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# GETTING IT RIGHT: TOWARDS SOCIALLY SUSTAINABLE EXPLOITATION OF THE EXTRACTIVE INDUSTRY IN KENYA

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Collins Odote\*

Smith Otieno\*\*

*...a transparent and inclusive mining sector that is environmentally and socially responsible...which provides lasting benefits to the community and pursues an integrated view of the rights of various stakeholders (emphasis supplied)...is essential to addressing the adverse impacts of the mining sector and to avoid conflicts induced in mineral exploitation. Public participation in assessing the environmental and social impacts and the enforcement of impact assessment requirements is important in tackling these challenges.*

-The Africa Mining Vision<sup>1</sup>

## ABSTRACT

*In the quest to enhance their material self-sufficiency, nations are supposed to take cognizance of the implications of their endeavours. This therefore calls for the adoption of sustainability attitudes by all the players in the various sectors of the economy. Being one of the drivers of the Kenyan economy, the petroleum and natural gas industry is at the opportune moment to churn a path for a successful future. The adoption of sustainable practices by this industry at its tender age will see to it that its future won't be coupled with the problems that have arisen in the past in other countries where petroleum and natural gas discoveries have been made. Social sustainability is particularly important among the other pillars of sustainability and the other pillars are predicated upon it. The petroleum and natural gas industry therefore has to take this into consideration in order to avert conflicts in future with communities amongst whom they operate.*

## I. INTRODUCTION

Recent discovery of oil in Kenya has put the country on the global map when it comes to resource-endowed countries. The expectation is that Kenya is poised to join the list of oil producing countries. These discoveries originally in Turkana in 2012 occurred at a time when the global oil prices were high and the returns from oil was also high. Although the global crude oil prices have since gone down to as low as 48 US dollars per barrel, these are expected to be temporary. In the mid to long-term, therefore the discoveries still elicit excitement and prospects for high economic returns and thus positive implications for the Kenyan economy.

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\* Senior Lecturer, Centre for Advanced Studies in Environmental Law and Policy, University of Nairobi.

\*\* LL.B Candidate, School of Law, University of Nairobi.

1 African Union, Africa Mining Vision, February 2009, Quoted in 'Mining in Africa: Managing the Impacts', available at <[http://www.africaminingvision.org/amv\\_resources/ISGbulletin5.pdf](http://www.africaminingvision.org/amv_resources/ISGbulletin5.pdf)> accessed 20 August 2014.

The discoveries have, however been accompanied by other challenges. These arise from the global discourse as to whether oil discoveries are a blessing or a curse. While the arguments in favour of blessing rely on the returns from the industry, those against and in favour of such discoveries being more of a curse rely on evidence from many countries where those discoveries have been accompanied by conflict, human rights violations and distortion of the economy. This latter phenomenon is referred to as the *dutch disease*. The process results to a situation where a boom in a natural resource sector<sup>2</sup> results in reduction in growth of other sectors.

As a result of the phenomenon of the resource curse or the *dutch disease*, discoveries of such natural resources as oil is normally accompanied by a broad array of socio-economic difficulties. The origin of the term was the economic consequences of the large natural gas find in the Netherlands in the late 1950s, and the resulting positive balance of trade, the strengthening of the currency and rising wages. The strengthening of the currency resulted in reduced the competitiveness of non-natural gas exports on international markets, and thus reduced the volume of exports of these goods, while at the same time leading to increased imports due to there being cheaper. In other times such discoveries have resulted in other ills like rent-seeking behaviour, fluctuations in the economy due to overreliance on oil revenues, weakening of institutions and increased non-accountability of the leadership.

Amidst this, there have been calls for a need to embrace sustainable attitudes in seeking to exploit these resources. This has come against a backdrop of the need to ensure maximum economic growth and development, while paying attention of not just the environmental but also social implications of the exploitation of the extractive industry. Against this background, this paper assesses the social implications of exploitation of oil and natural gas in Kenya. A case built for a socially sustainable petroleum and natural gas industry in Kenya. The paper cogently canvasses the issues in four interrelated parts. The first part lays a basis to the discussions by looking at the theoretical framework and some of the nomenclature that have been used to describe the human situation. Part two examines the concept of sustainability and more specifically, social sustainability. The third and penultimate section looks at the extractive industry in Kenya and social challenges emanating especially from the petroleum and natural gas industry.

The concluding part will attempt to build a case for a socially sustainable petroleum and natural gas industry in Kenya. It will be argued that social sustainability is ineluctably necessary in this industry if there is to be avoidance of conflicts with the communities amongst whom exploration and extraction activities are taking place.

## II. BACKGROUND: LAYING A BASIS

Past experiences in several countries have shown that among the three pillars of sustainability, social sustainability is very essential in ensuring that a project is acceptable among members of the group to be affected by such projects. Social sustainability thus

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2 See Ismail Kareem, 'The Structural Manifestation of the 'Dutch Disease': Experience from Oil Exporting Countries' IMF Working Paper, WP/10/103, <<http://www.resourcegovernance.org/sites/default/files/Dutch%20Disease%20%28IMF%29%20Newest%20Version.pdf>> accessed 20 August 2014.

forms an important pillar in the quest for sustainability generally. Issues on sustainability have become matters of public concern and corporates have sought to ensure that they conduct their activities in a socially responsible manner.

Societies exist around material objects and process and the stability of a society will thus be hinged on the nature of the relationships between the society and these material objects. Law has in the past been seen to be an important tool in guiding the manner in which these societies relate with the material objects within their reach. Law has therefore been seen to be a reflection of the existing relationships and also as a tool for the shaping of these relationships.

Law has in the past played the role of shaping such relationships and it has particularly put in place measures on how various entities are to interact with resources which are available for their use. These entities have in the past been required by law to ensure that their activities are aligned with the provisions of the law and there have been punitive measures to ensure compliance. Overtime, many entities have adopted voluntary measures aligned towards ensuring that their activities do not result to negative impacts on the society, economy or the environments in which they operate.

