 'Nigerian oil and gas local content Act: abuse of expatriate quota.'

In Ghana, the legal framework takes the national approach to local content. The Petroleum Act has no express provision on who a local is. Instead, their local content and local participation regulations define local content to mean the quantum of value addition that comes from the use of locally produced goods and services that are locally produced.¹³ This means that any citizen of Ghana is a local, thus taking the nationalistic approach. Nigeria has also adopted a nationalistic approach to local content in its legal framework and has not given the necessary focus to a community-based approach.¹⁴

However, some jurisdictions have provided for local content policies that are specific to the local community. For example, Canada has ensured that local content benefits local and indigenous communities more when oil and other minerals are extracted within their vicinity. In addition, the country has enacted laws that have legal provisions that provide for a community centred approach to local content.¹⁵ For instance, the Ontario Green Energy and Green Economic Act has ensured the creation of jobs within the province and that Ontarians draw maximum benefit from the renewable energy generated from within their jurisdiction.¹⁶ These provisions are more specific to communities and thus address particular issues that may affect such communities.¹⁷ To consider the needs and interests of the communities located where extraction takes place, Canada has a Community Development Agreement (CDA). In addition, communities are involved and engaged in outlining ways that will guarantee the extraction of resources.¹⁸ Indeed the two Acts highlighted above are enacted at the province level and thus address the community's needs. Moreover, they ensure a proportionate benefit derived from the extraction of oil and gas by both the IOCs and host states.

Chilenye Nwapi, in *Local Content Policies in the Extractive Industry in Canada*, outlines local content requirements and the approach adopted by Canada in its policy documents that encompass a three-level approach of national local, provincial local and community local.¹⁹

¹³ Section 49, *Petroleum (Local Content & Local Participation) Regulations, 2013*.

¹⁴ Section 106, *Nigerian Oil and Gas Industry Content Development (Local Content Act) 2010*. The section defines local content as "the value addition to the Nigerian economy by developing capacities and capabilities through the utilisation of Nigerian human capital, resources and services in the Nigerian oil and gas industry."

¹⁵ Clean Energy Act, 2010 (British Columbia, Canada)

¹⁶ Ontario's Green Energy Act: Setting the Course for Clean Energy, Green Energy Act Alliance, 2009, 2. See also May H, Matt M, Alex P, Kate S., *Local Content Requirements in British Columbia's Wind Power Industry*, 2010, 11.

¹⁷ Isabella R, "A review of key numbers and issues secretariat hosted by secretariat funded by designing local content policies in mineral-rich countries" IGF, 2018, 3.

¹⁸ Isabella R, "A review of key numbers and issues secretariat hosted by secretariat funded by designing local content policies in mineral-rich countries" 8.

¹⁹ Pereira, EG. Spencer, R. and Moses, J.W, "Sovereign Wealth Funds, Local Content Policies and CSR," Springer, 2021,386.

The three-level approach has provided an avenue for the communities to actively participate in the negotiations of how they can reap maximum benefits from the extraction of minerals within their vicinity. This has played a significant role in the socio-economic development of communities in Canada.²⁰ *Nwapi* further argues that a more local and community-centred approach to local content come with varied advantages. For example, he notes that one way to reduce community discontentment is by ensuring that the communities benefit first from the extraction activities happening within their vicinity.²¹ He further asserts that the community-centred approach reduces any conflict that may come from the non-involvement of the locals in the course of extraction and reduces the communities' dependency on the revenues from the national government. This, he argues, enhances the socio-economic development of these communities.²² From the foregoing, local content should benefit all citizens, including the communities living where extraction occurs.

In Kenya, the Constitution of Kenya, 2010 saw several progressive provisions. For example, article 10(1) addresses the binding nature of the national values and principles of governance. The values bind all state organs, state officers, public officers, and persons whenever they apply or interpret the Constitution, enact or interpret any law, and make or implement public policy decisions. Among the fundamental values that have this mandatory nature is the participation of the people in matters that affect them. In essence, even IOCs are bound by these values by them being artificial persons.²³ The Constitution requires that benefits accruing from resources be shared equally among the citizens.²⁴ It further obligates the national assembly to enact legislation to ensure that communities benefit from natural resources within their vicinity. The natural resources that the Constitution envisions include oil and gas. Additionally, the enactment of the Community Land Act provides that benefits should accrue to those communities located where extraction takes place for the whole community's use.²⁵ The argument was emphasised in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR. The court set a precedent by decreeing

²⁰ Nwapi, Chilenye. 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries.' Law and Development Review 8.1,216.

²¹ Nwapi, Chilenye. 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries', 218.

²² Nwapi, Chilenye. "Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries 220.

²³ Article 260, *Constitution of Kenya* (2010).

²⁴ Article 69, *Constitution of Kenya* (2010).

²⁵ Section 35, *Community Land Act* (2016)

that communities that live around a mining area need to be fully involved in all decisions that will affect them and derive maximum benefit from the resources within their locality.

Shortly after the year 2012, the President of Kenya announced the discovery of oil deposits in Turkana County found in the north-western part of the country.²⁶ The country received the announcement with great expectations as it was a breakthrough that would see the country boost its economy and ensure socio-economic development in Turkana, where oil had been found,²⁷ a region that has been economically neglected for the longest time.²⁸ The Turkana people are pastoralists, and the land where they live and earn their livelihood is community land. In exercising its eminent domain, the government acquired their land to extract oil in line with the constitutional stipulation that all the natural resources and the land they rest vests in the state. However, the state holds such land in trust for the people of Kenya.²⁹ Therefore, this comes with the duty on the part of the state to compensate them.³⁰ Thus, the community should benefit from the resources extracted from their land.

With the discovery of oil in Turkana and based on the constitutional provisions on the use of natural resources for the benefit of the community, the government was expected to develop strategies and policies with a community dimension to ensure that the community benefited from the oil resource. Furthermore, this dimension would ensure the active participation of the local communities in the development, implementation and evaluation of local content policies, which would ultimately spur value addition.

Kenya consequently developed legislation and policies for local content to ensure value addition from its investments.

Local content in the petroleum industry is anchored in the Petroleum Act.³¹ It defines local content as any value addition injected into the Kenyan economy from the activities related to the upstream, midstream and downstream extraction of oil and gas, ensuring a structured

²⁶ Enns C and Bersaglio B, 'Pastoralism in the Time of Oil: Youth Perspectives on the Oil Industry and the Future of Pastoralism in Turkana, Kenya' *The Extractive Industries and Society*, 3, 160, 2016.

²⁷ Wolfgang F, 'Will oil be a blessing or a curse for Kenya? – Lessons from Indonesia and the rest of the world', 2012, <<https://blogs.worldbank.org/africacan/will-oil-be-a-blessing-or-a-curse-for-kenya-lessons-from-indonesia-and-the-rest-of-the-world>> accessed 1 January 2021.

²⁸ Eliza J, Leo Z and Kalipeni E, 'Oil discovery in Turkana County, Kenya: A source of conflict or development?' *African Geographical Review* 1, 2014, 34.

²⁹ Article 62(3), *Constitution of Kenya* (2010).

³⁰ Article 40 (3), *Constitution of Kenya* (2010).

³¹ *Petroleum Act of 2019* (Act No. 2 of 2019)

development of capacities and capabilities and the use of locally acquired goods and services.³² The objective of this is to ensure there is socio-economic development in the country.

In defining local content and who can be considered a local, the Petroleum Act takes a national approach that side-lines the local communities situated at the place of extraction.³³ The danger in the definition of who a local is and therefore covered under the provisions of local content gives leeway to (IOCs) to, on the one hand, adhere to the local content requirements while having the latitude to ignore the local communities around the area on the other hand. This is despite the provisions of the Constitution outlining the need to ensure that natural resources benefit the local communities and their local economies.³⁴ Additionally, the overriding danger with the lack of prescriptive provisions to protect locals is that they do not derive maximum benefits from the extraction within their vicinity. This may bring about dissatisfaction among the communities and may sometimes lead to conflicts. For instance, Tullow Oil Company that operates in the Lokichar basin in Turkana had to suspend operations because of riots by the local community. The community was protesting and complaining that Tullow Oil had short-changed them by not involving them in tenders, locals' employment, and vehicle hire contracts.³⁵ In the base titanium case in the County of Kwale, some conflicts oscillated around the ownership of land, inequality in the distribution of resources, and poverty induced by the displacement of locals to give way for mining to occur.³⁶ A community centred approach to local content that emphasises local communities' participation in the development, implementation and evaluation of the local content laws and policies would thus ensure that there is a value addition to local communities. This is one of the main aims of the development of LCPs by host states.

Further, even though the Petroleum Act has local content requirements, they have, unfortunately, been left to negotiations between the host state and the IOCs in the production sharing contract (PSC). This disadvantages the local communities as they do not participate in the negotiations and thus have no avenue to agitate for their interests. A more community-

³² Sec 2/, Petroleum Act (Act No. 2 of 2019)

³³ Section 2, *Petroleum Act* (Act No. 2 of 2019). Defines local content as the 'value addition brought to the Kenyan economy from petroleum-related activities through the development of capacities and capabilities in procuring locally available supplies, services and workforce.'

³⁴ Article 66, *Constitution of Kenya* (2010).

³⁵ Mobutu JO and Nzulwa J. "Effect of Local Content and Security Issues on the Operational Efficiency of Oil and Gas Organisations in Kenya, *International Journal of Strategic Management*, 2021, 1-19.

³⁶ Abuya WO., Mining Conflicts and Corporate Social Responsibility: Titanium Mining in Kwale, Kenya. *The Extractives Industries and Society*, 2016, 485-493.

centred approach to the development, implementation and evaluation of the LCPs would ensure a benefit accrues to the locals.

Therefore, this study considers the sufficiency of existing legislation and LCPs intended to ensure that both the country and local communities derive economic benefits during the entire petroleum value chain.³⁷ In formulating LCPs, the government must ensure that they provide value addition to the persons in the region where the resource is located. These LCPs would go a long way in shielding them from the loss of both their land and the potential benefit expected from extracting natural resources from that land. The risk of adopting a national approach to local content without giving due regard to the community approach is that communities suffer double jeopardy. Local content laws and policies should thus be designed to address the people's interests in such regions. The community approach to local content development thus presents a better avenue to address community interests. This way, the community can benefit from the entire value chain by supplying the required labour, goods and services.

1.2 Statement of Problem

The Constitution of Kenya 2010 lays the foundation for developing local content policies and legislation in Kenya. The Constitution acknowledges the need to create legislation that fosters investment in communities for economic benefit. The Constitution further obliges all state agencies, organs and persons whenever they enact, interpret and implement the law to be bound by national values and principles, among them the participation of the people in matters that affect them.

Kenya has enacted the Petroleum Act, 2019, as the principal Act to govern oil and gas as a natural resource. These resources are supposed to be sustainably managed and utilized and the benefits accruing therefrom shared among the citizens. The Act defines local content but through a national approach. On the other hand, Canada defines local content by focusing on the community within the area of extraction of oil and gas. Consequently, the study avers that a community-based approach would best serve the community's interests in the oil and gas extraction locality. This study analyses the current local content legal framework for oil and gas in Kenya to point out gaps concerning benefits accruing to communities living in the areas where extraction occurs. It offers recommendations on how the gaps can be addressed through the adoption of efficient LCPs.

³⁷Section 50, *Petroleum Act* (Act No. 2 of 2019).

1.3 Justification of the Study

In Kenya, the petroleum legal framework is still in its formative stages. Therefore, there is a scanty academic commentary on the legislative and regulatory frameworks regarding local content that emphasises the local communities where the extraction occurs. Thus, this research contributes to knowledge and literature gap and provides a better understanding of how best local content can be mainstreamed in Kenya.

Additionally, some of the study recommendations could help interrogate the Petroleum Act, Community Land Act, Local Content Bill, and the Draft Petroleum local content regulations. The study suggestions can enhance the protection of the local communities based in locations where extraction takes place. It, therefore, can be used to feed into the existing laws and improve the policies to ensure there is a benefit to such communities.

1.4 Research Objectives

The study is based on the following objectives;

1. To interrogate the meaning and importance of local content to the community in the oil and gas extraction locality.
2. To assess the adequacy of the current Kenyan local content legal frameworks in guaranteeing value addition to local communities located where extraction occurs.
3. To assess the best practices adopted by other jurisdictions in guaranteeing value addition to local communities.

1.5 Research Questions

This study is premised on the following research questions that guide the analysis of the concepts and laws to point out the gaps and make possible recommendations.

1. What is the meaning and importance of local content to the community in the oil and gas extraction locality?
2. What is the adequacy of the current Kenyan local content legal framework in guaranteeing value addition to the local communities located where extraction takes place?
3. What best practices do other jurisdictions adopt in guaranteeing value addition to local communities can make Kenya's legal framework efficient?

1.6 Hypothesis

Where there is a failure to have a local content policy specific to the local communities where the extraction occurs, those communities face the risk of remaining socially, economically disenfranchised.

1.7 Research methodology

The study uses the doctrinal research methodology since it is the most dominant research method in legal research designs.³⁸

The research uses desk review and secondary sources. The secondary sources used include journal articles, books, academic theses, and other web-based publications. These reviews provide sufficient information that enhances the identification of any gaps that may be in existence in law. The study then ascertains the relevant law relating to the identified gaps through data analysis, including statutes, legislation, and case law. Finally, the study gaps are analysed in the context of the specified relevant law. Consequently, the study draws probable conclusions and gives recommendations.

This study has adopted Canada as a country from which it considers best practices. Canada is considered best practice owing to its reputable character as a jurisdiction with an entrenched community-centred approach to local content. Whereas the economies of Canada and Kenya are not comparable, this study argues that Kenya as a leader in many ways in sub-Saharan Africa, deserves to borrow from the best as it positions itself into Vision 2030.

1.8 Limitation of the study

The major limitation to the study is that oil and gas extraction is a novel area in Kenya. Consequently, there has not been enough research on a community-based approach to local content that involves community participation in the development, implementation, and evaluation of LCPs. In addition, most of the available resources take a national dimension to LCPs in oil and gas, thus scanty literature on the topic of study.

The second limitation to this study is that the Petroleum Act (2019) and the other laws that will be delved into are relatively recent and have thus not been exposed to judicial interpretation.

³⁸ Terry H and Nigel D, 'Defining and describing what we do: Doctrinal legal research', *Deakin L*, 2012, 4.

1.9 Literature Review

This study acknowledges that there is scholarly work in the field of local content. It reviews selected scholarly works, points out the gaps and thus analyses in detail its contribution within the body of the thesis.

Heum,³⁹ *Acheampong*⁴⁰ and *T I Vaaland*⁴¹ in their respective journal articles acknowledge that local content, when properly designed and implemented, enhances the socio-economic development within a country. However, while outlining the importance of local content, the authors note that the value addition brought by the local content plays a critical role in contributing to the national goal of economic development. Whereas this may be true, they fail to note that for local content to have a far-reaching impact, it should stem from a region before spreading to the other parts of a country.⁴² The approach taken by these scholars, thus, fails to take into consideration the specific communities located at the point of extraction.

Chilenye Nwapi, in his journal article *Defining the 'Local' in Local Content*, presents an argument that the definition of local for purposes of local content in most jurisdictions take a national approach.⁴³ He argues that this approach fails to consider communities living in the areas where extraction takes place.⁴⁴ He, therefore, opines that those countries should adopt definitions that take into consideration the locals. The literature, however, suffers the gap of failing to define who a local is in determining who should benefit from LCPs.

In a policy paper titled '*Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors*', *Maria Esteves* also makes an almost similar argument with *Chilenye Nwapi*. The author and his co-authors argue that communities located where the extraction of oil and gas takes place rarely take advantage of LCPs.⁴⁵ The authors aver that regional approaches should thus be used in the management of the natural resource wealth. The authors conclude that LCPs, however good if they do not consider the realities of the locals,

³⁹ Per Heum, 'Local Content Development: Experiences from Oil and Gas Activities in Norway'.

⁴⁰ Theophilus Acheampong, Marcia Ashong and Victoria Crystal Svanikier, 'An Assessment of Local-Content Policies in Oil and Gas Producing Countries' (2016) 9 *The Journal of World Energy Law & Business* 282.

⁴¹ Terje I Vaaland, Alabi SO Soneye and Richard A Owusu, 'Local Content and Struggling Suppliers: A Network Analysis of Nigerian Oil and Gas Industry' (2012) 6 *African Journal of Business Management* 5399.

⁴² Chilenye Nwapi, 'A Survey of the Literature on Local Content Policies in the Oil and Gas Industry in East Africa' (2016) 9 *University of Calgary- The School of Public Policy* 30.

⁴³ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' (2015) 8 *Law and Development Review* 32.

⁴⁴ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' (n 5).

⁴⁵ Esteves AM, Coyne B Moreno A, 'Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors' 28.

can be counterproductive. The journal, just like that of *Nwapi*, fails to define who locals are. This thesis makes a case for a definition of local content and local community within the Kenyan local content legal framework.



CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

This chapter discusses the theoretical underpinnings of the study. The research is premised on three fundamental theories. The first theory applied in the study is the social contract theory. The theory is central to this study because it outlines the government's role in protecting its citizens' rights. The custodianship role that the government plays in the protection of citizens includes economic security. It obligates the government to develop laws and institutions that ensure justice to the citizens, including economic justice. The theory is therefore used to show how the government, through its institutions, can come up with LCPs that take into consideration the communities residing in places where oil is extracted for the community to benefit from investments made by the central government.

The second theory analysed is the localism theory. It is vital to the study as it contends that legislation, regulations, and policies should be devolved from the central government to the local government, which is closer to the people.⁴⁶ The objective of devolution is to ensure that the locals actively participate in critical decision-making processes of matters that affect them as they know best what can bring value to them. The development of legal frameworks shifts from the national approach to the centre of the people significantly affected by such extraction. This is achieved by involving them in developing, implementing, and evaluating these policies and legal frameworks. The involvement of the people helps achieve the tenets of democracy through public participation, ensure that there is an efficient legal framework that considers the interests of the community and ultimately achieve economic development of the locality.

The third theory analysed in the study is the economic regulation theory. The theory asserts that the government plays a significant role in developing laws and policies governing all the sectors within a country. In enacting these laws, the government aims at achieving one of two main interests; either public interest or specific group interest (the capture approach). The theory is thus essential to the study as it discusses the role of government in protecting either the general public or a given interest group. In developing regulations and laws, the government can adopt a community approach to local content to ensure that both public and community interests are taken care of during the development and implementation of LCPs.

⁴⁶ Nwapi C, 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries', *Law and Development Review*, 2015, 34,2.

This theory is instrumental in drawing good practices from jurisdictions that have adopted the capture approach, which serves to protect the interests of a specific group as opposed to the general public in establishing LCPs.

2.2 The Social Contract Theory

First propounded by *Thomas Hobbes* and further developed and supported by scholars such as *John Locke* and *Jean Jacques Rousseau*,⁴⁷ The theory posits that the relationship that exists between the state and its citizens is contractual. Theorists argue that people are born free. However, being part of a society, they surrender some of these freedoms and rights to the state, which, in return, offers them protection from any harm that may befall them.

