

LEGAL AND POLICY FRAMEWORK FOR OIL GOVERNANCE IN KENYA

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• Introduction and Context

- The mining sector contributed less than 1% of Kenya's GDP in previous years but with the discovery of oil the industry is projected to contribute 9.8 % according to Deloitte's Economic Outlook in 2012 .

- **Extractive industry outlook**—What does this mean for Kenya

- > Hope & opportunity for socio-economic growth

- > Challenge - “resource curse”

- **A new scramble;** in a New Dawn for Kenya – land grab

- > There is Renewed economic & diplomatic regimentation

- **Implications for democracy/governance**

- > Reversals in governance gains , underhand dealings

- > A lot Legal and policy reversals to align laws, policies and regulations with the new development in the sector.

- > The Devolution process will increase a sense of nativity

- > Human rights violations such as evictions, loss of livelihoods, loss of cultural heritage

- > Elite capture/auctioning communities.

- > Is it for sustainable development? Social/Environmental/Economic and thus the need to define framework for engagement/intervention

The legal framework for mining in Kenya

1. The Constitution of Kenya 2010

- Chapter 5 of the Constitution – deals with Land and Environment.
- The state has obligations in respect of the environment-Art 69 which include
 - **Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.**
 - Encourage public participation in the management, protection and conservation of the environment
 - Establish systems of EIAs and environmental audit.
 - and utilize the environment and natural resources for the **benefit of the people of Kenya- Norway is best in BS**
- Categories of land- Public, private and Community
- Art. 62(f) defines all minerals as belonging to the State-Does this mean that when Minerals are discovered in private/ community land it immediately converts to public?



- Art 40(3) (i) –compensation to be done by the state **promptly and fully** when it deprives the person of property which is for a public purpose or in the **public interest**.
- Article 66(2)- local communities to benefit. constitution to define benefit
- Schedule 4 of the Constitution part 2 (10)
- Community land Bill.- Institutions- Community Land Board and Land Administration Committee,- their roles and functions *vis a vis* that of the NLC
- Rights under this Bill are customary land rights and right to leasehold.
- Does the bill provide clear mechanisms for converting private/ community to land to private?
- Article 71-parliament to ratify a transaction if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource
- Art185 (4)- approve plans for management and exploitation of county

2. The Mining Act Cap. 306

- All mineral exploration, exploitation and trading activities in Kenya are currently regulated under the auspices of this Act.
- This act was enacted in 1940 and it has since been reviewed twice to align it with international mining practices.
- A further review was carried out recently creating **the Mining Bill 2013**
- This Bill provides for **lesser discretionary powers to the licensing authorities**, and hence **provide for greater security of tenure**
- Aims to provide for greater environmental protection, as embodied in Act No. 8 of 1999 (EMCA)
- It creates the office of the **Director of mines** . Its functions include promotion of co-operation amongst state agencies, county governments, the private sector, research bodies, non-governmental organisations and other organisations engaged in mining related programmes.



- **National Mining Corporation**-to engage in mineral prospecting and mining, acquire shares or interest in any firm, engaged in the mining
- ad hoc tribunal to arbitrate on any disputes relating to mineral rights.
- Mineral rights under community land to be granted with consent of the body authorised by law to administer community land(LAC) and the NLC
- S51 training and employment of Kenyan Citizens
- Right to continue to graze livestock and cultivate land- sec133
- Sec 180-court orders to stop operations-made to the Land and Environment court. This can be done by the cabinet sec or any **public officer**



3. Petroleum (Exploration and Production) Act

- It states that all petroleum is vested in the government.
- This is consistent with the Constitution . Article 62(f) states that all minerals and mineral oils shall vest in the national government in trust for the people of Kenya .
- **Powers of the Minister include to** negotiate, enter into and sign petroleum agreements with a contractor and petroleum agreements and may grant non-exclusive exploration permits for purposes of obtaining geological data –section 5(1)(2)
- He also has power to divide Kenya and its continental shelf into blocs
- The Petroleum Act permits the government to conduct petroleum operations either through an oil company established by the government for that purpose, NOCK or through private contractors that are licensed by the government (acting through the Minister of Energy) under petroleum agreements



• **Petroleum (Exploration and Production) Act.....continued**

- Model form petroleum agreement is scheduled to regulations is a form of production sharing contract
- The Ministry of Energy administers the application process relating to the entry into a PSC. This can be by way of **competitive bidding process** or through **bilateral negotiations**- under the regulations- Section 31 (4)(b)
- Act empowers the Minister to make regulations with respect to, inter alia, the conduct of petroleum operations, conservation of petroleum resources and measures relating to safety , environmental protection and the avoidance of wastes, pollution and accidents-section 26.