The realization by these entities that there is a need to ensure that their activities are acceptable to the communities to whom these activities are to be undertaken has brought into place social sustainability standards to be adopted by these entities. Citizens have also joined efforts in pushing for socially sustainable activities by these entities. This can be attributed to the fact that sustainability is a concept that is germane to many African societies and thus they can easily relate well with this concept.

### **III. THEORETICAL FRAMEWORK**

The Constitution of Kenya mandates Parliament to enact legislation to ensure that investments in property benefit local communities and their economies.<sup>3</sup> This directive is out of the realization that investments at the local level have the potential but does not always translate to tangible benefits to local communities. This is at the heart of push and pull between investors and community members, who invariably only share in the negative impacts of any investments in their localities but rarely get meaningful employment, social investments or other direct benefits from such investments.

While the need for the investments to benefit communities is accepted, the challenge is always the modalities for ensuring the desires are actualized. In the Kenyan context this becomes even more urgent with the discoveries of oil in rural parts of Kenya. The discussions normally take two approaches. On the one hand is the process of making decisions and on the other hand the dividends from the investments. One avenue for ensuring that there is involvement is through including community participation in the development projects. Participation generally is difficult to define, so is the term community. It follows, therefore, that defining a term that comprises these two difficult terminologies is not easy.

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3 Constitution of Kenya, 2010 , Article 66 (2).

Despite the difficulty in definition, the World Bank has proposed a definition of community participation as “an active process by which beneficiary/client groups influence the direction and execution of a development project with a view to enhancing their well-being in terms of income, personal growth, self-reliance or other values they cherish.”<sup>4</sup>

Despite its stated benefits, there is also opposition to participation of communities in development projects. Arguments against participation range from delays and expense, community dynamics and lack of appreciation of the technical aspects of project implementation. However despite the obstacles to and arguments against community participation, the concept still has a lot of support since, “development in the full sense of the word is not possible without appropriate community participation.”<sup>5</sup>

There are several theories that have been propounded to justify the need to develop good relationships between the corporate entities and the communities among whom they operate. One of the theories is the legitimacy theory. Proponents of this theory argue that the actions of an entity are supposed to be desirable or appropriate within particular socially constructed systems of norms, values, beliefs and expectations.<sup>6</sup> Corporates are therefore supposed to be seen to contribute towards causes that are of benefit to the community in which they operate. This can be related to a social contract between the community and the corporates where the corporate is allowed to operate among the community and in return the community will benefit from the activities of the corporate entity.

Once this legitimacy has been gained, the corporates are usually in a better position to maintain long-term relationships with the community. Corporates are therefore supposed to strive to ensure that there is an existing congruence between their activities and the norms in the wider society in which they operate. Legitimacy is therefore not a characteristic of the corporation, but a measure of societal perceptions of corporate behaviour.<sup>7</sup>

The society always expects the corporates operating amongst them to behave in a certain way. The activities of these corporates will lose legitimacy when they are not in accordance with the expectations of the community. Low legitimacy will have particularly dire consequences for an organization, which could ultimately lead to forfeiture of their right to operate.<sup>8</sup> A corporate is therefore supposed to establish systems to monitor its legitimacy levels among the community.

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4 Paul Samuel, *Community Participation in Development Projects: The World Bank Experience*, World Bank Discussions Papers Number 6, 1987, 2 <[http://www.wds.worldbank.org/ser/let/WDSContentServer/WDSP/IB/1999/09/21/000178830\\_98101903572729/Rendered/PDF/multi\\_page.pdf](http://www.wds.worldbank.org/ser/let/WDSContentServer/WDSP/IB/1999/09/21/000178830_98101903572729/Rendered/PDF/multi_page.pdf)> accessed 20 August 2014.

5 L Botes and D Rensburg, ‘Community Participation in Development: Nine Plagues and Twelve Commandments’ (2000)35(1) *Community Development Journal* 58.

6 MC Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’(1995) 4 (3) *Academy of Management Review*, 571-610.

7 *ibid.*

8 Matthew Tilling, ‘Refinements to Legitimacy Theory in Social and Environmental Accounting’ <<http://www.flinders.edu.au/sabs/business-files/research/papers/2004/04-6.pdf>> accessed 24 July 2014.

Various stages of legitimacy exist and a corporate entity can be in any of the four phases with regard to its legitimacy.<sup>9</sup> The first phase entails the corporate entity establishing legitimacy within the community. This mostly happens during the early stages of corporate entity's inception or entry into a community to engage with a project. The corporate entity is therefore required to show to the community that it has the relevant competence to carry out the activities it is meant to.

The second phase entails maintaining legitimacy. The corporate is in this case required to ensure that the activities that it undertakes assures the community of the corporate's legitimacy. The potential challenges to be faced by the corporate are henceforth to be foreseen and dealt with. The corporate should also recognize that expectations by members of the community are dynamic and change over time and it should also align its policies towards this. This requires constant engagement and levelling of expectations between the community and the corporation. The third phase entails the corporate extending legitimacy. This manifests itself where an already established corporate extends the goodwill it enjoys elsewhere to a new community. The last phase entails defending legitimacy and this is where a corporate entity attempts to counter a threat directed towards its legitimacy.

The other theory that has been used is the psychological contract theory. This theory suggests that corporates and communities have implicit expectations for each other which remains beneath the surface and is dynamic in character.<sup>10</sup> Corporates are therefore required to recognize the existence of these expectations and align their activities towards meeting these expectations.

In carrying out their functions, most corporate entities usually work towards a certain end. This end, in most cases, usually seeks for the expansion of opportunities and the betterment of human life. Various nomenclatures have been advanced for this "end" and much has been discussed concerning the same. In undertaking the work there are varying ideas of what the desire end is. While for some the end is increased development and profit maximization, there has emerged consensus that in the development process, benefits must transcend the economic realm and consider both social and environmental implications, hence the concept of sustainable development.