Rousseau outlined that the privatisation of property was the basis for developing the social contract. He argued that the state of harmonious sharing of resources was in place through human relations. First, however, there was the quest to have an individual property with civilisation, which brought about conflict.⁴⁸ To resolve conflict, people developed the concept of 'general will', which was a sort of agreement between members of the society to amicably use the existing resources for the benefit of every member.⁴⁹ The theorist termed the general will as the collective agreement by all community members about what they consider a right and a wrong and what they believe to be their immutable values.⁵⁰ Therefore, the general will speak to aspects that would be beneficial to the members of the community in particular and the state at large. The continued civilisation, however, prompted the need to form a new form of social organisation. This led to the formation of the state with powers to protect each member of society's rights, liberties, and privileges. In exchange for protection, members submitted some of their rights to the state.

⁴⁷ Jean-Jacques R, *'The Social Contract'* Simon & Schuster 1762.

⁴⁸ August JH, Alamilla S and Liang B, 'The Social Contract Theory Revisited: Examining the Relationship Between Greed, Conflict, and the Evolution of Cooperation', *The Role of Community Development in Reducing Extremism and Ethnic Conflict* (Springer 2018).

⁴⁹ Jean-Jacques Rousseau, *Rousseau: The Social Contract and Other Later Political Writings* (Cambridge University Press 2018).

2.2.1 Convergence of the Social Contract Theory and a Community Centred Approach to Local Content

The social contract theory is relevant to this study because it will be the basis for the argument that the government ought to protect the rights of its citizens, including economic rights. It presents a more people-centred approach to making rules and regulations that should govern them. The theory asserts the importance of having a supreme government that is in place that has powers derived from the people. These powers protect the community from any harm that may befall them. Communities form the most basic organisational structure in every polity and have specific values that tie them together. These values are regarded as the laws they use in relating to each other while also deriving benefits from the said values. Usually, the community codes the values to ensure there are harmonious and beneficial relationships.

Premised on the above, the theory and the topic of study intersect in that the surrender of some of these community rights should guarantee the community government protection.⁵¹ In so doing, the government should consider these communities' unique features and values to ensure that they enact legislation that will enable the community to obtain benefits from resources within their environs. This argument is aligned to the Constitution of Kenya, which provides that all minerals vest in the government and the government holds such minerals in trust for its citizens.⁵² The same Constitution requires the government to protect the rights of its citizens.⁵³ One of the ways through which people surrender their rights to the government for protection is by the payment of taxes.⁵⁴ Members of the society have a duty to pay taxes, and through the taxes, the government places enough mechanisms and measures that would ensure the protection of the community. This protection goes as far as legislating relevant laws and developing policies. The community is the most basic subject of protection, and the government ought to ensure that they have policies and legislation that are unique to the community's needs. This, therefore, talks to having a community-centred approach to legislation that would guarantee value addition and bring about socio-economic development to the community.

⁵¹ Al Gedicks, 'Transnational mining corporations, the environment, and indigenous communities' multinational corporations' *Brown Journal of World Affairs*, 2015, 129.

⁵² Article 62(3), *Constitution of Kenya* (2010).

⁵³ United Nations Human Rights Office of High Commissioner, 'Human Rights and Constitution Making' United Nations 2018, 35.

⁵⁴ Why it matters in paying taxes - doing business - World Bank group' <<https://www.doingbusiness.org/en/data/exploretopics/paying-taxes/why-matters>> accessed 4 January 2021.

Thomas' perception of the state before the surrender of life was that one which was exceedingly unbearable. He summed it as being nasty, short and brutish. The summation meant that without a government in place to which people have submitted some of their rights, the capacity to satisfy long- and short-term desires becomes impossible as there are no sanctions. Persons within a community and a country as a whole are therefore obligated to surrender their rights in return for protection.⁵⁵ By formulating various policies and laws, the government ensures the protection of the communities and the general citizenry. This protection extends to economic security hinged on laws and policies that consider every community's needs. Through the lenses of the social contract, the government should ensure affirmative action for local communities where oil and gas extraction occurs through more local community-centred LCPs.⁵⁶

2.3 Localism Theory

The localism theory posits that state powers and decision making should be decentralised to local governments closer to local communities.⁵⁷ It argues that there is a need for community participation in decision making in matters that affect them. This is because the community better understands their circumstances and the choices that would better address their needs.⁵⁸ The theory thus gives credence to the empowerment of the local community by promoting what you would call bottom-up regulation. The position taken by the localism theory aligns with the Kenyan Constitution, which enunciates the devolution of power, decision making and the participation of the people in governance. Three factors are critical for the theory of localism to apply. These include efficiency, democracy and community.

2.3.1 Efficiency

The theory contends that decentralising power to local governments and subsequently to the people brings about efficiency. It presents them with an opportunity to participate in issues that affect them actively.⁵⁹ The autonomy of local governments allows communities that live in a

⁵⁵ August H, Alamilla S and Liang B, 'The social contract theory revisited: Examining the relationship between greed, conflict, and the evolution of cooperation, *The role of community Development in reducing extremism and ethnic conflict*, 2018.

⁵⁶ Warden-Fernandez J, 'Indigenous communities' rights and mineral development special issue: Indigenous peoples and the development of natural resources', *Journal of Energy & Natural Resources Law*, 2005, 395.

⁵⁷ Nwapi C, 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries' 2015, 16.

⁵⁸ Painter J and others, 'Connecting Localism and Community Empowerment' 13.

⁵⁹ Briffault R, 'Localism and regionalism' *Buffalo Law Review*, 2000, 48.

given area to make laws that respond to their needs, thus reducing the cost of governance, which brings about efficiency.

As a method of ensuring efficiency, the theorist suggests that where there is autonomy by the locals in the development of laws, they can come up with frameworks that can match their specific conditions. They assert that local communities know best what would work for them. Consequently, taking an active role in the development, implementation and evaluation of the legal frameworks enables them to consider the key factors that affect them, thus ensuring efficiency in governance.⁶⁰ In developing LCPs, the national government should allow a more expansive space for the county governments to establish policies that affect them.

In developing the theory further, *Alex Anas* criticises the concept of an up-bottom approach to the formulation of laws and policies. He asserts that in circumstances where policies are formulated from a more centralised place, there are chances of overlooking the essential and primary aspects that are important to the communities that are to be affected by the policies and laws. Policies that are developed centrally, therefore, may not serve the communities well. Borrowing from this assertion, the study attempts to make a case for formulating a flexible regime of local content laws and policies that will allow space for the community concerned to accommodate its unique features. In making a case for flexible policies, the anthropological foundations of communities will ultimately inform policy. For instance, the policy will have factored in the nature of the life of a people in whose area petroleum resources are.

Another aspect of efficiency presented by the theory is that, where locals are left to participate in decision-making actively, efficiency is achieved by the people in that area and others in other localities.⁶¹ The argument presented here is that people will participate in decision-making and implement laws that are advantageous to them. In a free polity, thus, people located in areas where their needs are not catered for can move to areas where the locals have formulated laws and efficient frameworks.

This first limb of the localism theory is the lens through which the research assesses the efficacy of the existing legal and policy framework. This study ultimately underscores that the local community bound by the exact anthropological origins, culture, and ethnicity is local content's focal point. The impact of local content is only efficient when the local community displaced to exploit resources is accorded priority. Actual efficient development can only be realised

⁶⁰ Chloe S, 'Localism: theory and practice including a case study of the transition town movement' 35.

⁶¹ Briffault R, 'Localism and Regionalism' (2000) 48 Buff. L. Rev. 1.

when the exploration of petroleum resources directly impacts this local community's ways of life and living standards.

2.3.2 Democracy

The second factor is democracy. The theory argues that decentralisation of powers and decision-making gives the community a chance to have their voices heard in issues that directly affect them much more straightforwardly than looking up to the national government.⁶² Through public participation, principles of democracy are achieved through the notion of “people first.”⁶³ This would mean considering the plight of the persons situated within a given area first, then moving to other places. Decentralisation thus provides a way for the community interests to be included when the government is making decisions on matters affecting them.

The argument presented by the theorists is that the application of democratic principles is more straightforward at the local level. This is because the administrative bodies can get in touch with people and ensure community participation in drafting the laws and policies that affect them. At the community level, it is also easier for people to get in touch with the leaders as opposed to where the structures are centralised. Centralisation thus deviates from the principles of public participation as the laws made cannot be said to have emanated from the community. Therefore, it can be argued that the community, as a smaller unit, presents an opportunity for most of its members to have their aspirations reflected in the laws and policies made.

The theory makes a connection to the concept of local autonomy and local democracy. Thus, the link is that when local governments have power derived from the locals who form part of the community, then such power and autonomy can legislate and work for the benefit of the communities. Local participation by the members of the communities thus promotes autonomy and democratic governance towards the legislation of community-oriented legal frameworks. Furthermore, this theory presupposes that county governments where resources are discovered should make a case for the community's involvement in developing the policies relating to the extraction of those resources.

In assessing this second limb of the localism theory, this study seeks to determine the inadequacy of the legal framework in so far as effective involvement of the local communities, living in the locality of extraction and the benefits to the economic and social benefits of the extraction. Through this lens, the study argues that any inadequacies require an amendment of

⁶² Oliver S, ‘Broadband localism’ *Ohio State Law Journal*, 2012, 73.

⁶³ Moseti Y, ‘Public participation for sustainable development in local cities’ 7, 1.

the laws that cover the subject of local content and their alignment with the Constitution of Kenya's values and national principles of participation of the people. The focus on the local community under the definition adopted in this thesis ensures that the constitutional decrees in Article 10 get to be experienced in the various spheres of life of the communities. Furthermore, the involvement of local communities gives political, social and economic credence to the aspirations of entrenching a formidable and efficient local content policy framework.

2.3.3 Community

Community is the third factor under the localism theory. It portends that people who live together in a community have shared values and beliefs that bind them together. Therefore, it is of utmost importance that decisions made on issues that affect them consider the values and principles that they espouse. Thus, when legal frameworks are being developed, communities, through the shared values, can agitate for frameworks that would guarantee the maximum benefit and their well-being.⁶⁴ The decentralisation of power guarantees the preservation of community identity and further ensures that the policies developed on issues that affect them respect community values and beliefs.⁶⁵ This third limb of the localism theory informs the definition of community that this study adopts.

In defining what constitutes a community, the theory's proponents go beyond the simplistic approach of people within a region or locality. Instead, their definition encompasses shared values by the people within the locality, their unique identity, and specific easily identifiable characteristics. They thus argue that when decisions are made within their locality and the passed laws consider the community's shared ideals, they can identify with these laws and equally benefit from them.⁶⁶ This is unlike situations where legal frameworks are adopted from a centralised place for everyone, which may not positively impact communities as they ought to.

The community approach thus takes a shift from the first two aspects of the theory discussed in the sense that it stresses the values shared by the community rather than their autonomy, democratic tendencies and efficiency advantages. Instead, it points to the need to incorporate a community's values in their governance structure to accrue their common good. Thus, this

⁶⁴ Mikos RA, 'Marijuana localism symposium: Marijuana, federal power, and the states' *Case Western Reserve Law Review*.2014, 730.

⁶⁵ Kessler S, Hansen N, Lessmann C, 'Interregional redistribution and mobility in Federations: A positive approach,' *Review of Economic Studies*, 2011, 1345.

⁶⁶ Briffault R, 'Our Localism: Part II--Localism and Legal Theory' (1990) 90 *Columbia Law Review* 346.

theory, in essence, provides a meaning of the concept of community that best incorporates the interests that should be protected and promoted in enacting an efficient local content policy.

2.3.4 Convergence of Localism Theory and Community-Based Approach to Local Content

From the foregoing, the localism theory speaks to the central argument of this study. Thus, when developing LCPs, it is crucial to have the participation of the local community that lives close to areas where petroleum resources are extracted and who are directly affected by such exploitation.⁶⁷ Through such involvement, the communities can agitate for policies that will ensure economic development within their community.

In cases where the frameworks consider the local communities, there is greater inclusion of the values of the communities. Where values and aspirations of local communities are matched with the frameworks, efficiency is realised through collective agreement of allowing the operation of the laws in that area.⁶⁸ For example, the current framework does not outline aspects such as percentages of the work that the locals can devolve and do. It, however, takes a national approach towards the definition of who a local is. The national dimension may mean that the locals may be sidelined in important decisions that affect them. The danger is that the sidelining of the communities may make them feel disenfranchised hence conflicts.

Democracy has been argued to be one of the crucial facets for successfully implementing a community-centred local content framework. A community-centred approach to the development of local content legal frameworks ensures there is the practice of democratic rights by the communities. One of the hallmarks of democracy is the concept of public participation. Public participation allows a community to agitate for their rights freely. This would ensure that the aspirations of a given society are considered during the decision-making processes.⁶⁹ This would mean that the laws that are formulated derive their legitimacy from the communities and the locals. The advantage of this is that since the implementation of the said frameworks affects them significantly, they will participate and will thus derive maximum benefits from the investment done by the government.

⁶⁷ Hartwich OM, New Zealand Initiative (Organisation), and Local Government New Zealand, *A Global Perspective on Localism* (The New Zealand Initiative 2013)
<<http://nzinitiative.org.nz/site/nzinitiative/files/publications/Global%20Perspective%20on%20Localism.pdf>>
accessed 10 March 2021.

⁶⁸ Roger MG, 'Where Is the Local? Critical Localism and Peacebuilding' (2015) 36 *Third World Quarterly* 840.

⁶⁹ Selen AE and Hendriks CM, 'The Democratic Challenges and Potential of Localism: Insights from Deliberative Democracy' (2013) 34 *Policy Studies* 422.

The Constitution of Kenya is founded on the doctrine of public participation. This doctrine is embedded in the diction of the sovereignty of the people in Article 1. *Justice Odunga GV* posited that '*...public participation ought to be real and not illusory, not to be treated as a mere formality to fulfil the constitutional dictates...rather ensure that the spirit of public participation is attained both quantitatively and qualitatively.*'⁷⁰ In essence, the local community will be informed about a project and its impact on their land and environment through public participation. Consequently, the community will be able to express their concerns and make their demands known so that, in the end, the decision taken has both the public seal of approval and legitimacy.

In the extraction of oil and gas, communities located near the place of extraction bear the brunt of the extraction. The negative impact of extraction, such as environmental pollution and loss of community land, adversely affects them more than other citizens. The effect they suffer from the said extraction warrants them to participate in developing, implementing, and evaluating the said legal frameworks. This would ensure that they benefit from the extraction directly proportional to the adverse effects experienced.

Localism theory emphasises the locals and the communities taking centre stage in the decision making of the development and implementation of the frameworks that would affect them.⁷¹ The Kenyan governance structure as currently constituted offers a two-tier system of governance comprising of the national government and the county governments. The county governments are more connected to the people in comparison to the national government. Therefore, the theory of localism suggests the need to have the basic unit that is more connected to the people to be at the centre of decision making. This would guarantee that communities can draw benefits from the legal frameworks relating to oil and gas exploitation. On the other hand, the Kenyan approach to local content legal framework takes the national approach, which then crystallises into the risk discussed by the theory of the localism that the locals end up gaining insignificantly from the frameworks. The theory will form the basis of analysing the study's second objective to assess the adequacy of the existing LCPs and laws in protecting local communities.

⁷⁰ Republic of Kenya v County Government of Kiambu, ex parte Robert Gakuru & another [2016] eKLR.

⁷¹ Rolfe S, 'Divergence in Community Participation Policy: Analysing Localism and Community Empowerment Using a Theory of Change Approach' (2016) 42 Local Government Studies 97.

2.4 The Economic Regulation Theory

The economic regulation theory asserts that the purpose of regulation within a country is to put checks and balances in the economic activities within an area or a country as a whole.⁷² It also outlines that governments develop regulations, policies, and laws to fulfil a given purpose in society. Thus, the proponents contend that the government has a higher duty in regulating various economic aspects within a country.⁷³ Thus, they see regulations as a means to spur or inhibit economic growth in a particular sector or area within a country. In this strand, the study makes a case for the utilisation of LPCs for spurring economic growth within local communities. The continued nationalistic approach is prone to entrenching further the inhibition of economic growth within marginalised communities. Borrowing from this theory, governments should adopt a local community approach and spur economic development, improve living standards, and create employment opportunities.

The economic regulation theory has two main facets. The first is the public interest approach to economic regulation.⁷⁴ This facet outlines that the government can come up with regulations using the power that it wields. These regulations are intended to ensure that the general public is not hurt by any activity that may be taking place within its borders.⁷⁵ This means that in cases where the government wants to ensure maximum protection of the citizens, it has powers to enact policies and laws that would guarantee this protection and benefits to the citizens.

However, the public interest approach does not mean that every legislation should necessarily be planned to benefit all the citizens within a country. On the contrary, the theorists assert that through public interest, governments also must put in place legislation that would be more beneficial to a single economy sector or a given specific region within a state with the aim of economic protection.⁷⁶ As a way of keeping this in check, the government may come up with sector or region-specific legislation to ensure their protection. The theorists further assert that regulations and laws result from forces of demand and supply depending on the need of every industry and region.

⁷² Tigler GJ, 'The Theory of Economic Regulation' 20.

⁷³ Ginosar A, 'Public-Interest Institutionalism: A Positive Perspective on Regulation' (2014) 46 *Administration & Society* 301.

⁷⁴ Posner RA, 'Theories of Economic Regulation' (1974) 5 *RAND Corporation* 25.

⁷⁵ Becker G, 'Toward a More General Theory of Regulation' (1976) 19 *The Journal of Law & Economics* 245.

⁷⁶ Gronnegard CJ, 'Competing Theories of Regulatory Governance: Reconsidering Public Interest Theory of Regulation' [2011] *Handbook on the politics of regulation* 96.

The second aspect of the theory is the concept of capture.⁷⁷ The proponents define capture as a situation in which those in government work with interest groups within a market segment to lobby for their interests. This is premised on the argument that regulations are not always put in place to cater for the welfare of everyone. Instead, they assert that special interest groups, together with the government, can also formulate policies and laws to protect specific interests within the society.⁷⁸ This study agrees with the propositions averred by the theorists in this regard. Thus, one of the main arguments of this study is that governments at all levels should adopt sector-specific and region-specific policies that can inform better utilisation of resources that are predominant in a particular area for the benefit of the local populace. However, this aspect deviates from public interest based on the inherently competitive nature of humans in every society.⁷⁹

The government is the custodian of the economic resources derived from the different sectors of the economy, and it receives revenues and royalties from these resources, including petroleum and gas. However, the various economic models adopted by governments across the globe make it impossible for the royalties and revenue derived from petroleum activities to devolve to the local communities. As such, the involvement of the local communities in the entire value chain will better ensure that an economic change occurs within the community.

2.4.1 The intersection between Economic Regulation Theory and Community Based Approach to Local Content

This theory speaks to the argument of community perspective to local content. A more community-centred approach to local content development in oil and gas legal frameworks underscores the need to develop frameworks that consider the community interest. The economic regulation theory intersects with the community approach to local content development in various ways. The first ambit of the theory is centred on public interest. Communities are the basic units that make the public. The theory stipulates that regulations should be developed to ensure a public good through the public ambit approach.⁸⁰

When the government considers the public's interest, the developed policies ensure maximum economic and social benefit for everyone, including local communities.⁸¹ . In the development

⁷⁷ Amitai E, 'The Capture Theory of Regulations—Revisited' (2009) 46 *Society* 319.

⁷⁸ Christopher C and Cary C, 'Capturing Regulatory Reality: Stigler's The Theory of Economic Regulation'.