4. ENERGY ACT Chapter 314 Laws of Kenya.

- It does not provide for upstream activities but rather provides for downstream petroleum operations.- licensing,
- Institutions include **Energy Regulatory Commission (ERC)** regulate importation, exportation, generation, transmission, distribution, supply and use of electrical, petroleum and other forms of energy.
- It also has power to issue, modify, renew or revoke licenses and permits for all undertakings and activities in the energy sector.
- **National Oil Corporation of Kenya(NOCK)**-to facilitate and participate in the exploration for petroleum products but currently it is involved in a lot of downstream activities.
- There is a draft Energy Bill which is set to be discussed in Parliament this November, 2013. It aims to ensure that oil revenue is equitably shared between the national government, community government and communities where oil is found in a fair share formula.
- It is meant to repeal both the Petroleum Act and Energy Act.



Policy Foundations for Oil Extraction

National Energy Policy –Sessional paper 4 of 2004- Main

- Objective is to ensure affordable, sustainable and reliable supply of energy to meet national and county development needs, while protecting and conserving the environment.
- Ensure foreign investments in the energy sector have a **minimum of 30% indigenous ownership** as well as provide for the phased transfer of provision of energy services to the Counties in accordance with Article 174 of the Constitution.
- Recognises the role of energy in economic development in attaining Vision 2030 which identifies energy as one of the infrastructure enablers of attaining its social economic pillar.
- Advocates for an open tender system (OTS) in awarding of concession rights and promote through funding, petroleum exploration activities and support private and public investments.
- Inter-ministerial Committee, called **National Fossil Fuels Advisory Committee (NFFAC)**




- Composition shall be drawn from the Ministry in charge of Energy, NOCK, Attorney General, NEMA, KRA, the ministry in charge of mineral resources, ministry of finance, **the Governor** of the concerned county or his representative
- Its mandate shall be to negotiate with investor on the terms of the license of the petroleum exploration, production and development and advise the cabinet secretary on all petroleum exploration matters.
- investors include creating a petroleum **sovereign fund** as well as strengthening monetary and fiscal regimes to maximize the government take on petroleum exploitation while taking into account the investors interests
- Technology transfer and development of **local manpower** including engaging qualified **local personnel as a priority** and support any local investors that have the capacity and interest to participate in and/or undertake petroleum exploration and production.



2. The National Environment Policy

- aims to provide a holistic framework to guide the management of the environment and natural resources in Kenya.
- provides for opportunity to address key challenges facing the environment such as the need to harmonise and align the sectoral laws relating to the environment such as agriculture, beach management, water with EMCA and the Kenyan Constitution.
- **Public participation**, education awareness have been clearly captured under the policy.
- The policy outlines the principles that will guide its implementation key among the **environmental right as enshrined in the Kenyan Constitution (Article 42)** as well the right to development using an ecosystems approach to ensure that all ecosystems are managed in an **integrated** manner while also providing a range of **benefits to people**.
- Articulation of Vision 2030 needs heavy funding, it is therefore important to take in to account the economic value of our oil and to promote good governance, public participation and transparency in the national and county accounting systems. –**Fiscal regime**

3. The National Minerals and Mining Policy

- Aims at creating an overarching framework for managing Kenya's mining that is simple, stable, predictable efficient and unified.
 - Underscores the need to **define the classes of transactions requiring ratification** by parliament in order to ensure the compliance of the regulatory framework with article 71 of the Constitution of Kenya.
 - Recognizes the need to bring into the mainstream the **small scale artisanal mining** sector.
 - Advocates **for equitable benefit sharing** and addresses the issue of intergenerational equity by prescribing various measures aimed at bequeathing future generations with direct and indirect benefits from mineral wealth.
 - promoting mineral processing **value addition** by creating an enabling environment for investment in mineral processing for value addition
 - Kenya Minerals and Mining Authority (KeMMA), Kenya Mining Corporation (KEMCO), Kenya Geological Survey (KGS) and the Mining Dispute Resolution Tribunal (MDRT) to improve efficiency and effectiveness in mineral resources management and policy implementation
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Oil and Conflict nexus in Turkana

- Historical grievances;
- Scramble by elites to capture land in oil districts;
- Availability of small arms and light weapons;
- Governance challenge/ Regime and its inability to carry forward reforms and legislation- capacity of legislators need to be built.
- High levels of corruption in Government and the corruptive nature of oil resource;
- Trans boundary nature of oil- Turkana/ Ethiopia basin
- Regional fragility,
- Government hostility towards CSOs Issues
- Cultural barriers to development.



Policy recommendations and opportunities for counties

- Government should establish an equitable and transparent benefit-sharing Mechanism; PSCs to be made open to the public.
- Establish a joint government-civil society and Parliamentary petroleum oversight committee to control and monitor oil revenues;
- Institutionalize the principle of “Publish What You Pay” and Publish “What You Earn” as a mechanism to strengthen transparency and control of oil revenues;
- Tap on the opportunities presented by the Laws eg NFFAC
- Establish a policy on Corporate Social Responsibility of oil companies
- Engendering oil industry activities;
- Oil exploration and production needs to be pursued with in the framework of East African Community
- Independent policy ideas in policy making process which is open to citizen’s participation.



➤ Constitution Article 62(1)(a) read together with Article 62(2)(a) vests government land that is not leased to anyone, and is not the subject of any letter of allotment in the county government in trust for the people resident in the county while granting the management and administration of such land to the National Land Commission NLC- need for county government to engage the NLC



THANK YOU!