#### **IV. THE DEVELOPMENT TRAJECTORY**

Many countries, especially in the developing world continue to face many challenges in the quest to develop. The World Bank annually publishes the *World Development Report*, which explores a particular theme in the process of development. One of the most relevant reports for this article is the 1991 report, titled *The Challenge of Development*.<sup>11</sup> The report made the point that development remained the most important challenge facing the entire global, with at least 20% of the world's population living below one dollar

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9 *ibid.* 6.

10 Uwafiokun Idemudia, 'Community Perceptions and Expectations: Reinventing the Wheels of Corporate Social Responsibility Practices in the Nigerian Oil Industry' <<http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8594.2007.00301.x/full>> accessed 24 July 2014.

11 World Bank, *World Development Report 1991: The Challenge of Development* (New York, Oxford University Press 1991).

a day, the standard categorization of poor people. Despite efforts, many countries still have not made sufficient progress in their development path. Many of these countries have thus continued to find themselves vulnerable economically and this has had global consequences.

Mass poverty in underdeveloped and developing new states has been acknowledged to be a global phenomenon.<sup>12</sup> These States continue to struggle to establish the necessary structures and also getting the requisite manpower to drive their economies. The pace of progress in these countries has thus been slow with resultant increasing poverty levels. The need to address levels of development has led to the universal commitment to global development due to the realization that this is a shared responsibility of everybody.<sup>13</sup> However in the process of realizing this commitment there is debate as to what type of development is necessary. The 1991 World Development report noted that while the future of developing countries lies in their hands, there is need to ensure that the policies and institutions put in place to spur development ensure that the market has space but that the market is regulated.<sup>14</sup> This has led to the emergence of several concepts in the development jargon.

## **A. ECONOMIC GROWTH**

One of the core tenets of development has in the past been economic growth. Efforts have been made to ensure that opportunities for income generation are generated for individuals and this is meant to further the goal of increasing the levels of development.

Economic growth is to be distinguished from economic development. While the latter relates to the quantitative change in what or how goods and services are produced through shifts in resource use, production methods, workforce skills, technology, information, or financial arrangements,<sup>15</sup> on the other hand, the definition of economic growth as offered by Professor Kuznets refers to sustained increase in its population and product per capita.<sup>16</sup> Growth in this sense is seen to be a quantitative concept. In this sense therefore, economic growth is required to see to it that the welfare of human beings is improved and by this, human satisfaction is to be met.

The concept of economic growth should thus be seen to reflect on the variables of economic development. Such variables have in the recent past been seen to include human welfare. The concept of economic growth therefore necessitates the introduction of appropriate measures to ensure that the change in human welfare is correctly measured.

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12 TN Singh, 'Law's Concern for the Backward and Poor: An Indian Perspective' in Yash Vyas et al (eds), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

13 Rajeev Dhavan, 'Law as Concern: Reflecting on Law and Development', in Yash Vyas (eds), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

14 World Bank (n 11) 1.

15 Matt Kane 'Public-Sector Economic Development: Concepts and Approaches' <<http://www2.econ.iastate.edu/classes/crp274/swenson/CRP523/Readings/econdevelopmentmattkane.pdf>> accessed 20 August 2014.

16 S. Kunets, 'Towards a Theory of Economic Growth', in R. Lekachman (ed), *National Policy for Economic Welfare at Home and Abroad* (Garden City, Doubleday and Co 1995) 16.

## B. Development

Many scholars have in the past debated on the meaning to be attached to the idea of 'development' which the nineteenth century scholars have referred to as 'progress'.<sup>17</sup> The definition of development remains contentious as various concepts and definitions have sprung up over time. Development consequently should be assessed within its historical perspective. Development has also been perceived by others as a social condition.<sup>18</sup> In this sense, development is experienced by human beings in their daily existence and endeavours. The social existence of human beings changes over time either due to natural events or through man influencing their social conditions.

The classical and neo-classical conception of development was seen to particularly equate development with economic growth and this was measured in the form of increase in productivity.<sup>19</sup> The level of productivity in a given society was thus used as a yardstick of their development. Industrial revolution, which increased the rates of productivity exponentially, was thus a turning point in development. The focus during the period of the industrial revolution was the maximization of income raised through exploitation of poor peasants. Moreover, the emphasis during this period was on increasing the capacity of states to manufacture finished goods.

A new approach to this concept was later developed in the late nineteen sixties. This new approach sought to depart from the purely economic connotation of development that had been espoused. The United Nations was responsible for the development of this concept. This was through the resolution adopted by UNESCO in 1970 which espoused the idea that:

"The concept of development should include economic and social factors as well as the moral and cultural values on which depend the full development of the human personality and dignity of man in the society...Not only is man at the origin of development, not only is he its instrument and beneficiary, but above all he must be regarded as its justification and its ends."<sup>20</sup>

This new concept therefore looked at development as that which would lead to the transformation of man in totality and not only in the economic sense. These transformations were to result into the change in the nature of man socially, economically, politically and culturally. These would further lead to a wider social transformation which will be evident by the assumption of new and better qualities by these societies. This definition has also been adopted by donors and international development agencies which seek to reduce the rates of poverty.

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17 Kitching Gavin, *Development and Underdevelopment in Historical Perspective: Populism, Nationalism and Industrialization* (Routledge, London 1989) quoted in Okech-Owiti 'Law, Ideology and Development: Dialectics or Electicism at Play?' in Yash Vyas (ed), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

18 Okech-Owiti, 'Law, Ideology and Development: Dialectics or Electicism at Play?' in Yash Vyas (eds), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

19 *ibid.* 18.