⁷⁹ Carpenter D and Moss D A, "*Preventing regulatory capture: Special interest influence and how to limit it*" (Cambridge University Press 2013).

⁸⁰ Potter MR, Olejarski AM Pfister MS, 'Capture Theory and the Public Interest: Balancing Competing Values to Ensure Regulatory Effectiveness' (2014) 37 *International Journal of Public Administration* 638.

⁸¹ Gary B, 'Toward a More General Theory of Regulation' (1976) 19 *The Journal of Law & Economics* 245.

of more community-centred LCPs, economic regulation would thus ensure that the interests of the communities who live within the proximity of where extraction takes place, which is part of the larger public, are also considered when developing policies that would affect them. The LCPs and laws created should therefore reflect the critical interests and needs of the communities first. With the interest of the communities first taken care of, it will then ensure that the positive socio-economic impact experienced within these localities spread through to other regions.

Capture, the second approach to the economic regulation theory, can be interpreted to support a community-based approach to local content legal framework development.⁸² The capture approach incorporates the interest of a particular group of persons in policy and regulations development. The legal frameworks are developed to accommodate the interests of special groups of persons for the group to derive benefits intended by the framework. The communities located around areas where extraction occurs can be termed as special interest groups.

In the development of policies, the capture approach asserts that the government plays a pi role in promoting the interest of different segments.⁸³ The communities situated in the extraction areas should be termed as unique segments deserving of economic regulations since they are most affected by the extraction of natural resources found within their vicinity. However, most often than not, they are also disadvantaged for lack of adequate financial and non-financial capacities required to compete for opportunities arising from petroleum activities. Moreover, the effects of extraction, such as pollution and alienation from their land, predispose them to adverse impacts. The capture approach to economic regulation thus aids in ensuring that the LCPs and laws that the government develops take into account the interests of the communities in the locality where extraction takes place and other priority interest groups.

The economic regulation theory will come in handy in handling the third objective of the study. It discusses best practices in implementing LCPs in other jurisdictions that have positively impacted the local community compared to the nationalistic approaches adopted by the Kenyan legal framework.

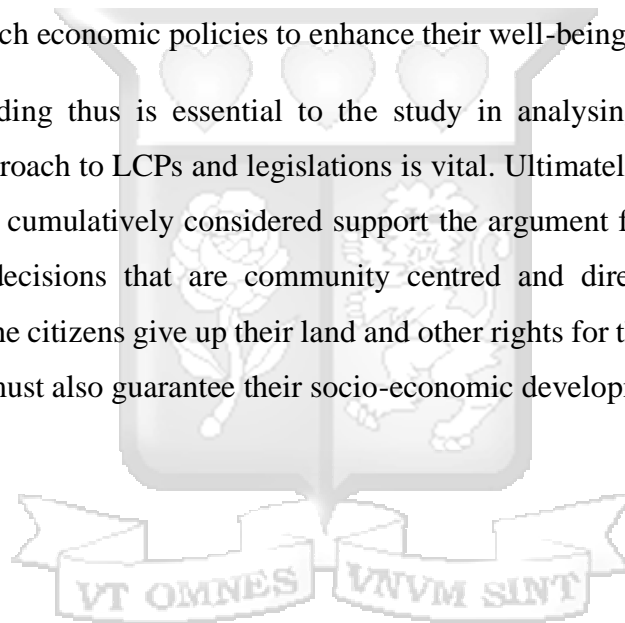
⁸² 'The Economic Theory of Regulation after a Decade of Deregulation' 59.

⁸³ Croley SP, 'Beyond capture: Towards a new theory of regulation' [2011] Handbook on the politics of regulation 50.

2.5 Conclusion

From the foregoing critical analysis of the theoretical underpinnings, it is evident that various theories support legal approaches that support laws and policies that can enhance the maximum benefit to communities where extraction occurs. Through the social contract lenses, this can be construed from the fact that the government, through the mandate given to them by the people, have a corresponding duty to enact laws that would benefit their citizens. This should not just take a national approach but also a community-based approach. The localism theory also supports the idea that power should be decentralised from the central government to the local government. This enables a community to participate in decisions that affect them. Through the lens of economic regulation theory, the government has a role in ensuring that its policies support the economic well-being of its citizens. This means that its citizens at all levels should derive benefit from such economic policies to enhance their well-being.

This theoretical founding thus is essential to the study in analysing why a national and community-based approach to LCPs and legislations is vital. Ultimately, this study concludes that the three theories cumulatively considered support the argument for enacting legislation and making policy decisions that are community centred and directly impact the local population. Thus, as the citizens give up their land and other rights for the extraction of oil and gas, the government must also guarantee their socio-economic development.



CHAPTER THREE

COMMUNITY-CENTRED LOCAL CONTENT: THE CONCEPT, THE RATIONALE AND THE BENEFITS

3.1 Introduction

This chapter analyses the concept of local content. It brings to the fore the need for a community centred approach to local content. The approach seeks to benefit communities that live close to the areas where oil extraction occurs. The concept thus lays the foundation for the study in answering the first and second research objectives. The community-centred approach argues for communities taking part in developing, implementing, and evaluating the LCPs to bring about socio-economic development.

Most of the areas where oil and gas discoveries are made are economically marginalised.⁸⁴ The long-standing marginalisation and attachment to land are discussed to justify the need for the community affected to benefit more from the extraction by developing community centred LCPs in oil and gas.

3.2 Local Content: The Concept

There is no single universally accepted definition of what local content is.⁸⁵ The definitions that various states have adopted vary depending on the objectives that the local content policy is intended to achieve in the said state. In the Kenyan context, local content takes the national approach. It is defined as the net value added to the country's economy from the exploration, mining, processing and subsequent marketing and sale of petroleum products.⁸⁶ The definition goes further to include developing the national capacity and capabilities and advocating for the procurement of locally available goods and services and the use of a locally available workforce.⁸⁷

Ghana defines local content as the use of the Ghanaian workforce, labour, resources, services, and other capabilities to enrich the country's economy.⁸⁸ The definition is further expounded in the Petroleum (Local Content and Local Participation) Regulation of 2013 to include the

⁸⁴ Chilenge N and Nathan A, 'A new developmental state in Africa: evaluating recent state interventions vis-a-vis resource extraction in Kenya, Tanzania, and Rwanda' *McGill Journal of Sustainable Development Law* 223.2017, 244.

⁸⁵ Eduardo G, Christopher M & Trischmann H, *Local Content Policies in the Petroleum Industry: Lessons Learned*, 4 Oil & Gas, Nat. Resources & Energy J, 2019,635.

⁸⁶ Section 2, *Petroleum Act* (Act No 2 of 2019).

⁸⁷ Section 50, *Petroleum Act* (Act No 2 of 2019).

⁸⁸ Section 23, *Petroleum Commission Act* (Act No 821 of 2011).

percentage and or quantum of the locally produced goods, labour, materials and others whose value can be monetised.⁸⁹

In Nigeria, the existing legal provisions define it as the quantum and or percentage of composite worth added to or made in Nigeria through the usage of Nigerian assets, goods, materials, services and administrations in the oil activities bringing about the improvement of native ability without adversely quality, well-being, security, and ecological norm.⁹⁰

The Natural Resource Governance Institute (NRGI), on the other hand, defines local content as any value other than the revenue generated by the extraction of oil and gas that is brought to the regional and or the national economy from the extraction of the said minerals.⁹¹ The definition includes the aspect of labour and services sourced by the IOCs, the goods they procure, and the knowledge exchange brought to the said regions and nationally. In addition, the definition by NRGI seeks to include the area where extraction takes place.⁹² This is a step towards addressing the region's need where the extraction is taking place vis-à-vis the national added value from the extraction.

The above definitions take a national approach to the description of local content. The approach considers value addition at a national level. There is little or no attention given to the local communities situated where extraction takes place. The approaches adopted by states thus present a lacuna in protecting the rights of the persons located where the extraction takes place. This is as a result of legislation not giving enough attention to such people. The national approach proceeds from a presumption that national interests include community interests. This argument is rebuttable. For instance, in most instances, natural resources are discovered in far-flung, marginalised areas inhabited by people with high illiteracy levels. Opening the definition of 'local' to a nationalistic approach will expose the communities from these underdeveloped areas to unfair competition from citizens from other regions who have better competence, skills and education to compete for local content benefits.

Some jurisdictions have taken a somewhat different approach to the definition of local content. In Canada, for instance, local content provisions take the path of looking at a specific community that is considered disadvantaged and focus on the need for value addition that

⁸⁹ Section 49 *Petroleum (Local Content and Local Participation) Regulation of 2013*.

⁹⁰ Section 106, *Nigerian Oil and Gas Industry Content Development Act* (Act No. 2 of 2010).

⁹¹ *Local Content Strengthening the Local Economy and Workforce*, NRGI 2015, 2.

⁹² *Local Content Strengthening the Local Economy and Workforce*, 2.

would enable such a community to be at par with the others.⁹³ The advantage of this approach is that it enhances economic development while also ensuring there is a value addition to these communities. If applied in Kenya, this approach would strengthen community participation and economic feasibility of areas where extraction takes place, like Turkana. The value addition brought by specificity in local content would thus translate to economic and social development.⁹⁴

This study proposes the adoption of the localism theory in defining a local community and local content. The nationalistic local content approach has historically been inefficient in bringing marginalised communities to par with the rest of the country. From the labour force utilised in the value chain by IOCs to the goods procured and used in petroleum activities, a nationalistic approach will further leave the marginalised communities, whose localities oil and gas deposits are discovered, to the periphery of economic progress. For instance, in the Lokichar community of Turkana County, most locals are not well-skilled to take up decision-making roles within the IOCs. Also, they lack the capacity required to provide goods and services to the IOCs. Thus, there is a need to empower the local community to participate in decision-making and ensure a thriving local content regime. For instance, to enhance the local community's capacity, the study notes that the current local content bill has proposed stage-wise levels of training. The bill takes judicial notice that it isn't practical to train the entire community and replace illiteracy with competence and skills at once. The oil and gas industry is technical and requires experience and hands-on skills that take many years to acquire. However, through such training programmes, the IOC may, in the long run, create the required capacity to enable local communities to take up decision-making positions within the IOCs.

3.3 Rationale for a community centred local content.

The reason why states develop LPCs is to ensure that there is the economic development of the host state on the one hand and social development for its citizenry on the other hand. The discoveries of oil and gas are most of the time made in remote and marginalised areas. This marginalisation should prompt states to develop policies and legislation that protect people living in these remote areas and ensure that they benefit from the resources extracted from their land. Several reasons and rationale give states the impetus to develop LCPs and legislation that

⁹³ Nwapi C, 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries' *Law and Development Review* 8, 2015, 213.

⁹⁴ Kakonge J, 'Kenya's Turkana oil and gas field shows the challenges of local content policies' *Africa at LSE*, 2020 <<https://blogs.lse.ac.uk/africaatlse/2020/05/25/kenya-turkana-oil-and-gas-field-supply-chain-challenges-local-content-policies/>> accessed 24 January 2021.

focus on the communities living near where extraction occurs. The main reasoning analysed include attachment to land, historical marginalisation and protection against economic immigrants.

3.3.1 Attachment to Land

In the case of *Mayagna Awas Tingni Community v Nicaragua*, the *Inter American Commission on Human Rights* commented that communities have significant ties to their land. These ties should not be severed unless there are justifiable reasons.⁹⁵ The emphasis on the right to the attachment to the land is an essential factor since it is from land that most communities draw their livelihood. Therefore, severing communities from their land goes against their right to own property and socio-economic rights, all of which are protected by different laws, including the Constitution.⁹⁶

The attachment to land was equally emphasised in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*⁹⁷. The commission ruled that communities have particular attachment and interest to land that ought to be guarded by the state. Any displacement or derogation from this attachment thus should be fully compensated. The government should ensure that communities receive maximum benefits from any activity that arises from the alienation from their land.

3.3.2 Historical Marginalisation

One of the groups that the Kenyan Constitution protects is the marginalised group.⁹⁸ Marginalised groups are defined to include, among other things, pastoralist communities settled in a specific location or nomadic. The prejudice necessitates their special protection by the state they have faced in the past and continue to face. In addition, the marginalisation is because the area has not been prioritised in socio-economic development.

In curing the inequalities brought by marginalisation, affirmative action has been provided for by the Constitution.⁹⁹ Marginalisation should be considered during the development of LCPs to boost the economic and social well-being of the inhabitants of such regions in the course of

⁹⁵ *Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACmHR Case 79 (2001) Commission on Human Rights.

⁹⁶ Kameri MP, Odote C, Musembi C, Kamande M, *Ours by right: Law, politics and realities of community leasehold property disputes in Kenya*, Strathmore University Press, Nairobi, 2013, 49.

⁹⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, ACmHPR, 4 February 2010, available at <https://www.refworld.org/cases,ACHPR,4b8275a12.html> [accessed 24 January 2021]

⁹⁸ Article 260, *Constitution of Kenya* (2010).

⁹⁹ Article 56, *Constitution of Kenya* (2010).

extraction. LCPs would ensure that the people living in these regions are prioritised and benefit from the activities that emanate from extracting minerals within their vicinity. Statistics have shown that the standard of health and education levels are deficient in Turkana.¹⁰⁰ Some of the critical inputs of LCPs, including training, knowledge transfer, research and development, would thus help cure the low literacy level experienced in the region for the longest time. It would also reduce the literacy gap that exists between this area and other counties in the country. Affirmative action and LCPs would work in synergy to ensure economic and social development in the area.

3.3.3 Protection against Economic Immigrants

Economic immigrants' migration can be loosely termed as the migration of people that have better capacities from one area of the country to another to take advantage of the available economic opportunities of the new settlement place. For this thesis, the new place they migrate to is where oil and gas deposits are discovered. Since the immigrants have better skills and knowledge, they are easily absorbed into the work stream and may take all the jobs offered within the IOCs. They are also better placed in taking advantage of the procurement opportunities that present themselves in such areas hence depriving local communities of benefits they would otherwise derive from petroleum activities. For the avoidance of doubt, the definition of economic immigrants is not based on ethnicity. Its meaning is limited to skilled persons whose only reason for migration is to claim the newly discovered oil and gas resources in a locality. In essence, those of different ethnicity but who have reasonably been residents in the extraction locality are locals for this study.

Consequently, it becomes necessary to adopt a community-centred approach to local content.¹⁰¹ One of the ways that this can be avoided is by having local communities take part in the development of the LCPs and their implementation and subsequent monitoring and evaluation. This enables the interests of the communities to be considered and ensures that communities get the maximum benefit from resources extracted from their land.

In Kenya, most Turkana people may not have the capacity to negotiate for value addition due to their low literacy levels. They may therefore not be able to benefit from revenue sharing

¹⁰⁰ Kapchanga M, 'Turkana and Wajir Counties Have Highest Levels of Illiteracy' (*Standard Media*) <<https://www.standardmedia.co.ke/adblock?u=https://www.standardmedia.co.ke/north-eastern/article/2000098680/turkana-and-wajir-counties-have-highest-levels-of-illiteracy>> accessed 24 January 2021.

¹⁰¹ Kakonge J, 'Kenya's Turkana oil and gas field shows the challenges of local content policies' *Africa at LSE*, 020 <<https://blogs.lse.ac.uk/africaatlse/2020/05/25/kenya-turkana-oil-and-gas-field-supply-chain-challenges-local-content-policies/>> accessed 24 January 2021.

contracts fully. However, other people from other areas with better capacities may benefit from the opportunities that present themselves.

The marginalisation of the communities that live within the proximity to the locality of oil and gas exploitation renders them vulnerable to being taken advantage of by the 'better learned' immigrants. The immigrants possess the necessary skills and training that the IOCs require, thus taking all the jobs there and leaving the local community only to offer manual jobs at the sites. The marginalised communities need protection from these immigrants by providing training that will enable them to take up critical roles in extracting petroleum resources.

Therefore, the community approach would ensure that LCPs and developed laws protect such communities and help boost the economic well-being of these communities living in the place of extraction. It also protects them from opportunistic migration that may place them at a disadvantage.

3.4 Dimensions to Community Based Local content

Scholars have developed various approaches to LCPs. While a majority point towards local content that emphasises value addition nationally, others have pointed to the need to have local content that takes cognisance of the communities located in places where extraction takes place.¹⁰² The need to have a more community-centred approach to benefit communities from the natural resource extracted within their locality has been given credence by courts. In the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*,¹⁰³ The court asserted that mining companies situated in mining places should be given optimal and reasonable opportunities to benefit from the extraction. This approach would be favourable in developing, implementing, and evaluating LCPs in Kenya to ensure value addition and maximum benefit to the local communities. This segment thus critically analyses community dimensions to local content development.

There are several approaches to developing a community-centred dimension to local content. They include; geographical location, anthropological, political and dependency approaches.

¹⁰² Robin K, 'International Institute for Sustainable Development (IISD)' in S Philander, *Encyclopaedia of Global Warming and Climate Change* SAGE Publications, Inc. 2008, 2
<<http://sk.sagepub.com/reference/globalwarming/n343.xml>> accessed 24 January 2021.

¹⁰³ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR.

3.4.1 Geographical Location Approach

The geographical location approach is the simplistic approach to the development of LCPs that are community centred. This approach suggests that local content policy should define the geographical location and extent that benefits most from the oil extraction.¹⁰⁴ This means that for the Turkana region, the approach would stipulate that the persons who are supposed to benefit most from the added value from the extraction are people in Turkana County and specifically those located in the ward where extraction is taking place. So, for instance, the Natural Resource Sharing Bill prioritises benefits to the people situated in the ward where the extraction of the mineral is to take place.¹⁰⁵ Thus, only persons within that area should benefit optimally from the extraction. However, the approach does not consider the influx of persons who may move into such places to take advantage of the added value that should be a reserve of the genuine locals in the region.

This study agrees with this approach. Local content should have a 'selfishly guarded' definition and sphere. Perhaps a particular percentage of the extraction activities should be specifically reserved for the local community. It will be imperative that other people from the region and nation be involved in the works and benefits of petroleum resources since the Constitution already decrees national unity. The geographical location approach should thus be tied to a percentile of the petroleum activities to the locals in a given locality.

3.4.2 Anthropological Ties Approach

Anthropology as a field of study emphasises the study of people and their way of life.¹⁰⁶ An anthropological approach towards local content in determining communities that are supposed to benefit more from the oil extraction is thus pegged on people's way of life.¹⁰⁷ Where local content is developed while taking the anthropological approach on persons who are supposed to benefit, it would mean that people with standard cultural practices and values should be at the forefront of profiting from the extraction activities.

As stated earlier in this study, there is no single definition of local content or a community for that case within the existing legal framework that best describes a community for purposes of local content. However, the Constitution of Kenya 2010 has set out particular considerations

¹⁰⁴ Section 2, *Natural Resource Sharing Bill* of 2014.

¹⁰⁵ Section 2, *Natural Resource Sharing Bill* of 2014.

¹⁰⁶ Dalby S and Mackenzie F, 'Reconceptualising local community: environment, identity and threat' *Journal of Indigenous Research* 7, 2019, 29.

¹⁰⁷ Kameri-Mbote P, Odote C, Musembi C and Kamande M, *Ours by right: Law, politics and realities of community leasehold property disputes in Kenya*, Strathmore University Press, Nairobi, 2013, 44.

that define what a community is. Therefore, it would be fair to argue that the Constitution is the basis for the anthropological ties approach to local content. In Kenya, in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.¹⁰⁸ The court decreed that in determining who should first benefit from the extraction within the vicinity, the people who share a common culture, heritage and traditions should be given priority.