20 See <<http://unesdoc.unesco.org/images/0011/001140/114046E.pdf>> accessed 20 August 2014.

The common theme that cuts across these various conceptions of development is the idea of 'change'. Development is thus measured in terms of the alleviation of the human condition. It entails the activities pursued by man towards realizing good change so as to improve their conditions. according to Amartya Sen development alleviates the human condition by increasing the scope of freedoms to be enjoyed by them, it ensures that the 'capabilities' of a person are expanded such that they will lead the kind of lives that they value and have reason to value.<sup>21</sup>

Sen has listed the freedoms that result from development as;<sup>22</sup>

- Political freedoms e.g. civil rights and participative freedoms
- Economic facilities, this entails the ability of a person to trade of their goods and services
- Social opportunities
- Transparency guarantees in the public bodies
- Protective security in the form of maintenance of law and order

It has thus been realised that the preoccupation with defining development through the use of criteria such as gross domestic product, per capita income or other such measures has had the effect of de-emphasizing the social, cultural, democratic and human rights aspects of personal development and human dignity.<sup>23</sup> Furthermore, the concept of development has been criticised by postmodernism theorists who contend that development is not concerned with prosperity of human beings but sought to establish control over them. This, it has been argued, has been done in many ways an example being the manner in which development was preoccupied with drawing citizens into the formal networks of circulation where they could be taxed hence reinforcing the control the state had over them.<sup>24</sup>

This has thus necessitated the development of a flexible and adaptable definition of development. Such definitions are therefore to put the people at the centre stage when it comes to determining development. This can be seen to be a shift from concentrating on the macro to focusing on the level. The end result is a focus on a multidimensional approach to defining and achieving development in a society.

In adopting this school of thought, two approaches towards development are identified. One seeks to ensure the elimination of poverty and the other looks at the long term economic and social development.<sup>25</sup> The former approach looks at the situation in the developing countries and focus is laid on the challenges experienced in these countries such as poverty and hunger and methods of improving these in the short term are

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21 Amartya Sen, *Development as Freedom* (First Anchor Books 1999).

22 *ibid.* 38.

23 Sammy Alderman, 'Human Rights and Development in the 'New World Order'' in Yash Vyas, *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

24 John Rapley, 'Understanding Development: Theory and Practice in the Third World' (3<sup>rd</sup> edn, Lynne Rienner Publishers 2007).

25 Adam Szirmai, 'The Dynamics of Socio-Economic Development: An Introduction' <[http://assets.cambridge.org/9780521817639/excerpt/9780521817639\\_excerpt.pdf](http://assets.cambridge.org/9780521817639/excerpt/9780521817639_excerpt.pdf)> accessed 18 July 2014.

explored. The latter seeks to get a better understanding of the different factors having long term effects on socio-economic development.

It is noteworthy that these new concepts of development have shifted focus from emphasis on economic development to addressing of social concerns when it comes to development. The realization of economic growth has thus been seen to be sustainable if social concerns are also addressed. Amartya Sen thus writes:

.the ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, 'merely useful and for the sake of something else', for the same reason, economic growth cannot sensibly be treated as an end in itself, development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy.<sup>26</sup>

This has led to the adoption of the concept of the term "human development" so as to take into account the needs of society.

### C. Human Development

The term 'human development' can trace its origins to the year 1990 when the UNDP launched the first *Human Development Report (HDR)*. Over the years, Human Development Reports (HDRs) have been produced by UNDP reflecting Human Development Indices for various countries. The 1990 report set the context of the use of the term and evidenced that the focus would be on people. The opening words of the first chapter of the 1990 report thus read;

People are the real wealth of a nation. The basic objective of development is to create an enabling environment for people to live long, healthy and creative lives. This may appear to be a simple truth. But it is often forgotten in the immediate concern with the accumulation of commodities and financial wealth.<sup>27</sup>

According to this statement, there was consequently a necessity to depart from the classical and neo-classical notions of development whose focus was on economic growth to one much more geared towards the improving the human condition. This can be equated to the resolution adopted by UNESCO in 1970 on the goals the organization was supposed to pursue. Human development has thus been defined by the UNDP as 'a process of enlarging people's choices'.<sup>28</sup> The choices which to be expanded were also outlined in the report.

Human development is thus seen as a process that eventually leads to an outcome. It entails widening the choices that people have and increasing the levels of their achieved well-being.<sup>29</sup> By making people the focus of development efforts, it leads to the

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26 Sen (n 21).

27 United Nations, Human Development Report, 1990.

28 *ibid.*

29 Sabrina Alkire, 'Human Development: Definitions, Critiques, and Related Concepts,' United Nations Development Programmes Human Development Reports Research Paper (June 2010).

enhancement of the range of choice that human beings have. Human development seeks to balance human capabilities with economic, social and political opportunities where they can use those capabilities.

Over the years, the UNDP's definition of human development has evolved and the place of people in the development discourse and process has been reiterated. What has come to be of essence in defining human development is the concept of participation? It has been argued that development loses its meaning once the participation of the people is not embraced. People should thus be allowed to participate in the formulation of policies, priorities and actions, and in the mobilization of resources.<sup>30</sup> The UNDP report for the year 1991 thus called for development of the people, by the people and for the people.

Participation is held as being instrumental in ensuring people's choices are widened and that available opportunities are also enlarged. In their report of the year 2004, the UNDP stated that the role of development is to enlarge human freedom. This is in sync with Amartya Sen's arguments that development should expand the real freedoms that people enjoy.<sup>31</sup> The focus is on ensuring that the development process is democratic. This 'democratic view' of human development is geared towards enabling people to have an influence on the experiences that shape their lives.

When looking at participation, the questions that one seeks to ask are; what kind of participation is under consideration? This can be either participation in decision-making, implementation or participation in the benefits; who are the people participating? Lastly; how is participation occurring? This entails looking at the basis of participation, the form of participation and the effect of participation.<sup>32</sup> This principle can be incorporated through people participating in the decision making process, the implementation of these decisions and their monitoring and adjustment to improve outcomes where necessary.<sup>33</sup>

From the foregoing, democratic development therefore calls for a situation where there is a development of the available human resources. This is to be done through the continuous improvement of the means of production and in this case, living labour. This view of human development also calls for situations where the various benefits arising from growth are able to reflect in the lives of the people.<sup>34</sup> The products of labour are thus to be distributed in the society. Further, there should be reward systems for those who contribute to production. Participation is at the core of ensuring this is realized.

From the sets of definitions propounded for 'human development' various variables which constitute human development can be derived. The HDR adopted in 1990 came up with a Human Development Index which contains three basic dimensions of human development; the dimension of a long, healthy life; the knowledge dimension

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30 Singh (n 12) 19.