This is also the argument by the proponents of the localism theory, as discussed in Chapter Two. It follows then that in the development of LCPs and laws, people's values and cultures should be considered. The minority groups living along the Niger Delta in Nigeria, for instance, have advocated for this approach because they are the most affected by the mining that takes place within their vicinity.¹⁰⁹ The Ogoni people have thus argued that when determining who should benefit first from the extraction, the people who share a common culture, heritage and traditions should be given priority.

3.4.3 Political Boundaries Approach

The determination of the persons who should receive the value addition with the extraction also uses the political boundaries approach. This approach is premised on politically established boundaries by the state and the people's political context.¹¹⁰ Though closely related to the geographical location approach, this approach argues that people should first feel the benefit within the state's boundaries set out in statutes or constitutions.¹¹¹ This approach would mean that the persons to be positively affected by the value addition from the extraction must be those within the political boundaries where the extraction is taking place. Thus, in Turkana, for instance, it would mean that the residents of the ward where the extraction is taking place would benefit first, then other residents in Turkana County at Large. This approach, however,

¹⁰⁸ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, ACmHPR, 4 February 2010, available at <https://www.refworld.org/cases,ACmHPR,4b8275a12.html> [accessed 24 January 2021]. The commission upheld that the Endorois, by nature of their culture and way of life, were entitled to the right to property and free disposition and benefit from natural resources. The case arose from an eviction notice served on the Endorois to vacate their ancestral land for which they benefitted, for creating game reserve along Lake Bogoria. The Endorois, at the time of eviction, were pastoralists, and most of their cultural practices, such as religious practices, depended on the land.

¹⁰⁹ Chelagat G, 'Kenya's legal and institutional framework on benefit sharing from oil exploitation: the case study of Turkana county' 2014, 81.

¹¹⁰ Kameri MP, Odote C, Musembi C, Kamande M, *Ours by right: Law, politics and realities of community leasehold property disputes in Kenya*, Strathmore University Press, Nairobi, 2013, 24.

¹¹¹ Chelagat G, 'Kenya's legal and institutional framework on benefit sharing from oil exploitation: the case study of Turkana county', 25.

has loopholes since the immigrants to such areas would also benefit from the value addition intended by the local content policies and regulations at the expense of the local communities.

The social contract theory is premised on the surrender of rights by citizens to the state in exchange for guaranteed protection. On the other hand, the political approach denotes a polity that is delineated by politically established boundaries. In pursuing this approach, this study makes a case for the lowest political boundaries that is the ward for local content. This way, the local community within the extraction locality will derive maximum benefits from the petroleum resources.

3.4.4 Dependency Approach

The dependency approach looks at the economic dependence on resources, such as land, where the extraction occurs. For example, the Turkana people largely depend on land for pastoralism purposes.¹¹² This approach argues for the need to ensure that after the government has exercised its eminent domain power and acquired the land from the community for extraction of natural resources, all the persons who depended on the said land should benefit from petroleum activities on a priority basis. Local content regulations thus are designed to satisfy that objective.¹¹³ In addition to the benefit through local content, Article 40 of the Constitution of Kenya guarantees the property right. If that right is limited, like where the government exercises its eminent domain power, there should be prompt and commensurate compensation. Thus, the economic benefit derived through efficient local content policy is for the long-term empowerment of the people within the locality of extraction.

Therefore, the dependency approach to designing local content legislation and policies considers the impacts of the extraction. It covers the neighbouring areas that would also be affected by environmental degradation and other pollution experienced in oil and gas extraction. This approach has been applied in Nigeria among the Ogoni people who, despite not being located in the oil extraction areas, have been adversely affected by the water pollution that results from oil extraction.¹¹⁴ Therefore, the regulations on local content consider the ripple effects of the persons affected by the extraction and ensure that they benefit from the LCPs.

¹¹² 'Interview: Pushed to the Brink in Turkana' *Human Rights Watch*, 2015)

<<https://www.hrw.org/news/2015/10/15/interview-pushed-brink-turkana>> accessed 25 January 2021.

¹¹³ Akaninyene ST, 'The right of the Niger delta people of Nigeria to resource control' *Malmö University, Sweden*, 2016, 66.

¹¹⁴ Chelagat G, 'Kenya's legal and institutional framework on benefit sharing from oil exploitation: the case study of Turkana county', 26.

Jeremiah Dibua, when analysing the Ogoni People in Nigeria, refers to the rampant conflict in the area. He opines that their disenfranchisement brings this. He notes that they originally depended on the land for economic benefit. When the government moved to reclaim the land for oil extraction purposes, they should have been given more significant consideration in the benefit that would accrue from value addition from petroleum activities.¹¹⁵ The rationale is that community dependency on land was rendered impossible, and as such, the government ought to have given them priority in benefitting from the petroleum activities. He notes that the government's failure to consider this has led to rampant agitation in the area.¹¹⁶ The dependency approach has, in effect, been used to ensure that the Ogoni people derive benefit from the extraction.

Communities' dependency on land, more so in sub-Saharan Africa, is in no doubt. The extraction of oil and gas deposits has ripple effects on the environment. Chances that the community will ever reclaim the land from which the natural resources are extracted to their original status are very minimal. In this regard, the dependency approach can be utilised to ensure that the local community derives maximum benefit that can enable them to adapt to their 'new' mode of life that is not dependent on the land. For instance, the Turkana community that depends on land for pastoralism will require resources to relocate to other areas and engage in alternative economic activities. This would improve their lives and alleviate them from the historical curse of marginalisation.

3.5 Benefits of Community-Based Local Content

The objective of LCPs is to regulate the allowable percentages of goods and services that a foreign company investing in another country can bring from outside the host country, among other set requirements. In addition, the policies provide for training, knowledge transfer and employment of the locals from the host country, thus ensuring the creation of future capacity and participation of local companies in the oil and gas industry, which eventually reduces the reliance on foreign capital and expertise.¹¹⁷

¹¹⁵ Dibua J, 'Citizenship and resource control in Nigeria: the case of minority communities in the Niger delta' 40 *Afrika Spectrum* 40, 2005.

¹¹⁶ Adangor Z, 'The principle of derivation and the search for distributive justice in the Niger Delta region of Nigeria: the journey so far' *Journal of Law, Policy and Globalization* 41, 2015, 125.

¹¹⁷ Chilenye N, 'Defining the "local" in local content requirements in oil and gas and mining sectors in developing countries' *Law and Development Review* (2015).

LCP's ultimate goal is to raise growth and improve the competitiveness of the overall economy of the host country while maintaining a rising trend in the living standards of the locals.¹¹⁸ They also cushion the newly established petroleum industries of the host country from international competition. This enables small enterprises to grow in a secure environment.¹¹⁹

From the foregoing, nations invest in oil and gas to grow their economies and, more importantly, improve the local community's living standards. Therefore, the community dimension to local content is essential as it helps an area be the first to achieve economic benefit from the extraction undertaken within that area.¹²⁰ Through having the community take part in the development, implementation and subsequent monitoring and evaluation of the said policies, several benefits would ultimately accrue to the local communities located within proximity of the area where there is extraction.

3.5.1 Creation of employment opportunities and use of local workforce

One of the critical factors that have prompted the development of LCPs is the need to create employment for the locals.¹²¹ In most countries, the creation of employment is one of the critical mandates of the government. It ensures that communities and citizens benefit from the natural resources within their boundaries, which improves their social development. The creation of employment takes various approaches, including implementing specific laws intended to boost this objective. To this end, local content requirements in most host states require IOCs operating within their boundaries to use the local workforce in their operations. This prevents IOCs from outsourcing for labour at the expense of the locals, who should benefit from local content.¹²² . Where properly applied, such LCPs bring about economic development to the communities in the affected areas.¹²³

With governments taking over land to extract oil and gas, communities that used to get their livelihood from such land are left without that resource. The surrendering of land to the government for extraction purposes thus precariously places members of a given community

¹¹⁸ Chileny N, 'Defining the "local" in local content requirements in oil and gas and mining sectors in developing countries' (2015)

¹¹⁹ Olawuyi S, 'Local content requirements in oil and gas contracts: Regional trends in the Middle East and North Africa' *Journal of Energy and National Resources Law*, 1 (2019), Vol 37, 96.

¹²⁰ Carolyn F, 'International experience with benefit-sharing instruments for extractive resources.

¹²¹ Adedeji AN et al., 'Relationship among local content policy, indigenous oil firms' participation and job creation in Nigeria: a theoretical concept' (2015) 49 *The Journal of Developing Areas* 49, 2015, 426.

¹²² Chileny N, 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries.

¹²³ Ramdoo I, 'Local content policies in mineral-rich countries' *European Centre for Development Policy Management*, 2016, 1.

at an economic disadvantage. Host states, therefore, have developed LCPs that give employment priority to such people to ensure that they are shielded from the loss of their livelihood. Furthermore, where local content laws are prescriptive, a certain percentage is preserved for persons living in areas where the extraction occurs, thus securing their employment. A good example is Nigeria, where a percentage for local labour is prescribed in the law.¹²⁴ Under the constitutional decrees of non-discrimination and involvement of the people, Kenya should adopt a framework that ensures the local community is represented in the higher echelons of decision-making instead of being involved only in the lower cadre positions.

3.5.2 Value Addition through Training and Knowledge Transfer

Developing local skills is critical for any host state as it assures the country of future capacity, which is valuable in the oil and gas industry and across other sectors.¹²⁵ In cases where oil and gas are discovered in developing countries, these countries may not have enough expertise to manage the entire value chain. This forces the IOCs to outsource such expert and skilled labour from other countries. Under such circumstances, value addition for local communities may be below as a result of the outsourcing.¹²⁶ As a way of dealing with this, countries, when developing LCPs, include provisions that require IOCs to train the locals, including the local communities, to be part of the skilled labour. This would benefit both the state by developing the country's future capacity and talent and the local communities who benefit from such expertise and knowledge transfers.

Training and knowledge transfer helps to position the citizens of a country in general and the local communities to develop capacity. It enables them to take up employment positions within the IOCs otherwise held by foreigners due to the lack of the required skills in oil and gas among the country's nationals and, specifically, the people within the oil and gas extraction locality. This benefit is outlined in the Petroleum Act.¹²⁷ A community approach would outline the need to have the people located in areas where extraction takes place given priority in the knowledge transfer and training. Community centred LCPs thus ensures that the training of locals and knowledge transfer is experienced. Furthermore, this would make it easier for the communities

¹²⁴ Section 34 & Schedule. *Oil and Gas Content Development Act of 2010*, (Nigeria).

¹²⁵ World Bank, 'Skill Development' <https://www.worldbank.org/en/topic/skillsdevelopment>, 2021.

¹²⁶ Eduardo GP, Christopher M and Heike Tr, 'Local Content Policies in the petroleum industry: Lessons learned' (2018) *Oil and Gas, Natural Resources, and Energy Journal* 4, 2018, 664.

¹²⁷ Section 50, *Petroleum Act* (Act No. 2 of 2019.)

to better negotiate for their best interest, guaranteeing them benefits accruing from oil and gas investments by the state.

3.5.3 Procurement and Use of Local Goods & Services

The requirement of the IOCs to procurement locally produced goods and services is another fundamental tenet of most local content laws and policies. Accordingly, they require IOCs to use locally available goods and services during the entire petroleum value chain.¹²⁸ This means that IOCs may not be allowed to procure goods outside the host country so far as the goods in the host country meet the required and acceptable standards.¹²⁹

This is important for host countries as it helps to grow industry thus achieve economic development, which is one of the critical objectives of developing LCPs. It also helps shield local small upcoming industries from external competition, making it possible for the industry to grow. Furthermore, through such a prescriptive approach to procuring local goods and services, local communities are presented with a conducive environment to trade with the IOCs. This brings about socio-economic development, hence improving the locals' living standards, consequently assisting the country in adhering to sustainable development goal number one that calls for the elimination of poverty.¹³⁰ The Petroleum Act further outlines that locals must own such goods and services.¹³¹ To ensure there is a derivation of maximum benefit, LCPs and regulations define the locals to encompass only the citizens of the host country who must be residents of the host country.¹³²

3.5.4 Research Development and Technology Transfer

Research is critical for the economic development of countries. Host states develop LCPs that require IOCs to develop research in oil and gas during their contract period. In instances where there may not be enough research to help extract oil and gas, it is always incumbent upon the companies to develop research stations through which they conduct their research concerning the extraction of the oil.¹³³ The research may be around technical areas of the entire value chain,

¹²⁸ Section 50, *Petroleum Act* (Act No. 2 of 2019).

¹²⁹ Eduardo GP, Christopher M, Heike Tr, 'Local Content Policies in the petroleum industry: Lessons learned' 647.

¹³⁰ United Nations, 17 Sustainable Development Goals, *Department of Economic and Social Affairs* <https://sdgs.un.org/goals>.

¹³¹ Section 2, *Petroleum Act* (Act No 2 of 2019).

¹³² Nwapi, Chilenye. 'Defining the "local" in local content requirements in the oil and gas and mining sectors in developing countries.' *Law and Development Review* 8.1,2015,188.

¹³³ Gwayaka M P, 'Local content in oil and gas sector: an assessment of Uganda's legal and policy regimes' *ACODE* 2014, 5.

future community engagement strategies, especially in areas where extraction takes place, location of oil deposits, the quantity of available reserves for both current and future, and so on. The information and data gathered during research are collated, synthesised, and kept for use in the industry.

Technology transfer is another critical feature of LCPs. It can be loosely defined as the know-how movement and machinery from one station to the other. This requirement is imposed as a means of helping the host country to develop its Industries and technical capacity.¹³⁴ The rationale is that investment in technology is capital intensive and requires substantial financial injections. Since IOCs have the financial muscle, they can set up such technologies. Usually, the IOCs must transfer the installed equipment and technologies to the host state after the contract as defined in the production sharing contracts. This enables the host country to have future technological capacities required in the industry and beyond. It ensures that the government would in future be independent and reduce overdependence on the IOCs for the provision of various technologies. These technologies, at times, come at a very high cost that results in the reduction of the benefits that would otherwise have been derived from the project by the host state and its citizens. The communities also benefit because they are trained to run, maintain, and manage such equipment, ensuring the required industry capacities.

3.6 Conclusion

In the upshot, the chapter has analysed different approaches to local content that have been adopted in various jurisdictions. The nature of the Kenyan local content framework has thus far been the nationalistic approach. The chapter concludes that a community approach to local content has a significant effect on the economic development of the host state and socio development for the local community living within the area of extraction. It is thus critical that countries develop legal frameworks that secure local content benefits for local communities living in the areas that extraction occurs.

¹³⁴ Offiong A, 'Technology transfer and the challenges of local content development in the Nigerian oil industry' *Global Journal of Engineering Research.*, 11, 2013, 5.

CHAPTER FOUR

LEGAL FRAMEWORK FOR LOCAL CONTENT

4.1 Introduction

Chapter two analysed the theories that support the argument for a community perspective to local content. Chapter three examined the concept of local content. It discussed why the community perspective to local content is essential in achieving economic development for host states and socio-economic development to communities. With that foundation and in addressing the second research objective, chapter four analyses International and regional frameworks to demonstrate that the community dimension to local content is acknowledged internationally as one way of improving the lives of local communities. The Kenyan legal framework for local content has been evaluated to assess its sufficiency in addressing the community perspective to local content, which is the thesis of the study. Consequently, the study has identified gaps in the framework that would present challenges to implementing a local content regime beneficial to local communities.

4.2 International and Regional Frameworks

The economic regulation theory is premised on governments using their laws and policies for public interest and, in some instances, for the benefit of a specific interest group. In the analysis of international frameworks, the economic regulation theory weaves in the best practices in international and national legislation in other jurisdictions to inform local content policy in Kenya. Global and regional frameworks are analysed based on Articles 2(5) and 2 (6) of the constitution, recognising Kenya's international obligations and operationalising them in the country.¹³⁵ Since Kenya is a signatory to multilateral and bilateral treaties, it should align its laws and policies to these treaties because they provide guidelines on what requirements should be imposed on investors in various areas, including local content.¹³⁶ A review of some of the international and regional frameworks thus seeks to confirm that the concept of community perspective of local content is recognised and adopted by various economies the world over and that it is vital in achieving social-economic development of communities. Kenya is a member of the community of nations. Therefore, its legal infrastructure is informed by developments in other countries, especially in sectors not fully exploited in Kenya, such as the petroleum resources sector.

¹³⁵ Article 2(5) and 2(6), *Constitution of Kenya* (2010).

¹³⁶ Olawuyi DS, *Extractives Industry Law in Africa*, Springer Nature Switzerland AG, Switzerland, 2018, 144.

4.2.1 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007

Adopted in 2007, the convention establishes the rights of indigenous communities in different states. It recognises that indigenous communities should enjoy the same socio-economic, cultural and political rights as other communities. In essence, economic immigrants who settle in the locality of extraction to derive benefits from the prospected extraction do not qualify to be called a local community within the meaning of enacting a local content policy. Therefore, the convention is vital to the study as it sheds light on the need to take care of the unique circumstances of communities during decision-making processes to enhance their protection and ensure they enjoy their rights.

Article 5 of the convention asserts that communities should strengthen their political and economic rights and retain the right to participate in matters that affect them.¹³⁷ Additionally, it provides that states are obligated to enact laws that would protect such communities from any form of economic exploitation by other people.¹³⁸ Proponents of the economic regulation theory advance the same argument. Further, Article 19 provides that before a country develops laws and policies that will affect the community, there must be proper consultations with their representatives to protect their interests.

From the foregoing, it can be adduced that the declaration promotes the protection of the economic rights of different communities. It calls on states to ensure that the laws put in place take into account the specific needs of communities first.¹³⁹ In the case of local content, this objective can be achieved if LCPs and laws are more community centred as they will enhance value addition. Further, in borrowing from this declaration, it is the position of this study that Kenya, pursuant to Article 2(5) of the Constitution, should adopt a local content policy that has community interest at the heart of it. In adopting the local community approach, people living within the extraction locality will benefit from value addition in the entire petroleum value chain.¹⁴⁰

¹³⁷ Article 5, *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007*.

¹³⁸ Article 17 (2), *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

¹³⁹ Eweje G, 'Multinational Oil Companies' CSR Initiatives in Nigeria: The Scepticism of Stakeholders in Host Communities' [2007] *Managerial Law*.

¹⁴⁰ Gumbo T, 'Community-Based Activism and Local Content Development: The Case of Platinum Mining Communities in Zimbabwe.' (PhD Thesis, 2020).

4.2.2 African (Banjul) Charter on Human and Peoples' Rights

The Charter outlines the obligations of the signatory states concerning protecting human rights in the host country. Kenya ratified the Banjul Charter in the year 1992. The Charter is relevant to the study because it acknowledges the rights of individuals within the host countries in terms of decision making. It states that every person has an explicit right to take part in the decisions that affect them.¹⁴¹ Szablowski argues that a purposive interpretation of the *Banjul Charter* means that communities should participate in the decision-making process in developing local content policies and legal frameworks as they form the basic governance structure for public participation in a polity.¹⁴² The Charter also establishes the African Commission on Human and People's Rights, where aggrieved communities may seek remedy by promoting and protecting their rights.¹⁴³

Additionally, the Charter outlines that communities have property rights, and encroachment of these rights is only allowed after considering the community's interest.¹⁴⁴ Therefore, it operates on the notion that property owned by individuals or communities should only be adversely possessed in the interest of the communities. A community centred approach to local content can take care of such interest. According to this Charter, all member countries must recognise human rights under the Economic Community of West African States (ECOWAS) Treaty.¹⁴⁵

The local community is critical to the development of a country. The Constitution of Kenya 2010 underpins national values and principles in article 10. Participation of the people is among the national values and principles. However, this value has been prosecuted in literally all laws and policies enacted post-2010. The entrenchment of the right in the constitution emphasises the need to involve the people in the decision-making process in matters that affect them.¹⁴⁶ This Charter that applies to Kenya courtesy of Article 2(5) of the constitution thus emphasises the need for Kenya to adopt a local content policy that involves the communities and ensures they benefit from natural resources extracted from their land.

¹⁴¹ Article 13 (1) *African (Banjul) Charter on Human and Peoples' Rights*.

¹⁴² Szablowski D, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Bloomsbury Publishing 2007).

¹⁴³ Article 30, *African (Banjul) Charter on Human and Peoples' Rights*.

¹⁴⁴ Article 14, *African (Banjul) Charter on Human and Peoples' Rights*.

¹⁴⁵ Article 3, *Economic Community of West African States revised Treaty*.

¹⁴⁶ Widiati EP, 'Efficient Public Participation in the Local Law-Making Process' (2018) 33 *Yuridika* 389.

4.2.3 Rio Declaration on Environment and Development of 1992

The declaration is an essential aspect of the study because it recognises the role of different players within a state. It states that in matters that touch on the environment, it is crucial to ensure public participation of all the parties affected at all levels.¹⁴⁷ Local communities situated where extraction takes place suffer from adverse effects of mining activities, including environmental ones.¹⁴⁸ The declaration advocates for the inclusion of the views of such communities when developing LCPs to ensure that they benefit from local content.

4.2.4 The principles of Participation, Accountability, Non-discrimination & equity, Empowerment & access to information and Legal access to remedy (PANEL).

The principles of participation, accountability, non-discrimination and equity, empowerment and access to information and legal access to remedy are commonly referred to as the PANEL principles. The principles are a good governance approach to managing projects, including oil and gas projects.

4.2.4.1 Participation

The participation principle argues that all stakeholders affected by a project must be consulted before the commencement of the project.¹⁴⁹ The participation must have free, fair, prior and informed consent.¹⁵⁰ Thus, before starting any project, the project implementer must give the community full details of how it will affect them socially and economically. In the case of local content, therefore, the participation principle supports the notion of community involvement in the development of LCPs since this would affect them. Moreover, as advocated by localism theorists, this principle supports the argument in the study that through the involvement of communities in the development of LCPs, their concerns would be addressed, and they would benefit from local content.

¹⁴⁷ Principle 10, *Rio Declaration on Environment and Development of 1992*.

¹⁴⁸ Dube B, 'Zimbabwe's "Coal Rush" Brings Despondency as Local Communities Bear the Brunt of Environmental Degradation' (*FairPlanet*, May 2021) <<https://www.fairplanet.org/story/zimbabwe%e2%80%99s-%e2%80%98coal-rush%e2%80%99-brings-despondency-as-local-communities-bear-the-brunt-of-rampant-environmental-degradation/>> accessed 9 November 2021.

¹⁴⁹ Mauerhofer V, 'Public Participation in Environmental Matters: Compendium, Challenges and Chances Globally' (2016) 52 *Land Use Policy* 481.

¹⁵⁰ Muigua K, 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya'.

4.2.4.2 Non-Discrimination and Equality

Non-discrimination and equality underscore the need to ensure the involvement of all classes of people in the management of projects during the entire project cycle. In doing so, the principle further provides, there should be a deliberate effort to ensure that all the groups are involved and take an active role in participating in the decision-making process of matters that affect them.¹⁵¹ This is the argument advanced under the community perspective to local content discussed in chapters two and three of the study.

4.2.4.3 Accountability

Accountability emphasises the need to ensure openness and accountability in the laws and policies developed to ensure that obligations owed to communities, including those relating to local content, are met.¹⁵² The communities must understand them to know what benefits they would derive from the projects within their vicinity. This is inconsonant with the social contract theory and the argument in the study that the government has a responsibility of protecting its citizens in all matters that affect them.

4.2.4.4 Empowerment and access to information

This principle requires that the communities affected by the operations in a project must have information about the project and how they will benefit from it. They must also know how to access such information.¹⁵³ This principle supports the study in those communities that live within proximity of where extraction takes place need information about the project because they are the ones that are mostly affected by the activities undertaken by IOCs. When shared with accurate information and the expected benefits, the community can better advance their interests and ensure they form part of the developed policies.¹⁵⁴ This is the position taken by the localism theorists, as discussed in chapter two.

¹⁵¹ Cécile P, Basse EM Loukacheva N, 'Openness, Transparency and Public Participation in the Governance of Uranium Mining in Greenland: A Legal and Political Track Record' (2017) 53 *Polar Record* 603.

¹⁵² Niyi-Gafar O, 'A Conceptual Framework for a Human Rights-Based Approach to Water' (2019) 6 *Journal of Comparative Law in Africa* 149.

¹⁵³ Niyi-Gafar O and Oluwatosin I, 'Adopting a Rights-Based Approach. Towards the Legal Protection of the Nigerian Child'.

¹⁵⁴ Ahmad MS and Abu Talib NB, 'Empowering Local Communities: Decentralisation, Empowerment and Community Driven Development' (2015) 49 *Quality & Quantity* 827.

4.2.5 International Finance Corporation (IFC) Performance Standards on social and environmental sustainability (2006)

The International Finance Corporation (IFC) is the finance arm of the World Bank that finances private enterprises to undertake projects, especially in developing countries. It has set social and environmental sustainability performance standards for the Multi-national Corporations (MNCs) that they finance. The MNCs are required to observe ecological and social risks during the life of the projects. Compliance with these performance standards is one of the conditions set by IFC for financing the MNCs. Specifically, performance standard 7 (PS7) argues that indigenous people are the most marginalised. This is because they are less developed than the rest of the population. Since they are weak economically and socially, they cannot agitate for their interests well, which may cause an infringement to their cultures, values, and religion.¹⁵⁵

This standard acknowledges that multi-nationals can provide opportunities for such communities. Thus, when benefits are sought for communities and when designing programmes, the standard requires that this be done while maintaining respect for community cultures and natural resource-based livelihood. It also argues for community participation that is free, fair and has informed consent by the communities in decisions that affect them.¹⁵⁶ This participation should be done throughout the life of the project.

Another IFC standard outlines that for effective, sustainable development, there is a need to ensure close interaction between the corporations and the local communities.¹⁵⁷ One of the ways through which a country can achieve sustainable development is by involving local communities in decision-making processes. Moreover, community inclusion in developing policies enables them to grow economically.¹⁵⁸ Thus, local content is one of the ways that can bring about socio-economic development to communities.¹⁵⁹ This, as argued in this standard, would contribute to the achievement of sustainable development goals. This study portends that the IFC can influence an enhanced mechanism for local content policies by requiring IOCs

¹⁵⁵ Boyle L and Michell K, 'A Management Concept for Driving Sustainability in Marginalised Communities in South Africa', *Urban Forum* (Springer 2018).

¹⁵⁶ Performance Standard 7, Social and environmental sustainability, indigenous peoples, *International Finance Corporation (IFC) performance standards*, 7(April 30, 2006). The requirement of having free, fair, and informed consent is one of the panel principles' main arguments.

¹⁵⁷ Performance Standard 1, Assessment and management of Environment and Social Risks and Impacts *International Finance Corporation (IFC) Performance Standards*, 2012.

¹⁵⁸ Nwapi C, 'Neoliberal Extractive Resource Governance Frameworks and Interregional Economic Inequality in the Global South: Strengthening Regional Competitiveness through Local Content Policies' [2015] *International Development Economics Associates (IDEAS)*, eds, *Inequality, Democracy and Development Under Neoliberalism and Beyond* (New Delhi: IDEAS, 2015) 271.

¹⁵⁹ Johnson L, 'Space for Local Content Policies and Strategies'.

to prove beforehand the structures adopted to involve the communities. This requirement at the funding level will ameliorate the disenfranchisement of communities in countries that have not enacted a home grown local content policy.

The international regime outlined above revolves around involving the public in the decision-making processes in matters that affect them. It includes the development of policies and legislation. Therefore, the regime forms the basis of legislating local content in Kenya so that communities benefit from the investments undertaken within their vicinity. This is core to the study.

4.3 Kenyan Local Content Legal Framework

This section analyses the sufficiency of the Kenyan local content legal framework in protecting communities that live in areas where oil and gas extraction occurs.

4.3.1 Constitution of Kenya, 2010

The Constitution of Kenya 2010 does not have explicit provisions for local content that would benefit local communities. However, certain aspects can be interpreted to give effect to the need for local content that is beneficial to the local communities located in places where extraction takes place. Fundamental in the constitution is Article 1 that places the people as the sovereign power holders.¹⁶⁰ This provision means that every decision ought to reflect the needs and aspirations of the people. Therefore, in decision-making about matters that involve the extraction of natural resources, the people who live in that area should have a voice in the decision-making processes to benefit from the investments done within their vicinity.¹⁶¹

Article 10 (2) of the constitution further espouses national values and principles.¹⁶² One of the principles of governance outlined is the principle of participation of the people. The involvement of the people is essential in local content development. It ensures that the locals where the extraction is taking place participate in developing and implementing local content laws and policies. This participation would guarantee benefit to these communities.¹⁶³

Article 62 (1) (f) vests all natural resources in the government, thus outlining areas where they are found as public land.¹⁶⁴ It further provides that the government shall hold public land in

¹⁶⁰ Article 1, *Constitution of Kenya* (2010).

¹⁶¹ Clement F, 'Analysing Decentralised Natural Resource Governance: Proposition for a "Politicised" Institutional Analysis and Development Framework' (2010) 43 *Policy Sciences* 129.

¹⁶² Article 10 (2), *Constitution of Kenya*, 2010.

¹⁶³ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries'.

¹⁶⁴ Article 62(1), *Constitution of Kenya* 2010.

trust for the people of Kenya. The extraction, processing, and use of resources, including oil and gas, should be equitable, efficient, productive, and sustainable.¹⁶⁵ Further, Article 69 (1) (h) outlines the need to ensure the utilisation of the resources for the benefit of the public. This includes the locals located in the area where the extraction takes place. Finally, article 66 (2) is explicit and speaks directly about the benefit that should be obtained by local communities in the course of extraction of natural resources.¹⁶⁶ The article gives power to parliament to enact laws that would ensure that investment made on land become beneficial to the local communities and their localities.

4.3.2 Draft National Energy and Petroleum Policy, 2018

The policy¹⁶⁷ is still in draft form to date. Like the constitution, the policy emphasises that all resources in the country should be managed to benefit all Kenyans.¹⁶⁸ The policy is clear that the country lacks a local content policy. Therefore, part of the strategies it proposes is developing a local content policy in the short term (2018-2022).¹⁶⁹ It also points out that there is no clear framework for community engagement during the extraction of resources, including oil. The policy argues that lack of community engagement can spark conflicts that result in developmental setbacks. Therefore, it proposes that policymakers develop a clear legislative framework to define the engagement of communities and other actors during the extraction of natural resources for socio-economic development.¹⁷⁰

4.3.3 Draft Local Content Policy, 2019

The draft local content policy is expected to cut across all sectors and provide the framework for developing sector-specific local content legislation and regulations.¹⁷¹ The fundamental role is to ensure the creation and retention of value in the entire value chain during the exploitation of natural resources in Kenya. Accordingly, objective seven of the policy provides for the inclusion interests of communities who live near industrial activities. This inclusion, the policy argues, should be done by ensuring that there is legislation and LCPs that guarantee these communities, including other marginalised groups, 'exclusive' access to employment, procurement opportunities and contracts.¹⁷²

¹⁶⁵ Article 60(1), *Constitution of Kenya* 2010.

¹⁶⁶ Article 66, *Constitution of Kenya* 2010.

¹⁶⁷ *Draft Energy and Petroleum Policy*, 2018.

¹⁶⁸ Article 9.8.1 *Draft Energy and Petroleum Policy*, 2018, 94.

¹⁶⁹ Article 9.8.3 *Draft National Energy and Petroleum policy* 2018, 94.

¹⁷⁰ Article 9.8.4 *Draft National Energy and Petroleum Policy* 2018.

¹⁷¹ Part IX, *Draft Local Content Policy*, 2019,

¹⁷² Objective 7, *Draft Local Content Policy*.

The Draft National Energy and Petroleum Policy and draft local content policy thus advocate for community participation in the entire value chain during the extraction of natural resources. This will ensure that the communities living near the areas where extraction occurs are also considered when developing LCPs and laws.

4.3.4 Community Land Act, 2016

The Community Land Act defines a community 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, geographical space, ecological space or ethnicity'.¹⁷³ The definition relates to the integrated and hybrid definition adopted by the study in chapter one. It defines a community as a people living in a sub-county within which a petroleum resource is situated, who share a common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical and ecological space or ethnicity, and are affected by the exploration of the petroleum resource.

The Act was enacted to ensure proper administration of community land and give effect to Article 63(3) of the constitution. It provides that all resources found in community land be used sustainably to ensure maximum benefit to the whole community.¹⁷⁴ It further emphasises equitable sharing of the benefits that accrue due to investment in natural resources.¹⁷⁵

One of the ways through which a community-centred LCP can be achieved is through proper consultation with the relevant stakeholders.¹⁷⁶ This would ensure that all community interests are considered when developing the policies, guaranteeing the maximum community benefit from the extraction of resources within their land. Therefore, the Act requires that there should be an open consultative process on investments on community land which should translate into an agreement between the investor and the community.¹⁷⁷

In ensuring that there is proper community participation in the decisions that affect them, the Act provides for a community assembly with membership from all the adults in the community and a community management committee whose membership is from the community

¹⁷³ Section 2, *Community Land Act*, (Act No. 27 of 2016)

¹⁷⁴ Section 35, *Community Land Act*, (Act No. 27 of 2016).

¹⁷⁵ Section 35, *Community Land Act*, (Act No. 27 of 2016).

¹⁷⁶ Odumosu-Ayanu IT, 'Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry-Community Agreements' (2012) 35 NC Cent. L. Rev. 65.

¹⁷⁷ Section 36 (b), (c), (g) and (h) *Community Land Act*, (Act No 27 of 2016).

assembly.¹⁷⁸ This magnifies the localism theorists who argue that communities should be involved in decisions that affect them because they best understand what would be beneficial to them.

Therefore, from the foregoing, the study argues that the Constitution of Kenya 2010, the draft national energy and petroleum policy 2018, the draft local content policy 2019 and the Community Land Act provide a solid foundation for legislating local content laws and regulations with a community perspective. This would guarantee socio-economic growth to both the host state and the locals, including the communities living close to where extraction takes place, hence achieving the objectives of LCPs.

4.3.5 Petroleum Act, 2019

Legislated to give effect to Article 66 of the constitution, among other articles, the Petroleum Act (the Act) came into force to ensure effective, efficient and beneficial operations in the exploration, development, contracting, and production of oil and related activities.¹⁷⁹ The Act thus was intended to speak to, among other petroleum-related activities, the benefits and value addition that comes within the value chain of petroleum operations in the upstream, midstream and downstream petroleum.

Premised on the above and being the primary legislation that deals with activities related to petroleum, the Act makes provision for local content that would ensure there is a benefit to the country and the citizens. This complies with Article 66 of the constitution, which states that communities should benefit from investments made by the government within their vicinity. Communities that live in the areas where extraction takes place are most affected by the operations of the IOCs. Sometimes they are required to surrender their land hence end up losing their economic activities and livelihoods. Their interests must therefore be taken into account during the extraction of oil and gas and beyond.¹⁸⁰

The enactment of the Act was a big step towards legislating local content in the country, which the previous Petroleum (Exploration and Production) Act (repealed) did not provide.¹⁸¹ The

¹⁷⁸ Section 15, *Community Land Act*, (Act No 27 of 2016).

¹⁷⁹ Preamble, *Petroleum Act*, (Act no 2 2019).

¹⁸⁰ Olawuyi DS, "Legal strategies and tools for mitigating legal risks associated with oil and gas investments in Africa" *Hamad bin Khalifa University*, 2015, 6.

¹⁸¹ Section 9 (g) of the Petroleum (Exploration and Production) Act (repealed) which provided that the preference to the use of local products, equipment and services locally available was implied in every contract with an IOC

Petroleum Act 2019, however, still has gaps as regards local content benefits to the community living in the areas where extraction takes place.

Host states develop LCPs and laws to achieve economic development and bring about socio-economic development to their citizens, including communities that live in areas where extraction occurs.¹⁸² However, as discussed in Chapter Two of this study, the definition of local content takes a national approach. Therefore, it does not give attention to the local communities located near the areas where extraction occurs.¹⁸³ The definition, therefore, allows for the participation of all Kenyans in petroleum activities. However, as discussed, oil and gas discoveries are made in marginalised and less developed areas. The nationalistic approach may bring about unfair competition between the local communities and other citizens who can better participate in petroleum activities. The definition, therefore, goes against the grain of the constitution in that Article 66. This article emphasises the need to ensure that any investments undertaken in an area benefit the communities in that area.

The Act has further defined the meaning of local community as '*people living in a sub-county within which a petroleum resource is found*'.¹⁸⁴ This definition covers only one aspect of what a community is. As discussed earlier, apart from sharing a geographical space, a community can be identified based on sharing other aspects like *ethnicity, culture, values and ways of life*.¹⁸⁵ This is the argument advanced by the localism theory. In determining who comprises the community, therefore, the petroleum Act leaves a gap which may mean that the resources within a community may benefit other persons for the single reason that they geographically live in that area, at the expense of the bona fide members of such a community.

Section 50 of the Act outlines local content requirements that all IOCs conducting petroleum-related activities must comply with. They include IOCs giving preference to locally available goods and services in their procurement processes.¹⁸⁶ This provision is, however, not clear on how the locals will benefit. It has a rider that the goods supplied must meet acceptable standards prescribed by local and international standards bodies.¹⁸⁷ This requirement may disadvantage

¹⁸² Abdulkabir Ai, et al, 'The Role of Local Content Policy in Local Value Creation in Nigeria's Oil Industry: A Structural Equation Modeling (SEM) Approach' (2016) 49 Resources Policy 61.

¹⁸³ Section 2, *Petroleum Act* (Act, No 2 of 2019). Defines local content as the added value to the Kenyan economy from petroleum-related activities through development of national capacity and capabilities and investment in developing and procuring locally available workforce, services and supplies, for the sharing of accruing benefits

¹⁸⁴ Section 2, *Petroleum Act* (Act No 2 of 2019)

¹⁸⁵ Article 63(1) *Constitution of Kenya*.

¹⁸⁶ Section 50(1) (b) *Petroleum Act* (Act No. 2 of 2019).