31 Sen (n 21) 3.

32 Ondotimi Songi, 'Resource Control, Community Participation and Nigeria's Petroleum Industry Bill' <<http://www.eisourcebook.org/cms/Nov%202013/Nigeria,%20Resource%20Control,%20Community%20Participation%20&%20the%20PIB.pdf>> accessed 24 July 2014.

33 'Human Development: Definition, Concept and Larger Context' <<http://www.arab-hdr.org/publications/contents/2002/ch1-e.pdf>> accessed 19 August 2014.

34 *ibid.* 16.

.and the dimension on living standards. Various writers have also sought to expand on the range of variables by adding more dimensions. Sen for example has supported the position that there is no 'fixed' list of dimensions of human development.<sup>35</sup> The range of possible dimensions that have been identified include; health and life, education, decent standard of living, political freedom and process freedoms, creativity and productivity, environment, social and relational and lastly culture and arts.<sup>36</sup>

In looking at human development, one cannot overlook the concept of freedom. Freedom is created where human capabilities have been enhanced through human development. Different categories of freedom thus emanate once human development has been attained. One such freedom is the freedom of economic facilities. This freedom seeks to ensure that ways are devised to ensure that economies function to generate income opportunities and promote distribution of wealth.<sup>37</sup> Closely related to this is the freedom of social opportunities which entail the expansion of the space for education and health care. Sen argues that development as freedom results in human beings being able to lead lives which are richer in description.<sup>38</sup>

The recent past has seen the rise of a new concept, the concept of sustainable development. Sustainable development has in the past been viewed by many people as a "soft" law but this notion has been abandoned by many who now realize that sustainable development is core in all human activities. Consensus is slowly emerging that in the process of development what is key is to ensure sustainability. This consensus has even led to the recent efforts to develop the Sustainable Development Goals by the UN as a successor to the Millennium Development Goals.

#### **D. The Concept of Sustainable Development**

Human history has revealed the need to ensure that the activities of human beings are carried out in a manner that ensures sustainability. This has necessitated the adoption of the concept of sustainable development, a concept that mainly originated in the environmental field but has in the recent past been seen to be important in a wide array of fields.

The genesis to the concept was the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden. The outcome of that conference was disagreement between developing and developed countries on how to address the global environmental challenges facing the world. In response to the outcome of this conference, the United Nations in 1983 established the World Commission on Environment and Development (WCED) as an independent body to address global environmental problems. The Commission finalized its work in 1987 and published its report, *Our Common Future*, commonly referred to as *The Brundtland Report*.<sup>39</sup>

35 Amartya Sen, *Dialogue Capabilities, Lists, and Public Reason: Continuing the Conversation*, Feminist Economics.

36 Sen (n 21) 15.

37 Szirmai (n 25) 19.

38 Amartya Sen, 'The Concept of Development', In H Chenery and TN Srinivasan (eds), *Handbook of Development Economics I* (Elsevier Science Publishers 1988).

39 World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press 1987).

The report sets out a programme for integrating environmental concerns with economic goals by governments and the private sector at international, national and local levels.<sup>40</sup> It argued that reconciling the development focus of the developing world and the environmental concerns of the developed world was not only possible but also imperative. In the reports proposals, the concept of sustainable development should act as the basis for striking a balance between these two approaches and sustainable development as “*development that meets the needs of the present without compromising the ability of the future generations to meet their own needs*”.<sup>41</sup> The key aspects that emanate from this definition are; the need to ensure that human needs are met in a manner that does not affect the ability of future generations to meet their needs.

The Rio Declaration<sup>42</sup> also provides a definition for sustainable development and both the substantive and procedural aspects of sustainable development have been dealt with here. The substantive aspects of sustainable development listed are; intergenerational equity; the integration of environmental protection into the development process; intragenerational equity and poverty alleviation; particular attention for countries with special development and environment needs; the reduction of unsustainable consumption and production and population reductions; and effective environmental legislation.<sup>43</sup> On the other hand, the procedural aspects are; broad public participation and access to information and judicial review; use of precaution where there are threats of serious or irreversible damage; internalization of costs; environmental impact assessment; notification and consultation with the affected States and the involvement of major groups.<sup>44</sup>

The socio-political aspect of sustainable development necessitates that there is economic and social development. This is a departure from the traditional conception of sustainable development as an environmental concept. This has therefore necessitated the appreciation of the three pillars of sustainability; environmental sustainability, economic sustainability and social sustainability which have been postulated by Scholars like Strange and Bayley.<sup>45</sup>

Environmental sustainability entails the use of resources in a manner that ensures that the exploitation of resources is only for those necessary to meet the ends sought without depleting the resources. This enables human beings to meet their needs without exceeding the carrying capacity of supporting ecosystems to continue regenerating the services necessary to meet those needs.<sup>46</sup> This led to the development of global efforts to ensure the conservation of the environment.

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40 BJ Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific,' (2005) 9 (2 and 3) *Asia Pacific Journal of Environmental Law* 109-211, 117.

41 *ibid.*

42 *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development* (1992) UN Doc. A/CONF.151/6/Rev.1.

43 *ibid.*

44 *ibid.*

45 T Strange and A Bayley, *Sustainable Development: Linking Economy, Society, Environment* (OECD 2008).

46 R Yadav and GS Pathak, 'Environmental Sustainability Through Green Banking: A Study on Private and Public Sector Banks in India,' <<http://www.ssrn.com/link/OIDA-Int-Journal-Sustainable-Dev.html>> accessed 10 July 2014.

This came as a realization that there was need to ensure that there were global efforts in seeking to ensure that safeguards were put in place to ensure that the environment was conserved. Such efforts culminated in the establishment of the United Nations Environmental Programme (UNEP) through the UNGA Resolution 2997 (XXVII) so as to strengthen and coordinate environmental policy, particularly in developing countries.<sup>47</sup>

Economic sustainability on the other hand relates to ensuring that there is production of goods and services on a periodic basis and ensuring that the levels of debts incurred are manageable. The Rio Declaration<sup>48</sup> has embodied this concept in Principle 5 which relates to the indispensable role of poverty alleviation in achieving sustainable development.

The last pillar is that of social sustainability. This pillar seeks to ensure that there is fairness in distribution and opportunity, adequate provision of social services including health and education, gender equity, and political accountability and participation.<sup>49</sup> This pillar is at the core of ensuring that communities benefit from the extractive industry in Kenya. In discussing social sustainability it is necessary to underscore that the concept has been included as part of Kenya's governance framework by dint of the provision of the Constitution adopted in August 2010.

The Constitution includes provisions on principles of governance.<sup>50</sup> These are to guide any entity that is involved in the process of implementing any policy decision in Kenya. One of the principles is that of sustainable development. The implication of this is that the process of exploiting the extractive industry must take into account the requirement of sustainability. For the interests of local communities, this necessitates ensuring that the third limb of sustainability, namely social sustainability is not only adhered to but also realized in practice.

## V. CONCEPTUALIZING SOCIAL SUSTAINABILITY

Including social aspects to the discourse on sustainable development has been late in coming. When originally conceptualized by the Brundtland Commission, sustainable development focused on integrating environmental and developmental imperatives only. However, the concern has been that such an approach is not only narrow but fails to take into account the concerns of those to be affected by the development. Further as argued by UNDP in their annual World Development Reports, development is about people. Consequently in developments efforts a welfare-oriented approach must be embraced. This has also responded to concerns by theorists such as Banerjee who argue that;

Sustainable development, rather than representing a major theoretical breakthrough, is very much subsumed under the dominant economic paradigm. As with development, the meanings, practices and policies of sustainable development continue to be informed by colonial thought,

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47 Marie-Claire Cordonier *et al*, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford University Press 2004).

48 Rio Declaration (n 42).

49 Jonathan M Harris, 'Sustainability and Sustainable Development' <<http://isecoeco.org/pdf/susdev.pdf>> accessed 24 June 2014.

50 Constitution of Kenya 2010, Article 10.

resulting in the disempowerment of the majority of the world's populations, especially rural populations in the Third World. Discourses of sustainable development are also based on a unitary system of knowledge and, despite its claims of accepting plurality; there is a danger of marginalizing or co-opting traditional knowledge to the detriment of communities who depend on the land for their survival.<sup>51</sup>

Various authors have thus sought to define social sustainability as a key aspect of sustainable development, one that is geared towards ameliorating the conditions of human beings as a fundamental component of the development process. One of the definitions that has been postulated is that social sustainability is a life-enhancing condition within communities, and a process within communities that can achieve that condition.<sup>52</sup> Various aspects of social sustainability have also been elucidated by other authors. Sachs has identified the constituent elements of sustainable development to include social homogeneity, equitable incomes and access to goods, services and employment.<sup>53</sup> Chiu on the other hand identifies a tripartite approach to social sustainability based on conceptualizations of social limits, ecological limits and equality.<sup>54</sup>

The key indicators of social sustainability include equity in access to key services such as health, education and housing; equity between generations, which imputes a responsibility on the current generation to use resources in a manner that won't compromise the way the future generations enjoy the resources; a system of cultural relations in which the positive aspects of disparate cultures are valued and protected, and in which cultural integration is supported and promoted when it is desired by individuals and groups; the widespread political participation of the populace especially in the local affairs; an established system of transmitting awareness of social sustainability from one generation to another; mechanisms for a community to fulfil its own needs where possible through community action and lastly mechanisms for political advocacy to meet needs that cannot be met by community action.<sup>55</sup>

Among the indicators discussed above, equity transcends the rest. Equity, as an indicator of social sustainability calls for the distribution of opportunities and outcomes in a manner that is fair among the members in a society, with particular to the needs of the poor and the most vulnerable in the society. This calls for a situation where all citizens, regardless of gender, should have an equal opportunity to both survive and fulfil their

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51 Bobby Banerjee, 'Who Sustains Whose Development? Sustainable Development and The Reinvention of Nature' (2003) 24 (2) *Organizational Studies*, 143-180.

52 Stephen McKenzie, 'Social Sustainability: Towards Some Definitions', Hawke Research Institute Working Paper Series No.27 <<https://atn.edu.au/Documents/EASS/HRI/working-papers/wp27.pdf>> accessed 19 August 2014.

53 I Sachs, 'Social Sustainability and Whole Development' in Becker, E Jahn (eds), *Sustainability and the Social Sciences* (New York, Zed Books and UNESCO) 25-36.

54 R Chiu, *Social Equity in Housing in the Hong Kong Special Administrative Region: A Social Sustainability Perspective*, *Sustainable Development* 10(3), 155-162.

55 McKenzie (n 52) 12.

development potentials.<sup>56</sup> Efforts have been taken at the global level to provide for a social sustainability attitude. One such effort was the adoption of Agenda 21<sup>57</sup> at the United Nations Conference on Environment and Development.

Agenda 21 is a programme to support sustainable development in all countries. It comprises four sections one of which is entitled "Social and Economic Dimensions". This section contains chapters dealing with such issues as elimination of human poverty, human health and human settlement. Under the section on "Strengthening the Role of Major Groups" with the role of such groups as women, children, youth and indigenous people in achieving sustainable development is articulated. The report underscores that social issues are at the centre of and in indispensable component of sustainable development.

From the foregoing, it can be seen that the adoption of a socially sustainable regime in the quest for development is very essential. It is thus crucial that such activities undertaken towards economic development should lead to social progression. As Kenya gears to move to the production stage in its extractive industry, it is important that it does not just focus on economic development but instead addresses the imperatives of sustainable development as directed by Article 10 of the Constitution. This will help bridge the divide between investors and local communities, a task which is only possible if the production and exploitation deliver on the social aspect of the sustainability equation.

## VI. THE EXTRACTIVE INDUSTRY IN KENYA

Extractive industries play a major role in the development of the economies of various countries, including Kenya. Kenya has experienced a renewed interest in the Oil and Gas Sector. This is attributed to the discovery of commercially viable discoveries of oil in the Turkana region in early 2012 and offshore gas in late 2012 as well as the accompanying potential for economically transformative petroleum finds.