¹⁸⁷ Hufbauer GC, Jeffrey J Schott Cathleen Cimino-Isaacs, *Local Content Requirements: A Global Problem*, vol 102 (Columbia University Press 2013).

the locals since they may not have the required financial and non-financial capacities to compete effectively with the rest of Kenyans. The Public Procurement and Asset Disposal Act 2015 acknowledges that some people may be disadvantaged due to unfair competition and thus the need to protect them by applying the benefit of preferences.¹⁸⁸ This consideration is lacking in the petroleum Act, and instead, the Act leaves these communities to compete with other Kenyans who have better capacities to compete.

On staff recruitment, the Act requires IOCs to give preference to ‘*skilled and qualified*’ Kenyans. But, again, this is nationalistic, and it is thus open to all Kenyans. Most oil and gas discoveries throughout history are made in remote under-developed, and marginalised areas.¹⁸⁹ The literacy and, thus, skill levels of the inhabitants are usually very low. It is not easy, therefore, to get skilled people. As a result, most of them would only qualify for manual jobs within the IOCs. This means that other citizens can only do jobs at higher levels within the organisation from areas with higher literacy and skill levels or expatriates. This is a gap in the Act that disadvantages the local community and may constrain the achievement of one of the local content objectives.

Section 50(2) of the Act requires IOCs to develop and submit a local content plan to the Energy and Petroleum Regulatory Authority (EPRA) for approval. The gap here is that there is no mention of community participation in the development of the plan. Communities are the placed best to agitate for their interests because they better understand essential matters that affect them.¹⁹⁰ The apparent risk is that matters that would benefit the community may be omitted in the plan. However, a further look at the requirements and contents of the local content plan shows a listing of services that the plan should address.¹⁹¹ However, there is no indication of what the list means and how it should be implemented to benefit the local community.

Section 52(1) establishes a training fund into which IOCs pay annual fees to train Kenyans in upstream operations to build capacity. Training is critical for the country as it reduces

¹⁸⁸ Section 157(4) *Public Procurement and Asset Disposal Act* [Act No. 33 of 2015].

¹⁸⁹ Akosua KD, “The impact of oil and gas discovery and exploration on communities with emphasis on women” *Department of Sociology University of Ghana*, 10.

¹⁹⁰ Ulrika SP, “The paradox of localism: Exploring rhetoric and reform promoting the devolution of power” *Neham College*, 2019, 1.

¹⁹¹ Section 50(3) *The Petroleum Act* (Act No. 2 of 2019).

overreliance on foreign expertise.¹⁹² In addition, it ensures that the country has a pool of talent that it can use across sectors. However, the fund is only supposed to be used to train Kenyans in upstream petroleum. Unfortunately, this may not benefit local communities as the people who mainly work upstream are the highly skilled professionals from outside the communities living within the vicinity of IOCs. Also, the fund is managed by the Cabinet Secretary. Therefore, there are no mechanisms in place for managing the fund and ensuring that the community also benefits to improve their capacities that would enable them to participate in the operations of the IOCs.

The Act has identified the training of locals as one of the critical components for local content.¹⁹³ One of the challenges bedeviling host states, especially in developing countries, is the lack of expertise in the extraction and processing of oil and gas.¹⁹⁴ Therefore, there is a need to cure the existing skills gap to enhance the local workforce within the IOCs by training locals. Allowing community participation in the identification of the skills that they require can achieve this.¹⁹⁵ Due to the lack of local content regulations currently, the identification of skills could be cured while negotiating the production sharing contract by requiring that the community be involved in skills identification. The Act provides a model production contract (MPSC) with model provisions for local content, including training. However, even the MPSC that is supposed to guide negotiations does not have requirements for community participation. Instead, it provides that the IOCs develop training courses and programs in consultation with the Cabinet secretary without reference to the community.¹⁹⁶

The nationalistic approach in the Petroleum Act leaves out the communities that live close to where extraction takes place.¹⁹⁷ This exclusion poses a challenge to the communities deriving full benefit from the state's investments in oil and gas and may therefore not achieve socio-economic development. Moreover, this conflicts with Article 66 of the constitution, which

¹⁹² Al-Fattah S, 'The Role of National and International Oil Companies in the Petroleum Industry' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2299878 <<https://papers.ssrn.com/abstract=2299878>> accessed 9 November 2021.

¹⁹³ Section 50(3) (a) petroleum Act 2019.

¹⁹⁴ Tamara J S, "Political Risk in the Oil and Gas Industry in Emerging Markets: A comparative study of Nigeria and Mexico" *Faculty of Arts and Social Sciences at Stellenbosch University*, 2014.

¹⁹⁵ World Bank Group, Trade and Competitiveness, 'Kenya local content exchange, Nairobi, 4 July 2017,7.

¹⁹⁶ Clause 20(2) Model Production Sharing Contract.

¹⁹⁷ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas Sector' in Damilola S Olawuyi (ed), *Local Content and Sustainable Development in Global Energy Markets* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/local-content-and-sustainable-development-in-global-energy-markets/defining-the-local-in-local-content-requirements-in-the-oil-and-gas-sector/797D8BEAF7C3CAA68E367989D7552046>> accessed 30 May 2021.

provides that there should be legislation that ensures that the investments made in exploiting natural resources benefit the local communities and their economies.¹⁹⁸ This can be argued to be a significant lacuna in the Petroleum Act 2019.

The major challenge that the sector continues to encounter is that local content regulations have not yet been enacted. Therefore, the petroleum (Exploration and Production) Regulations 1984 are still in use. They, however, are insufficient in local content provisions. This has left the scope and content of local content to negotiations in the production sharing contract between the host state and the IOC, which has no community representation.

4.3.6 Model Production Sharing Contract (MPSC)

The Model Production Sharing Contract (MPSC) is provided for under the Petroleum Act.¹⁹⁹ It is signed between the host state and the IOC and is currently considered one of the most progressive MPSCs. It outlines the requirements that should be complied with by both the host state and the IOCs. Local content is one of the requirements that have to be met by the IOCs. But as the name suggests, this is a model contract that is subject to negotiations. Due to the lack of local content regulations, the scope and extent of local content are thus left to negotiations.²⁰⁰ The degree to which the MPSC would be beneficial to the country and its citizens, therefore, would entirely depend on how good the negotiators and the bargaining power of the host state are. The provisions for local content components: training, research and development, employment and procurement in the MPSC take a nationalistic approach just like the Petroleum Act, leaving out the participation of the local communities through negotiations where extraction takes place.

4.3.7 Draft Petroleum (Local Content) Regulations, 2019

The Draft Petroleum (Local Content) Regulation of 2019, if operationalised, would ensure that there is a value addition to Kenyans from Petroleum activities. The regulations are expected to operationalise the Act and define how local content should be managed. However, an analysis of the draft regulations shows that they have taken the same national approach stance as the Petroleum Act. For instance, they have adopted the national approach in the definition of local content. They have thus not considered the community approach, which would ensure that as the rest of the citizens benefit, special consideration is also given to local communities living

¹⁹⁸ Article 66, *Constitution of Kenya* (2010).

¹⁹⁹ Section 18, *Petroleum Act (Act No. 2 of 2019)*.

²⁰⁰ Balouga J, 'Nigerian Local Content: Challenges and Prospects' (2012) 4 *International Association for Energy Economics* 23.

close to where extraction occurs. This would go a long way in achieving the objective of developing LCPs and legislation. However, there is still a gap in the regulations in that regard. Further, the draft regulations have not clarified the definition of community, meaning that it remains as defined in the Petroleum Act 2019.

The essential benefits of local content as per the Act are; procurement of locally available goods and services, employment and training of locals, technology transfer and research.²⁰¹ Again, the regulations have upheld the national approach taken by the Act on the management of these benefits. There is no mention of how the community will participate, for instance, in developing the local content plan, training plans, etc. As discussed in this chapter, the gaps identified under the Petroleum Act 2019 regarding the community dimension to local content have thus not been cured by the current draft regulations.

One of the forward-looking additions in the draft regulations is the introduction of a schedule with the minimum local content levels. Towards this, the contractor or sub-contractor must progressively increase the minimum local content levels for goods and services, recruitment and training, and research, which are crucial to achieving the objectives of developing LCPs.²⁰² However, the schedule takes a nationalistic approach and does not mention the minimum local content levels for local communities living in the area where extraction occurs. This nationalistic approach taken by the draft regulations does not entirely cure the lacuna in the principal Act of not giving due regard to the participation of communities in the development of LCPs. This may not achieve the objective of bringing about social development to the local communities that form part of the total citizenry.

4.3.8 Local Content Bill, 2018

The local content bill covers the extractives sector, which includes oil and gas. It gives effect to Article 66 (2) of the Constitution of Kenya, which provides that parliament must enact laws that allow communities to benefit from investment in natural resources. However, it is essential to note that the bill is yet to become law.

The bill defines local content from the national perspective, just like the other laws discussed in this chapter.²⁰³ It has also defined a local person as a natural person, firm, or entity whose effective citizenship is Kenya.²⁰⁴ This definition has not incorporated the definition of local

²⁰¹ Section 50, *The Petroleum Act* (No. 2 2019).

²⁰² First schedule, *Draft Petroleum (Local Content) Regulations*, 2019.

²⁰³ Section 2 *The Local content Bill* (2018)

²⁰⁴ Section 2, *The Local Content Bill*, (2018).

communities for value addition to the communities located where the mining of natural resources takes place. Therefore, it opens local content benefits to all the citizens in the country. However, the danger is that other people may benefit more from exploiting the natural resource at the expense of the local communities situated where the extraction is taking place because they have better financial and non-financial capacities to compete.

The local content bill is a positive move towards attaining a local content law in Kenya. At the national level, it has provided well for the Kenyan citizens. Some of the value-added aspects envisioned by the bill are the locals' employment and training requirements.²⁰⁵ IOCs are required to train locals and enhance their skills to build their capacity. It also requires IOCs to ensure that locals are given priority during employment. IOCs are, however, allowed to employ foreigners only in cases where there are no locals who have the prerequisite expertise required for a particular job.²⁰⁶

The building and improvement of local economies as enshrined in the constitution²⁰⁷ is also buttressed under clause 43, which requires IOCs to give priority to locally produced goods. IOCs are, however, allowed, with the consent of the cabinet secretary, to outsource goods and services that are not available locally.²⁰⁸

Unlike the other laws, the bill has acknowledged a need to decentralise power from the central government to the county governments, which is a big step towards thinking about local communities. To this end, it has identified the responsibilities of both levels of government in so far as local content is concerned.²⁰⁹

The bill, also, within its institutional framework, has created a local content committee²¹⁰ and a secretariat²¹¹ which is an excellent improvement to the current legislation for local content. These two are supposed to develop local content policies and ensure that IOCs adhere to them. IOCs are required to submit local content plans to the committee outlining the benefits to the community in the course of their operations.²¹² Among the membership of the committee are two members appointed by the council of governors. The question that comes to bear is whether

²⁰⁵ Section 25, *The Local Content Bill*, (2018).

²⁰⁶ Section 26, *The Local Content Bill*, (2018).

²⁰⁷ Art 66, *Constitution of Kenya* (2010).

²⁰⁸ Section 43 (2), *The Local Content Bill*, (2018).

²⁰⁹ Clause 7, *Local Content Bill* of 2018.

²¹⁰ Clause 9, *Local Content Bill* of 2018.

²¹¹ Clause 19, *Local Content Bill* of 2018.

²¹² Clause 18, *Local Content Bill* of 2018.

this is a fair representation of the community. A community shares culture, values and socio-economic activities, among other factors²¹³ and best understand what matters to them. However, the representation by the county government still lacks the community perspective. Thus, the study argues that community participation in the decision-making process on matters relating to local content is still not adequate under the draft bill.

The bill takes the position of the Petroleum Act 2019 in the employment and training of locals. The operator develops the plans for employment and training without the participation of the community. Looking at the functions of the local content committee, they include the approval of the local content plan and overseeing and monitoring its implementation throughout the operations of the IOC. If the community living where the extraction occurs were represented in the committee, they would better advocate for their interests in all the local content components in the entire petroleum value chain.

4.3.9 The Energy Act, 2019

The Act, under section 2, takes a similar approach to the petroleum Act 2019 in defining local content and the local community.²¹⁴ The resultant benefit and value addition that is intended and outlined in the Act takes the national approach to local content rather than a community-centred approach. The definition thus does not take into consideration the local communities within the area of extraction.

Although section 206 attempts to address community issues, it does not clarify who should benefit from local content. Therefore, it does not provide for local content in relation to the community. Instead, the section outlines that the services and the goods used in the operations should first consider the people in the county where the operation occurs.²¹⁵ This may also disadvantage the communities because, bearing in mind the vastness of a county, any person who is not geographically close to the areas of operations may take the advantage at the expense of the locals themselves. Additionally, the Act explicitly outlines that Kenyans at large should be given first consideration.

The Act also creates the Energy and Petroleum Regulatory Authority (EPRA).²¹⁶ Under section 51 of the Petroleum Act and section 206 of the Energy Act, EPRA is responsible for overseeing compliance with local content provisions, including the development of local content plans,

²¹³ Article 63 *Constitution of Kenya* 2010.

²¹⁴ Section 2, *The Energy Act* (Act No. 1 of 2019).

²¹⁵ Section 206, *The Energy Act* (Act No. 1 of 2019).

²¹⁶ Part II, *The Energy Act* (Act No. 1 of 2019).

setting minimum requirements on local content regulations, among others.²¹⁷ However, despite the numerous roles EPRA is tasked with, the provisions do not provide for the participation of the local communities in local content processes that would ensure that they benefit from petroleum activities.

4.3.10 Mining Act, 2016

The Act gives effect to Article 66 of the constitution, among other articles that emphasise the need for local communities to benefit from the investment in natural resources.

The Act provides that in developing policies related to mining in an area, the authority in charge should ensure that they consider the locals and their values.²¹⁸ Section 47 of the Act deviates explicitly from other legislations that take the national approach to local content. It outlines that special considerations concerning employment in the mining area should be given to the community located in that area first and then to the rest of the citizens.²¹⁹ The Act additionally emphasises the use of locally made and produced goods and services. These goods and services should be provided by the local communities first and then by Kenyans in general.²²⁰

The Act requires that the community must be consulted and informed of the benefits that they will derive from a project, and they must give consent in the form of a written contract before the commencement of the project.²²¹ Thus, the Act takes a different trajectory and makes more community-centred provisions to allow the community space to advocate for their interests. This encourages the socio-economic development of communities, which is one of the core objectives of LCPs. Further, the Act requires that there should be a CDA between a large-scale mining license holder and a community. The CDA should be implemented and, among others issues, it should prioritise the employment of the community and citizens of Kenya.²²² As *Nwapi* notes, the practice of signing CDAs has worked in Canada and helped avoid conflicts since the community participates in decisions that affect them. The Act also entails regulations tailored towards providing for the procurement of local goods and services and ensuring that the mineral extraction supports sustainable development.

²¹⁷ Section 10, *The Energy (Act No. 1 of 2019)*.

²¹⁸ Section 47, *Mining Act of 2016* (Act No. 12 2016).

²¹⁹ Section 47 (2), *Mining Act of 2016* (Act No. 12 2016).

²²⁰ Section 50(b), *Mining Act* (Act No 12 2016).

²²¹ Section 23(4), *The Mining (Licence and Permit) Regulations* (2017).

²²² Section 47, *Mining Act* (Act No. 12 of 2016).

4.3.11 Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016

The Act came into force to guide transactions relating to natural resources that the national assembly must primarily ratify before their exploitation start. These include the extraction of crude oil and natural gas.²²³ Just like the Mining Act, the natural resources Act takes cognisance of local content that is community centred. But, first, it demands that before the national assembly ratifies the transaction, it must first outline the benefit derived from the transactions by the local community.²²⁴ This means that the transaction must come along with some aspects of value addition to the communities. However, the Act does not specify the nature of benefits that the community should expect, meaning this could differ from transaction to transaction.

The Act also provides for stakeholder consultation.²²⁵ Communities living where the mining of a natural resource takes place are allowed to agitate for their interests to be incorporated into the policies. This is meant to ensure that they derive maximum benefits in the entire natural resource extraction value chain. The only gap is that the law is not explicit on the level and scope of community engagement.

4.3.12 Public Procurement and Asset Disposal Act of 2015

The Public Procurement and Asset Disposal Act (PPAD) provides for public entities' efficient and effective disposal and procurement of public assets.

The PPAD defines what comprises locally produced goods and services.²²⁶ The Petroleum Act also uses the term locally manufactured goods when requiring the IOCs to give preference to local goods and services in their procurement processes. The PPAD further outlines the essential values and principles that ought to guide the procurement and disposal of goods. One of the values that speak to local content includes affirmative action, extended to marginalised persons. As discussed earlier in chapter one, oil and gas discoveries are made in remote and marginalised areas. The PPAD, therefore, strives also to improve the lives of marginalised people. This is the nexus with the topic of the study. The second value outlined in the Act is the promotion of local contractors and local industries to ensure value addition.²²⁷ However,

²²³ Section 3(1) and the Schedule, *Natural Resources (Classes of Transactions Subject to Ratification) Act*, (Act no 41 of 2016).

²²⁴ Section 9 (1) (f), *Natural Resources (Classes of Transactions Subject to Ratification) Act*, (Act No 41 of 2016). Supports local content with a community perspective as before parliament ratifies the transaction, it must be satisfied that it has adequate stakeholder consultations.

²²⁵ Section 9 (1), *Natural Resources (Classes of Transactions Subject to Ratification) Act*, (Act No 41 of 2016).

²²⁶ Section 2, *Public Procurement and Asset Disposal Act* (Act no 33 of 2015).

²²⁷ Section 3, *Public Procurement and Asset Disposal Act* (Act no 33 of 2015).

this provision does not emphasise communities that live within proximity of the area where projects occur.

The law further emphasises the persons who qualify for preference in procurement activities.²²⁸ It provides that preference should apply to regions and also people who are disadvantaged by unfair competition.²²⁹ When local communities are left to compete with other people from more advanced regions, e.g., cities, the chances are that they will have an advantage over them. This is because they are better capacitated both financially and otherwise to meet the requirements of the procurement laws. The PPAD, however, does not explicitly refer to communities that live within the proximity of where extraction takes place.

4.4 Conclusion

International frameworks which derive their authority from Article 2(5) and (6) provide for active involvement of local communities in matters that affect them, such as mining and extraction of oil and gas. Kenya continues to make commendable progress in an attempt to sufficiently provide the safeguards of local content. However, the Kenyan legal framework is not sufficient in providing for local content that is community-centred. Whereas the Constitution of Kenya under Article 63 acknowledges community interests, these interests are not adequately captured in various legislation, especially the Petroleum Act, the core legislation for the oil and gas industry. This study's position is that Kenya can take advantage of the lessons learnt from Canada to enact local content legislation and policies adequately. As a community of nations, Kenya should use the international framework to legislate for local content with a community perspective so that benefits are felt at both the local community and national level.

²²⁸ Section 6 and 7, *Public Procurement and Asset Disposal Act* (Act no 33 of 2015).

²²⁹ Section 157(4), *Public Procurement and Asset Disposal Act* (Act no 33 of 2015).

CHAPTER FIVE

PROPOSED INTERVENTIONS FOR THE GAPS IN KENYA'S LEGAL FRAMEWORK ON LOCAL CONTENT

5.1 Introduction

The importance of local content has gained traction in oil-producing countries worldwide, as discussed in chapters one and three.²³⁰ By protecting local industries from unfair competition, countries can create value addition from petroleum activities and achieve economic development and socio-economic development for their citizens. Nations, therefore, must ensure that legal frameworks are robust enough to guarantee these two objectives.