The discoveries have moved the debate on the role of the oil and extractive sector in the country's socio-economic development to the centre stage. The government is in fact strategically placing the extractive sector especially oil and mining as the engines of socio-economic growth towards the achievement of its long-term development programme as captured in Vision 2030.

Oil exploration activities in Kenya began in the 1950s, with the drilling of the first well occurring in the 1960s. But until recently although some of these wells encountered oil and gas traces, none of them had any commercial deposits. These works were undertaken under a royalty based licensing system and have occurred in accordance with the Mining Act<sup>58</sup> of 1940. It was not until 1984 that the Petroleum Exploration and Production Act,<sup>59</sup> Cap 308, was enacted to govern petroleum exploration and improve

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56 Kevin Murphy, 'The Social Pillar of Sustainable Development: A Literature Review and Framework for Policy Analysis' <[http://sspp.proquest.com/static\\_content/vol8iss1/1008-041.murphy.pdf](http://sspp.proquest.com/static_content/vol8iss1/1008-041.murphy.pdf)> accessed 19 August 2014.

57 UNCED, Agenda 21 (1992) UN Doc. A/CONF.151/26/Rev.1.

58 Chapter 306, Laws of Kenya.

59 Chapter 308, Laws of Kenya.

incentives to companies involved in exploration in Kenya. Significantly in the 1990s there were low exploration activities mainly attributed to depressed international crude oil prices which made it unattractive for prospecting companies to venture into areas perceived to be marginal. Most of the exploration activities undertaken during this period largely consisted of collection and analysis of primary data by National Oil Corporation of Kenya (NOCK). However with the increase in oil crude prices in the early 2000s, exploration by foreign companies increased resulting in the first discoveries in Lokichar in Turkana in 2012.

Despite the discoveries, the existing legal and institutional framework for the extractive industries is still out of tune with modern realities. The Petroleum (Exploration and Production) Act, for example was developed during the period when the main activity sought to be regulated was oil exploration. It may have been appropriate for a nascent petroleum sector but is not capable of addressing the requirements for a full blown extractive sector with its complexities. It does not address such issues as revenue sharing, clear delineation of sector roles and responsibilities, environmental standards, local content, and transparency.<sup>60</sup> The same applies to the regime governing the mining sector, hence the need for the review.

The regulation of the extractive industry has to be undertaken within the context of the Constitution. Article 61 of the Constitution defines oil and minerals as part of public land whose ownership is vested in the people of Kenya to be held on their behalf by the national government. While the position is not supported by the current Mining Act which vests minerals in the Government, the Mining Bill passed by the national assembly in 2014 and currently before the Senate adopts the constitutional position. The Mining Bill 2014 provides that the mineral resources shall be vested on the Government in trust for the people.<sup>61</sup>

The Mining Act and the Environmental Management and Coordination Act (EMCA) have been seen to be the major laws that seek to guide the manner in which mining is done in Kenya. The Mining Act thus vests all mineral resources to the Government and prohibits dealing with minerals without authorization.

For one to be granted licence to carry out mining operations as per the Mining Bill, several pre-conditions are to be met, these include, *inter alia*, proposals on programmes directed towards training Kenyans and providing them with employment, an Environmental Impact Assessment licence and proposals on the manner in which the investor will procure goods and services produced within the specific locality.

Most mining activities result into displacement of people from their homes and farms. Most of this displacement is usually involuntary. This therefore necessitates the payment of compensation to the affected persons. Compensation in itself is usually seen not to be enough in cases of displacement. Involuntary displacement usually has significant adverse socio-economic and environmental impacts, including abandonment of homes

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60 Hunton and Williams, 'Kenya Oil and Gas Sector Development: Review and Update of the Legal, Regulatory and Fiscal Framework' (3 July 2013) <<http://ices.ihubconsulting.org/wp-content/uploads/2014/03/Legal-and-Regulatory-Guidance-3-July-2013-Report.pdf>> accessed 23 July 2014.

61 Mining Bill 2014, Section 6.

and loss of assets and income that cannot usually be quantified in monetary terms.<sup>62</sup> This has led to arguments that in case of displacement the best form of compensation is land to land compensation.

Other social impacts that result from mining activities include; increased poverty through damage to subsistence agriculture, increased internal inequalities within communities between those who benefit directly from the mining activities and those who do not and economic dependency making local communities vulnerable when the mines close or scale down their operations.<sup>63</sup> Mining activities which usually take place among communities usually lead to distortion of the social relations in the communities. This can be attributed to the influx of foreigners within the community resulting to social tensions and dilution of the community's practices and lifestyles.

### **A. Social Challenges in the Extractive Industry in Kenya**

The greatest challenge that bedevils the extractive industry in Kenya is the view by local communities that the industry does not take into account their interests. Instead the process results in the acquisition of their land, invariably either without any compensation, or when compensation is issued the same is not adequate. In addition the operations of the companies engaged as investors in this sector normally lead to environmental degradation, human rights violations and labour disputes. The result is poor relations between local communities and the companies.

Poor relations between members of the community and the investors mainly arise due to inadequate compensation. Compensation and benefit sharing are thorny issues and at the root of either a frosty or harmonious relationship between communities and investors. Part of the trouble arises from the process of negotiating compensation and the value attached to land. Invariably because the decision over the exploitation of extractives is vested in the national government, local communities are in most cases never consulted as part of the negotiation process. Even when they are, there is no consensus on what the compensation is for.

While the communities see the oil, natural gas and minerals as theirs for sitting on their land, the investors proceed on the basis that compensation for the mineral will already have been settled with government. The other point of departure relates to land rights. Land in Kenya has multiple values over and above the economic importance.<sup>64</sup> When compensation is made the non-economic value attached to land is sometimes never considered leading to disenchantment by local communities. The situation is exacerbated by the fact that most of the land in such areas is community land whose protection is hampered by the fact that the country is still yet to enact a Community Land legislation. Communities also see that the companies make huge profits. These companies also do not usually provide the members of the community with financial advice on how they should use the money given to them as compensation leading to misuse of the money and its quick depletion.

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62 Robert Kibugi, 'Mineral Resources and Mining industry in Kenya' in C.O Okidi et al (eds), *Environmental Governance in Kenya: implementing the Framework Law* (E.A.E.P 2008) 361.

63 'Mining in Africa: Managing the Impacts' <[http://www.africaminingvision.org/amv\\_resources/ISGBulletin5.pdf](http://www.africaminingvision.org/amv_resources/ISGBulletin5.pdf)> accessed 19 August 2014.

64 Republic of Kenya, Sessional Paper Number 3 of 2009 on National Land Policy, September, 2009.

The process of compensation sometimes also seen result to erosion of communal values when companies resort to such measures as paying bribes to local leaders to guarantee them “acceptability” in the community. Such benefits as compensation sometimes eventually come at the detriment of deeply held community values.<sup>65</sup> Another Achilles heel in this sector relates to the lack of awareness among the community members on the manner in which the sector operates. Members of the community lack accurate information on the operations and technicalities of the sector leaving them to rely on propaganda. The end result is misinformation, unrealistic expectations and consequently disappointment. This justified the need for greater access to information and the importance of an Access to information law in Kenya so as to operationalise the provisions of Article 35 of the Constitution.

Closely related to this is the issue of the high expectations that the communities usually have from the companies, especially as relates to poverty alleviation and employment. These challenges arise when e the companies ‘import’ manpower in situations where there is shortage of skills. The influx of this specialized labour usually leads to discontent among the communities as has been witnessed particularly in Northern Kenya. One particular occurrence was seen where residents of Turkana South and East districts staged protests for alleged failure by Tullow Oil Company to offer them job opportunities and tenders.<sup>66</sup> Human Rights violation is another concern. There have been cases of human rights violation by the companies, for example abuse by security forces when quelling protests to cases of deaths resulting from the operations of the companies. In one instance, a truck owned by Tullow Oil is reported to have run over a herdsboy in a village called Nakukulas in Turkana County. The driver of the said truck never faced the criminal justice system resulting into tensions in the community.<sup>67</sup>

From the foregoing, it is imperative that the activities of the petroleum and natural gas exploration and extraction companies be modelled in a manner promotes sustainability by addressing the challenges discussed in this section.

## **VII. TOWARDS A SOCIALLY SUSTAINABLE PETROLEUM AND NATURAL GAS INDUSTRY IN KENYA**

Social relations are usually very intricate and as such in dealing with societies, one should take cognizance of the manner in which the society is placed and the needs of that particular society. One should particularly appreciate the relationships between the society and the material objects within the society since such relationships are what determine how stable a society will be.

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65 W Akpan, ‘The Theory and Practice of Corporate Citizenship in Nigeria: A Petroleum Industry Beneficiary Analysis’, Paper Presented at the International Research Symposium on Corporate Citizenship, ‘Is Corporate Citizenship Making a Difference?’ GIMPA, Accra, Ghana, 21-22 November 2006.

66 Lucas Ng’asike, ‘Tullow oil suspends operations over conflict with locals’, *Standard Digital* (Nairobi 28 October 2013) <<http://www.standardmedia.co.ke/business/article/2000096359/tullow-oil-suspends-operations-over-conflict-with-locals>> accessed 20 August 2014.

67 Interview with Ekai Nabenyoy, a youth leader from Turkana County, 20 August 2014.

Sustainable development is a concept that has gained root in many fields and as such it is prudent for the petroleum and natural gas industry in Kenya to take into consideration. Social sustainability, as a pillar of sustainable development is core in seeking to attain both environmental and economic sustainability. It is also at the basis of orderly and mutually beneficially exploitation of the extractive industry. It will guarantee the investors in the extractive sector a conducive environment for their operations and the local communities support. It will also ensure that the extraction process take into account and meaningfully improve the lot of the local community.

In this regard, it is imperative that all the players in the petroleum and natural gas industry in Kenya adopt measures that will ensure that the sector operates in a manner that is socially sustainable and gain acceptability among the communities amongst whom they operate. This requires the understanding of the social impacts, risks and opportunities of projects undertaken. The Constitution, as the supreme law of Kenya, has sought to ensure that there exists a sustainability attitude through the provisions Article 10 which provide for national values and principles of governance. Article 10 (2) (d) has thus provided that one of the national values and principles of governance is sustainable development. As part of the process of operationalising a sustainability culture of public participation becomes quintessential.

Participation at an early stage has the advantage of providing to the stakeholders local knowledge about the area they seek to carry out their operations and in this case information concerning the area of operation and the social concerns in the area is usually conveyed.<sup>68</sup> Participation by members of the community from the earliest stages also ensures that the companies gain legitimacy among the community and helps relieve the tensions that could have developed. Participation also helps to ensure that the members of the community are able to develop realizable expectations since they will be in a position to know the manner in which these companies operate.

For social tensions to be relieved, it is imperative that “just compensation” as stipulated for in Article 40 of the Constitution be provided to those to be affected by compulsory acquisition of their property. This necessitates the adoption of a compensation formula that will take into consideration the unique demands of various communities. Amongst the considerations that should be taken into account is the value of indigenous ecology. Taking this into account will legitimize the company in the eyes of the community as the communities will feel that the companies respect their way of life. By doing this, the companies will acquire the necessary “social licence” to carry out their operations within the community. The payment of just compensation should not in itself be the end; the companies are required to ensure that basic amenities are provided to members of the community in a bid to improve their welfare.

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68 Africa Mining Vision (n 63).

Another consideration is the need to create a framework to cushion the members of the community who rely on the activities of these companies from the effects of the either the completion of or suspension of operations by these companies. The companies should consult with members of the community when seeking to close so that they find a satisfactory manner of cushioning the community from the dependency on the company. The adoption of socially sustainable initiatives by the players in this industry will result to a win-win situation for both the communities and the companies as the communities will benefit from the activities of the companies while the companies will reap from the goodwill it enjoys among the communities in which they operate.