This chapter proposes recommendations that can fill the gaps identified in chapter four by comparing best practices internationally.

5.2 Lack of an Effective and Efficient Definition of Local Content

In trying to ensure value addition to the country, the Petroleum Act expressly defines local content.²³¹ The use of the words “*Kenyan economy*” in the definition means that the local content benefits from petroleum activities are open for all Kenyans. As discussed in chapter three, this definition takes the national approach and does not consider the local communities situated in the areas where extraction occurs. Local communities may not be able to compete with other citizens who have better capacities. The Localism theory has supported the inclusion of local communities to the extent that communities should make decisions in matters that affect them.

In asserting the need for localism, Chloe Severn reiterates the sentiments of *Norberg Hodge*. They aver that the paramount role of localisation is to ensure that local communities can diversify their economic prowess to enhance their economic well-being. The essence of localism is thus to secure the social and best interest of a community within a region.²³²

Section 50 of the Petroleum Act expressly provides for local content requirements.²³³ Although this provision is a step towards the right direction, the requirements fail to adopt the need to

²³⁰ Ramdoo I, “Unpacking local content requirements in the extractive sector: what implications for the global trade and investment Frameworks?” *Geneva, ICTSD and World Economic Forum*, September 2015

²³¹ Section 2, *Petroleum Act* [Act No. 2 of 2019]; *defines local content as the added value brought to the Kenyan economy from petroleum-related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available workforce, services and supplies, for the sharing of accruing benefits*”

²³² Chloe Severn, ‘Localism: Theory And Practice Including A Case Study Of The Transition Town Movement’ 35.

²³³ Section 50, *The Petroleum Act* (Act No 2 of 2019).

include the localism concept, ensuring that there is a benefit for the local communities where extraction occurs. The section provides the need to have IOCs use goods and services produced and offered locally. However, it does not outline or give importance to the communities located in places where the extraction takes place. The danger with the non-involvement of the local communities is that they may not derive economic benefit from local content.²³⁴ *Chilenye Nwapi* argues that most jurisdictions take the national approach to the definition of local content.²³⁵ He notes that there is a need to take a more specific approach to enhance local content development that is beneficial to the locals in the host state both at the national and community level.

Canada takes a more specific approach towards the communities located where the extraction is taking place. The country's local content policies take into consideration the particular needs of the community around first. For example, the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development report notes that the country uses the concept of direct employment of the local communities first before they consider other people from different communities. They argue that this approach enables these communities to access similar opportunities just like the other communities. The objective is to eliminate any form of discrimination or past historical injustice that may have occurred in the community.²³⁶ Australia also has express provisions that call for the inclusion of local communities located at the place of extraction to enhance their benefit. For example, in defining local content, the Australian Pacific Local Content Policy prescriptively and expressly caters to local communities by including the primary location where the extraction occurs.²³⁷

²³⁴ Abosede Omowumi Babatunde, 'Oil, Environmental Conflict and the Challenges of Sustainable Development in the Niger Delta' (2014) 9 *Journal of Peacebuilding & Development* 77.

²³⁵ Chilenye Nwapi, 'A Survey of the Literature on Local Content Policies in the Oil and Gas Industry in East Africa' 30.

²³⁶ 'Local-Content-Policies-Mining-Direct-Local-Employment. Pdf' <<https://www.iisd.org/system/files/publications/local-content-policies-mining-direct-local-employment.pdf>> accessed 30 May 2021.

²³⁷ APLNG Supply Chain-Local Content Policy

5.2.1 Recommendations

The national approach towards the definition of local content significantly hampers the effort to provide community-centred local content. *Ana Maria Esteves, Bruce Coyne and Ana Moreno* argue that there are two main approaches to local content development. These are the national and sub-national approaches. They further say that Governments should design a way through which benefits are maximised at these two levels.²³⁸ *Wassuna and Kirwa* also aver that since oil and gas are primarily discovered in marginalised areas, the definition of 'local' must be clear. They propose that it should encompass both local at the national level, and therefore open for all citizens, and local at the community level or what is referred to as “*local local*” in the study, which is available to communities who live within the areas where extraction takes place.²³⁹ This is because these communities are the most affected by the activities undertaken by IOCs.

The study recommends that the definition of local content should take both the national and community-based approaches. This way, benefits from petroleum activities will accrue to both the national government and the local communities located at the place where extraction occurs. In addition, when LCPs are crafted with the community in mind, they help achieve sustainable development goals.²⁴⁰

5.3 Unclear Definition of Local Community

Localism Theory calls for the need to have specificity in the definition of a community. The theorists opine that proper measures can ensure community protection by identifying who and what comprises a community. The social contract theory also calls for the protection of people within a polity. However, this protection can only be realised when there is proper identification of the target groups. The Kenyan Legal framework, specifically the Constitution, provides anecdotes on how communities can be identified, including ethnicity, culture, or similar interest.²⁴¹

²³⁸ Ana Maria Esteves, Bruce Coyne and Ana Moreno, ‘Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors’ 28.

²³⁹ Wassuna M K and Kirwa J O, developing a sustainable In-country value addition strategy: Real-time policy options for Kenya's extractive policy dialogue II, Nairobi, 28-29 May 2018, p.4-7.

²⁴⁰ UN General Assembly, *Transforming our world: the 2030 Agenda for sustainable development*, 21 October 2015, UN Doc. A/RES/70/1, Goals, 8,9,10. SDG 8 promotes sustained, inclusive and sustainable economic growth and full employment and decent work for all; SDG 9 on inclusive and sustained industrialisation and innovation; and SDG 10 on reducing inequalities among people.

²⁴¹ Article 63 (1), *Constitution of Kenya* 2010.

The Petroleum Act defines local communities in relation to a sub-county where extraction takes place and are also affected by the said extraction. The definition, however, takes a single approach to the meaning of what a local community is. This is the geographical approach. The localism theory asserts that people of a given society have specific, immutable values and practices that distinguish them from other communities. Such values often are the uniting factor and are critical when developing policies that affect them. Therefore, in determining the definition of locals, there is a need to consider a broader aspect of whom a local is rather than the approach taken by the Petroleum Act. In addition, although the Petroleum Act defines local community, the definition is explicitly provided for purposes of revenue sharing, not local content. Suffice it to mention that sections 50, 51 and 52 of the Petroleum Act that deal with local content make no mention of the local community regarding the requirements and benefits of local content.

Kakonje J argues that there is a need to curb opportunistic emigrants from benefitting at the expense of the local communities.²⁴² This means that there are certain circumstances where people with better capacities from other places migrate to locations where mining occurs. These immigrants may end up taking opportunities that would have benefitted the locals. A definite approach to defining who constitutes a local community would thus guarantee that the right persons benefit from LCPs.

The definition given in the Petroleum Act, which uses the geographical location approach alone, may not be sufficient. This is because a community has other dimensions other than the geographical dimension. The journal article, *Key Concepts of Local Community Development*, asserts that a local community comprises a more complex structure than the definition of a local community based on geographical considerations only. The author argues that a local community can also be defined using values shared by a people. This, therefore, makes the definition of local community adopted by the Petroleum Act insufficient for determining who should benefit from local content requirements.

*John Boye*²⁴³ and *Newenham-Kahindi*²⁴⁴ assert that local communities where oil extraction occurs should be prioritised in benefiting from LCPs. *Boye* says that the state is made of small

²⁴² Kakonge J, 'Kenya's Turkana Oil and Gas Field Shows the Challenges of Local Content Policies' (*Africa at LSE*, 25 May 2020) <<https://blogs.lse.ac.uk/africaatlse/2020/05/25/kenya-turkana-oil-and-gas-field-supply-chain-challenges-local-content-policies/>> accessed 24 January 2021.

²⁴³ Ejobowah JB, 'Who Owns the Oil? The Politics of Ethnicity in the Niger Delta of Nigeria' (2000) 47 *Africa Today* 29.

²⁴⁴ Aloysius M. NKi, 'A Global Mining Corporation and Local Communities in the Lake Victoria Zone: The Case of Barrick Gold Multinational in Tanzania' (2011) 99 *Journal of Business Ethics* 253.

units called communities. He argues that when sharing local content benefits equitably to all citizens, the state should prioritise local communities located in the areas of extraction. The author thus defines local communities as the smallest unit of persons with shared values and beliefs within a given geographical location. He notes that taking into account the interests of the units is essential to ensure no conflict arises due to feeling side-lined.²⁴⁵

5.3.1 Recommendations

The Constitution of Kenya 2010 and the Community Land Act provide that communities can be identified based on the ethnicity, culture or similar interests shared by a group of people. This definition, however, is lacking in the Petroleum Act, which is the law that guides the oil and gas sector in Kenya. The Constitution being the grundnorm, should inform the definitions adopted by the enabling legislation. The definitions of local content in the various laws reviewed in chapter four have cherry-picked portions of what makes a local community. The study recommends that the Local Content Bill, expected to become law, adopts a definition of the local community that mirrors the anthropological relations of a people with shared values and customs and the dependence on a natural resource to have an effective local content regime. This way, and the Act being the latest to be adopted by parliament, will take precedence in its application.

Additionally, the definitions should be expansive enough to ensure increased opportunities for the local community. They should provide models of ensuring training programs and technology transfer for the locals to allow for more local involvement in the entire petroleum and gas value chain. Through increased participation of local communities, it is expected that there will be easy technology transfer and development of local capacity that will eventually grow the national professional pool. This will reduce dependency on IOCs whose ultimate aim is profit.

Nwapi outlines that most of the national approaches given to the definition of local community may lead to the disenfranchisement of those who should rightfully derive benefit and value addition first.²⁴⁶ He notes that the scarcity in their reference results from legal frameworks and

²⁴⁵ Ejobowah J B, 'Who Owns the Oil? The Politics of Ethnicity in the Niger Delta of Nigeria' (2000) 47 Africa Today 29 pg. 2.

²⁴⁶ Chilenye N, 'Defining the "Local" in Local Content Requirements in the Oil and Gas Sector' in Damilola S O (ed), *Local Content and Sustainable Development in Global Energy Markets* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/local-content-and-sustainable-development-in-global-energy-markets/defining-the-local-in-local-content-requirements-in-the-oil-and-gas-sector/797D8BEAF7C3CAA68E367989D7552046>> accessed 30 May 2021.

policies that take a more national approach.²⁴⁷ The national approach disadvantages the communities where extraction occurs, and they end up not deriving maximum benefit from local content.

5.4 Lack of a community participation framework

As discussed in earlier chapters, community participation is critical when developing policies. This participation is anchored in both international and regional frameworks addressed in chapter four. Participation is one of the strong limbs of the PANEL principles and other international frameworks discussed. The principles outline a need to consider people's views in decision-making, mainly when they directly or indirectly affect them. Indeed, it is even a virtue of good governance in Kenya.²⁴⁸ The same principle is espoused in the social contract theory, which asserts that the effectiveness of the contract between the government and the locals is best enhanced through public participation.²⁴⁹ Through public participation, the general populace would have an opportunity to communicate their views and aspirations to the government, which can be considered when developing LCPs and legislation.

The Petroleum Act bestows EPRA the duty to conduct public participation regarding oil and gas exploration and mining.²⁵⁰ However, the Act is silent on the method adopted during public participation and who is supposed to participate in the process. Furthermore, there is no express provision for community participation in the exercise. Local communities may thus not have a forum to present their views for consideration effectively.

Courts have asserted the need to conduct public participation that would enhance benefit. For example, in *Thuku Kirori & 4 Others V County Government of Muranga*, the court noted that participation is one of the critical principles and national values set out under Article 10 of the Constitution of Kenya.²⁵¹ The court noted that the importance of participation must never be downplayed. The body conducting participation should not do so for the benefit of a selfish interest group but should prioritise the people who are most likely to be affected by the decision. The local communities where oil and gas extraction take place often bear more brunt

²⁴⁷ Chilenye N, 'Defining the "Local" in Local Content Requirements in the Oil and Gas Sector' in Damilola S O (ed), *Local Content and Sustainable Development in Global Energy Markets* (Cambridge University Press 2021)

²⁴⁸ Article 10, *Constitution of Kenya*, 2010.

²⁴⁹ Loewe M, Zintl T, Houdret A, 'The Social Contract as a Tool of Analysis: Introduction to the Special Issue on "Framing the Evolution of New Social Contracts in Middle Eastern and North African Countries"' [2020] *World Development* 104982.

²⁵⁰ Section 9, *Petroleum Act* [Act No. 2 of 2019]

²⁵¹ *Thuku Kirori & 4 others v County Government of Murang'a* [2014] eKLR

from IOC activities. Their views ought to be taken into consideration during public participation. The Petroleum Act, however, does not have provisions for community participation.

In other jurisdictions such as Canada, public participation considers interest groups and communities about local content. The history of the inclusion of local communities in Canada dates back to the 1990s when the Federal Government, the provincial Governments and the local communities, especially the aboriginal communities, came up with an Accord. The accord ensured a forum where these communities would be part and parcel of negotiation on matters that relate to their land and natural resources found on their land.²⁵² The participation of the communities happens throughout the project life.²⁵³

Additionally, Canada's Mining Policy enshrines a local content provision that is specific, which provides that before any mining operations commence, the indigenous communities must be consulted first and their views considered.²⁵⁴ Additionally, the Impact Benefit Agreement (IBA) that is executed must have the approval of the authorities and the local communities. The IBAs are designed to ensure value addition through local programmes, funding for personnel development, and infrastructural developments.²⁵⁵

5.4.1 Recommendations

To enhance community participation in the oil and gas value chain, the review of the Local content bill and the draft local content regulations is essential. They should incorporate the entrenchment of community-based agreements between the local communities, the Government and the IOCs, which would define the nature of investments undertaken in their land and how the community would benefit from them. This framework grants communities an opportunity to agitate for their interests within the agreements, thus enhancing local content benefits.

Closer home, the Community Land Act establishes the community assembly that comprises all the adults in the community. It also establishes Community Land Management Committees appointed by the community assembly. These management committees negotiate on behalf of

²⁵² 'Mcgill_2013_summer_forum_-_final_report.Pdf'

<https://www.mcgill.ca/isid/files/isid/mcgill_2013_summer_forum_-_final_report.pdf> accessed 30 May 2021.

²⁵³ 'Mcgill_2013_summer_forum_-_final_report.Pdf' (n 247).

²⁵⁴ Crawford A, 'Assessing the Implementation Readiness of the Member States of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development' 16.

²⁵⁵ Crawford A, 'Assessing the Implementation Readiness of the Member States of the InterGovernmental Forum on Mining, Minerals, Metals and Sustainable Development' 16.

the community, but the community assembly must approve their decisions. This gives the community a chance to participate in any investments in their land. The Community Land Act also requires negotiations between investors and communities to be reduced to a written agreement between the parties to protect their interests.

Another recommendation is that in conducting public participation, EPRA should develop a clear public participation framework that ensures the involvement of all stakeholders, including communities. Also, the oil and gas sectors are technical. Therefore, to effectively participate, the concepts should be broken down into understandable versions and explained in a language that the local community understands. It will be superfluous to conduct public participation in a language that is strange to the locals for the simple purpose of ticking the box. The final output must contain the seal of public approval.

5.5 Multiplicity of Laws Regulating Local Content

Chapter Four discussed several statutes and their enabling provisions that remotely address the concept of local content. *Mark Adams, David Boris, and Andrew Hale* argue that governments often develop policies, regulations, and several other legislations to govern a sector.²⁵⁶ They note that this leads to numerous legislations whose intention is to enhance safety. They note that in circumstances where there are too many regulations, there is a possibility of having regulatory overload. They aver that regulation overload may be counter-productive to the specific sectors by becoming overly complex and sometimes contradictory.²⁵⁷

The Petroleum Act, the parent Act that regulates local content for the oil and gas industry, can be argued to contradict other laws seeking to protect the local communities where oil and gas extraction occurs. For instance, the Community Land Act stipulates that those natural resources found in community land should be mined and used to benefit the local communities first. However, the Petroleum Act defines local content in the national perspective, thus considering the citizens at large without emphasising local communities located at the place of extraction most affected by petroleum activities.

²⁵⁶ Adams M, Borys J and Hale A, 'Regulatory Overload' (*Mercatus Center*, 29 November 2011) <<https://www.mercatus.org/publications/regulation/regulatory-overload>> accessed 13 June 2021.

²⁵⁷ Adams M, Borys J and Hale A, 'Regulatory Overload' (*Mercatus Center*, 29 November 2011) <<https://www.mercatus.org/publications/regulation/regulatory-overload>> accessed 13 June 2021.

The Mining Act has an express provision that gives due regard to the communities found in the areas where mining occurs. For example, section 47 of the Mining Act provides that investing companies must prioritise the local community when recruiting their employees.

The Public Procurement and Asset Disposal Act and the Energy Act refer to local content. However, they do not expressly state that the local communities should be given priority to benefits arising from oil and gas extraction. These laws thus depart from the localism theory, which asserts that communities form the basis for economic development.

Ibironke T. Odumosu-Ayanu notes that there is always a general assumption that legislation should protect the interest of local communities.²⁵⁸ He argues that instead of numerous legislations which are sometimes contradictory, there ought to be a complete delineation between the national local content and community local content. He notes that an articulated vision for local communities will enhance their protection than in a multiplicity of laws.²⁵⁹ The multiplicity of laws more often than not leads to uncertainties in their implementation and a reduction in their compliance. In Kenya, the several laws that touch on local content, as discussed in chapter four, can work against the objectives of LCPs.

5.5.1 Recommendations

The multiplicity of laws comes with the inefficiency of their implementation.²⁶⁰ The consolidation of similar laws can cure this. For example, the principal law that deals with the procurement of goods and services is the Public Procurement and Disposal Act, 2015 (PPDA). The PPDA should be amended to consolidate aspects of local content and ensure that the procurement of local goods and services in any sector comply with the Act. This would ensure that IOCs' sourcing of local goods and services in the oil and gas sector is guided by the Procurement laws. Additionally, the amendment should have an explicit provision specifically for local communities located where oil and gas mining takes place, which should give

²⁵⁸ Ibironke TOA, 'Local Content, Community Content, and Sustainable Development in the Oil and Gas Industry: Perspectives from Legislation, Policy, and Community Development Agreements' in Damilola S Olawuyi (ed), *Local Content and Sustainable Development in Global Energy Markets* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/local-content-and-sustainable-development-in-global-energy-markets/local-content-community-content-and-sustainable-development-in-the-oil-and-gas-industry-perspectives-from-legislation-policy-and-community-development-agreements/5E40857938F08F62275D15C87B12ADD2>> accessed 13 June 2021.

²⁵⁹ Adams M, Borys J and Hale A, 'Regulatory Overload' (*Mercatus Center*, 29 November 2011) <<https://www.mercatus.org/publications/regulation/regulatory-overload>> accessed 13 June 2021.

²⁶⁰ Adams M, Borys J and Hale A, 'Regulatory Overload' (*Mercatus Center*, 29 November 2011) <<https://www.mercatus.org/publications/regulation/regulatory-overload>> accessed 13 June 2021.

preference for the supply of goods and services to such communities. This will enhance community-centred approach benefits.

Consolidating the numerous laws will also ensure that the existing overlaps and contradictions are obliterated or minimised. For example, the definition of who comprises a local community varies from one Act to another, bringing numerous inconsistencies. This will be easily cured by having a consolidated law that will adopt a comprehensive definition to ensure benefit by the local communities.

With the upcoming Local Content Act, there is a need to entrench a local content approach to extracting oil and gas. The Act should consolidate the piecemeal legislations scattered across various Acts and bring them under one Act for ease of reference and coordination. Additionally, the enshrining of the provisions in the Act as opposed to having them in a Policy will safeguard them from the whimsical amendment and/or variation of the policy paper provisions. Having the conditions in the Act will ensure proper public participation, and procedural amendment should need arise.

Lastly, the contradictions, for instance, regarding the definition of natural resources in connection with the community as shown in the Community Land Act and the Petroleum Act, call for urgent harmonisation. The harmonisation and streamlining will ensure smooth sector regulation for better administration of oil and gas resources and deriving maximum benefits to the local communities in the first instance and the Kenyan public.

5.6 Unclear local content Benefit structure for communities

The Petroleum Act outlines the benefits that should accrue to the locals from the extraction of oil and gas.²⁶¹ The benefits include the employment and training of the nationals and the procurement of local goods and services. The approach taken by the Act deviates from the tenets of localism theory which argue for the inclusion of communities in decisions that affect them.²⁶² Instead, the Act defines locals as anyone who is a citizen of Kenya. This means all Kenyan nationals, including local communities, are given equal opportunity to compete for local content benefits. Unfortunately, this disadvantages the local communities in numerous ways.

Chilenye Nwapi argues that the people at the place of extraction suffer more from environmental degradation and other pollutions arising from the extraction of oil and gas than

²⁶¹ Section 50, *Petroleum Act [Act No. 2 of 2019]*.

²⁶² Briffault R, 'Localism and Regionalism' (2000) 48 *Buff. L. Rev.* 1.

the rest of the citizens.²⁶³ He notes that the predisposition to such disadvantages justifies communities to be given priority in the local content requirements and benefits. Prioritising them ensures that there is community contentment. In addition, it reduces conflicts that may arise due to the neglect of communities by the Government and IOCs in the extraction and production of oil and gas.

Courts have also been at the forefront in emphasising the benefits to local communities. In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 other*,²⁶⁴ the court emphasised that the locals should be considered in the benefit-sharing agreements and that locally produced goods and employment opportunities for locals should also be prioritised.

The approach taken by the current legislation, however, fails to consider the above. Under sections 51, 52 and 53, the Petroleum Act does not give any express provision prioritising the locals. These provisions also do not provide a percentage or even an indication of benefits reserved for the local community. The national approach adopted does not take into consideration the local communities within these areas. The danger is that these locations may not achieve socio-economic development, especially in cases where such regions are not economically developed. This goes against the fundamental objectives of local LCPs, which are to bring about economic development to the host states and socio-economic development to her people at the national and local community levels.

IOCs' sourcing and use of locally produced goods and services is another aspect of the local content requirements entrenched in the Petroleum Act expected to benefit locals. The Act provides that IOCs should use locally manufactured and produced goods provided they meet the required standards. However, the provision takes a national approach. Thus, there is no priority given to local communities located at the locality of extraction. In the absence of express provisions giving preference to these locals, the benefits may go to "outsiders" at the expense of the local community.²⁶⁵ As discussed in chapter four, oil and gas deposits are primarily found in areas that lag in economic development. The locals may thus lack the technical and financial capacity to compete with citizens from the rest of the country.

²⁶³ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' (2015) 8 Law and Development Review 32.

²⁶⁴ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

²⁶⁵ Nwapi C, 'A survey of the literature on local content policies in the oil and gas industry in East Africa' (2016) 9 University of Calgary- The School of Public Policy 30.

In Canada, the CDA provides that 60 per cent of employment must be reserved for indigenous communities located at the place of mining and gas extraction.²⁶⁶ This ensures that the locals benefit first from such employment opportunities. Additionally, the agreements outline that investors should procure goods from the local communities. For example, the Raglan Agreement of 1995 provided specific commitments that IOCs were to comply with regarding the procurement of goods from the local communities situated at the place of extraction.²⁶⁷

5.6.1 Recommendations

The first recommendation is the adoption of the prescriptive approach to benefits. One of the responsibilities that the Constitution has bestowed on the government is to enact laws that protect its citizens through parliament.²⁶⁸ In emphasising this role, the economic regulation theory posits that governments should enact laws that stimulate economic growth for their citizens. The law should expressly outline the specific benefits that accrue to persons at the national and local levels. In addition, it should be clear what benefits have been preserved for the community living within proximity of where extraction takes place arising from the procurement of local goods and services, employment, training and technological transfer for locals and research and development.

Kenya needs to take the lead, break away from the amorphous provision for local content, and descend into a more specific regime. In most African countries, the percentile of the goods and services to be acquired locally is not expressed. Instead, the Acts simply require that there be a priority to local goods, services and materials.²⁶⁹ The danger with this provision is that IOCs may just prioritise a meagre percentage for purposes of meeting the legal requirement. For instance, in Liberia, the condition is that contractors should prioritise goods and services if their price, quality, terms of payment are similar to those from other countries.²⁷⁰ This is a recipe for anarchy since, as stated above, most communities in whose locality oil and gas are discovered have historically been marginalised and underdeveloped and thus cannot be exposed to market

²⁶⁶ 266 Ramadoo I, 'Designing Local Content Policies in Mineral-Rich Countries' [2018] InterGovernmental Forum on Mining, Mineral, Metals and Sustainable Development 57.

²⁶⁷ Ramadoo I, 'Designing Local Content Policies in Mineral-Rich Countries' [2018] InterGovernmental Forum on Mining, Mineral, Metals and Sustainable Development 57.

²⁶⁸ Article 66 *Constitution of Kenya*, 2010

²⁶⁹ Article 26 Yemen Model Production Sharing Contract 2006; Olawuyi (2017 a, b.

²⁷⁰ Liberia Production Sharing Contract

forces of quality. They require preferential treatment. Kenya should adopt a percentage like Canada that has imposed 35% of all goods and services from aboriginal-owned businesses.²⁷¹

In Chile, the government, as a way of developing the capacity of the locals, has put in place an economic development agency tasked with the duty of enhancing the skill levels of the locals to enable them to be in a position to provide labour and supply local goods to IOCs.²⁷²

The study also recommends that local communities participate in the production sharing contract negotiations between the Government and IOCs. This should be provided for under the law. A provision allowing the involvement of the communities in such negotiations and agreements will enable them to entrench their interests in the contracts. That way, they would be able to derive maximum benefits from LCPs. Countries like Canada and Australia have adopted this approach.

There is also a need to fast track the finalisation of the Local Content Bill, 2018, to establish a clear and transparent Local Content Act that gives detailed local content rules. The Act should define local content and the accrual of benefits at the national and community level to ensure that local communities living near the areas where petroleum activities occur also benefit. In addition, borrowing from Jurisdictions like Canada, the local content bill should be reviewed to provide for a specific percentile of goods and services that IOCs must source from local communities where extraction takes place.

The local content bill proposes the establishment of the local content development committee, which is a progressive inclusion.²⁷³ However, the committee's composition includes representation from the County Government but has no representation from the community itself. The Act, therefore, should be clear and provide for community representation.

5.7 Lack of Local Content Regulations and Policy

The Social contract theory posits a jurisdiction where the government protects its citizens. The way this happens is by the enactment of laws and regulations. For this reason, governments put in place legal mechanisms to ensure the protection of all persons, including local communities.

²⁷¹ Article 4 of the Hibernia Southern Extension Benefits Agreement requires operators to provide a fair opportunity for all Canadian businesses and individuals and first consideration for those in Newfoundland to supply goods and services and employment opportunities. Section 45 of the Canada Newfoundland and Labrador Atlantic Accord Implementation Act (S.C. 1987, C3.).

²⁷² Ramadoo I, 'Designing Local Content Policies in Mineral-Rich Countries' [2018] InterGovernmental Forum on Mining, Mineral, Metals and Sustainable Development page 14.

²⁷³ Clause 9, *Local Content Bill 2018*

For example, the Kenyan Petroleum Act of 2019 was enacted to regulate petroleum activities and ensure that the nationals benefit from the said petroleum activities through local content.

However, there is still no local content regulations in place. What is pertaining are draft regulations. Regulations are supposed to clarify provisions of the Act to make its implementation and monitoring manageable. In instances where there are no clear laws and regulations, the protection of the people becomes a daunting task. The inexistence of local content regulations in the petroleum sector thus makes the protection of the local communities challenging. This is because the provisions in the Petroleum Act need to have regulations that would give it effect. Therefore, their absence may make it difficult to achieve the objectives of local content.²⁷⁴ Due to the lack of regulations, the scope and extent of local content are left to negotiations between IOCs and the government. This is disadvantageous to the communities. Thus, as posited by *Abdulkabir, Fahmi and Azmawami*, when there are no local content regulations and policy, the benefits of parent legislation become uncertain.²⁷⁵

The draft local content regulations are a step in the right direction. However, they do not consider the local communities located at the places where extraction takes place. They have defined local content in the national context, just like the Petroleum Act 2019. The importance of regulations governing local content would help address the limitations and other overlaps in the law from the foregoing. If the policies and regulations are not in place, such limitations may not be addressed. The interests of local communities, therefore, may not be effectively addressed.

5.7.1 Recommendations

The regulations to govern local content in oil and gas in Kenya are still in draft form. This means that if finalised, they can cure specific gaps that may be in existence in the various legislations. This could be achieved by re-drafting the regulations to include specific provisions that would enhance the protection of the local communities where oil and gas extraction is takes place to ensure that they benefit from local content.²⁷⁶ *Damilola S Olawuyi* argues that the formulation of clear, comprehensive and transparent laws and regulations is a sure way of

²⁷⁴ Abdulkabir A and others, 'The Role of Local Content Policy in Local Value Creation in Nigeria's Oil Industry: A Structural Equation Modeling (SEM) Approach' (2016) 49 Resources Policy 61.

²⁷⁵ Abdulkabir A and others, 'The Role of Local Content Policy in Local Value Creation in Nigeria's Oil Industry: A Structural Equation Modelling (SEM) Approach' (2016) 49 Resources Policy 61.

²⁷⁶ Ala Al-Rabeei, 'Local content policies effectiveness in the oil and gas sector of Yemen' (2020).

ensuring an effective and efficient local content policy that can satisfy the people it intends to benefit.²⁷⁷

5.8 Exclusion of Local Communities in the Production Sharing Contract

Avshalom Ginosar, through the economic theory of regulation, notes that a government puts in place legislations, rules and policies within a given area or the country as a whole to drive an even purpose and plan within a country. He argues that economic regulations and legislation can achieve economic stimulation.²⁷⁸ The MPSC design is entrenched in the Petroleum Act to fulfil the economic ends of its people and the country at large. The model thus fulfils the purpose of stimulating economic development and growth as propounded by the proponents of the economic regulation theory.

The MPSC deviates from the tenets of the economic regulation theory in that it lacks specificity on community participation in the process of negotiations. This makes it hard for the communities where the extraction takes place to benefit from the investments done on their land optimally. The Petroleum Act envisages that the community should benefit from the procurement of local goods and services by IOCs and the training and employment of locals, among other benefits. However, the MPSC does not consider the locals adequately. There is little provision on the advantage that the local communities living near the areas where extraction takes place can accrue from local content. The development of local content plans is left for negotiations between the government and the IOC without reference to the Local community.²⁷⁹

In other jurisdictions such as Canada and Australia, CDAs prioritise communities situated in areas where extraction occurs. Through the agreements, the local communities, the Government, and the IOCs sign a contract that defines local content benefits. *Nwapi* opines that one of the ways that community-centred local content can be of use is through a specific approach to the definition of who a local person is in the context of local content.²⁸⁰ He notes that when such definitions are apparent in the policies, the production sharing agreements also provide for them. With the Canadian mining policy requiring the IOCs to consider the interests

²⁷⁷ Damilola O, 'Local Content and Procurement Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa' (Oxford Institute for Energy Studies 2017)

²⁷⁸ Avshalom G, 'Public-Interest Institutionalism: A Positive Perspective on Regulation' (2014) 46 *Administration & Society* 301.

²⁷⁹ Clause 29(2) *Model Production Sharing Contract* Petroleum Act 2019.

²⁸⁰ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas Sector'.

of the locals, the production sharing agreements can offer increased benefits to the local communities.

Though the MPSC may be faulted, Clause 20 provides that there should be special consideration to special interest groups such as marginalised communities. However, this may not be effective as the communities do not actively participate in the negotiations and may not have the technical know-how to negotiate effectively for their value addition.

The MPSC also has provisions for the field development plan (FDP). The FDP is provided for in the Petroleum Act and the MPSC.²⁸¹ The Act requires the contractor to submit the FDP to the Cabinet Secretary, who then forwards it to the National Assembly for scrutiny to ensure that, among other issues, it meets local content requirements. After that, it is submitted to EPRA, the regulator. However, the big question that lingers is whether the regulator and the National Assembly have the needed technical know-how to critically analyse the FDP to ensure that there is a benefit to the local communities in particular and the nationals at large.

As discussed, the FDP is discussed between the government and the IOC without the participation of the community. This goes against the tenets of the localism theory, which argues for community participation in matters that affect them. Again, using the argument advanced by the economic theory of regulation, the national assembly, which enacts laws and represents Kenyan citizens, has the responsibility of reviewing the FDP on local content to ensure that communities benefit.

The MPSC has, in addition, provided for an elaborate dispute resolution mechanism between the government and the IOCs. However, the community is excluded. Moreover, it is not explicit as to where the community should present their grievances. This makes it difficult for the communities to agitate for their interests and goes against legality and access to remedy, one of the tenets of the PANEL principles. The principle argues that communities have a right to be heard when they are aggrieved to access justice and get redress.

5.8.1 Recommendations

The study recommends that the MPSC be designed to take the approach adopted by Canada and Australia. These two jurisdictions use the CDAs that significantly involve the communities. This way, they can negotiate for their interests.

²⁸¹ Section 30 *Petroleum Act* [Act No. 2 of 2019]; Clause 29 Model production sharing contract.

It is proposed that the clarity provided by the Community Land Act be adopted. This Act provides that any investor who wants to invest in any community land must enter into a contract with the community. The agreement explains, among other issues, the nature of the investment and the benefits that the community will derive from it.²⁸² This agreement is approved by the community assembly, thus involving the entire community. The draft local content Bill could be strengthened to ensure that the contracts between investors and the communities are prescribed the same way as they are under the community land Act. The draft regulations and policies can also outline that the Government and the IOCs should consult with the local communities during the negotiations of MPSC as contained in the Petroleum Act. This would ensure that communities can participate and propose provisions that would enhance their socio-economic development through value addition brought by local content.

It is also proposed that community representatives be present in the National assembly when the FDP is analysed. Furthermore, to ensure a proper understanding of the local content requirements by the members of the National Assembly, it would also be prudent that professionals with the technical know-how are present to confirm that the FDP meets the objectives of local content.

The MPSC has a dispute resolution mechanism that excludes the community. Looking at the environment sector, the Environmental Management and Coordination Act (EMCA) provides a public complaints committee where anyone can present their complaints.²⁸³ This Act has a transparent mechanism that is sensitive to communities because they are the ones who are most affected by the activities of IOCs during the extraction and production of oil and gas. Therefore, since the Local content bill is still in draft form, it could be enhanced to ensure a precise grievance handling mechanism available for the communities in case they are aggrieved in the process of LCPs development and implementation that mirrors the EMCA Act.

²⁸² Section 36(1) and 36(2) *Community Land Act* [Act No. 27 of 2016].

²⁸³ Section 32, *Environment Management and Coordination Act* [Act No. 8 of 1999].

CHAPTER SIX: CONCLUSION

The study sought to make a case for developing a local content framework that benefits communities both at the national and community level. The study used three objectives to advance this argument. The first objective analysed the importance of a local content framework with a community perspective. Based on the analysis, it was clear that an efficient LCP with a community dimension ensures that a host state country achieves economic development and socio-economic development for its citizens both at the national and local levels. The second objective evaluated the Kenyan local content legal framework to confirm whether it sufficiently provides for local content that protects the interests of communities where oil and gas extraction occurs. In this regard, the study found that the existing legal framework in Kenya does not sufficiently guarantee this protection. Thus, it recommends the establishment of a robust framework that would also ensure that communities at the local level where extraction takes place benefit from local content. Finally, the third objective analysed best practices that Kenya can adopt to protect local communities where the extraction is taking place for socio-economic development. For example, Kenya can borrow from other jurisdictions like Canada that have provided a specific percentile of benefits that the local community should derive from local content.

The study concludes that although enacting the Petroleum Act 2019 is good progress towards legislating local content, there is a gap in incorporating the community perspective to local content. The need for an effective and efficient local content framework with both the national and local community perspective is thus becoming more and more critical for the oil and gas sector in Kenya. The framework would ensure that host states improve their economies by growing their industries and that communities at the national and local level would benefit from LCPs hence improving their social well-being. These two are the main objectives of implementing LCPs for any country. The perspective of local content both at the national and local community level would thus go a long way in enabling the country to achieve both its developmental goals and sustainable development goals (SDGs), especially SDG 8, SDG9 and SDG10.²⁸⁴

²⁸⁴UN General Assembly, *Transforming our world: the 2030 Agenda for sustainable development*, 21 October 2015, UN Doc. A/RES/70/1, Goals, 8,9,10. SDG 8 promotes sustained, inclusive and sustainable economic growth and full employment and decent work for all; SDG 9 on inclusive and sustained industrialisation and innovation; and SDG 10 on reducing inequalities among people.

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APPENDICES

Appendix A: Similarity Index/Plagiarism Report















Document Information

Analyzed document	KENYAS LEGAL FRAMEWORK FOR LOCAL CONTENT IN OIL AND GAS A CASE FOR A COMMUNITY CENTRED APPROACH.docx (D118472462)
Submitted	2021-11-13 23:05:00
Submitted by	
Submitter email	Rose.Mkalama@strathmore.edu
Similarity	7%
Analysis address	library.strath@analysis.orkund.com

Sources included in the report

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W	URL: https://www.researchgate.net/publication/281259633_Defining_the_Local_in_Local_Content_Requirements_in_the_Oil_and_Gas_and_Mining_Sectors_in_Developing_Countries Fetched: 2021-11-13 23:07:00		6
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Appendix B: Ethical Clearance Confirmation



15th November 2021

Mrs Mkalama Rose,
rose.mkalama@strathmore.edu

Dear Mrs Mkalama,

RE: Kenya's Legal Framework for Local Content in Oil and Gas: A Case for a Community Centred Approach

This is to inform you that SU-IERC has reviewed and **approved** your above SU-master's research proposal. Your application reference number is SU-IERC1215/21. The approval period is 15th November 2021 to 14th November 2022.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Fred Were".

for: Prof Fred Were,
Chairperson; SU-IERC



Final Decision

This document certifies that the study:

\\\"Kenya's Legal Framework for Local Content in oil and Gas: A case for a community centred approach\\\"

Principal Investigator: Mrs. mkalama, rose ndanu

Reference number: SU-IERC1215/21

Was reviewed and received the following status:

\\\"done\\\"

Additional Comments: Final decision: approved

Comments sent:

Reviewer #1:

'recommended for approval'