

**A CRITICAL REVIEW OF KENYA'S LEGAL FRAMEWORK ON
TRANSPARENCY AND ACCOUNTABILITY IN OIL EXPLORATION
AND EXTRACTION: AVERTING THE RESOURCE CURSE.**

**SHARON SISIMWO TUGEE
(G62/74976/2014)**

**A PROJECT PAPER SUBMITTED IN PARTIAL FULFILLMENT FOR THE AWARD
OF THE DEGREE OF MASTER OF LAWS**

SCHOOL OF LAW

THE UNIVERSITY OF NAIROBI

2017

DECLARATION

This is my original work and has not been presented for the award of any degree at any other University or educational institution.

Sharon Sisimwo Tugee:

Signature..... Date.....

This project has been submitted for examination with my approval as the University Supervisor.

Mr. L. Obura Aloo:

Signature..... Date.....

The University of Nairobi

ACKNOWLEDGEMENTS

I wish to extend my sincere thanks to God Almighty for opening the door for me to pursue my studies. Secondly, I wish to express my gratitude to my Supervisor, Mr. L. Obura Aloo for his valuable help, guidance and critical suggestions throughout the period of my work.

I have to thank my family, especially my mother Mrs. Margaret Sisimwo Tugee for being a constant source of encouragement throughout this period. I also wish to extend my gratitude to friends and family who were also a source of encouragement throughout my studies.

I am indebted to the Hon. Mr. Justice J. L. Onguto for his great assistance.

DEDICATION

This thesis is dedicated to my mother, Mrs. Margaret Sisimwo Tugee and my father, the late Dr. Roderick Kubor Ole Tugee for instilling in me discipline and the importance of education. Thank you.

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ACRONYMS AND ABBREVIATIONS

- EITI - Extractive Industries Transparency Initiative
IMF - International Monetary Fund
IFC - International Finance Corporation

LIST OF STATUTES

KENYA

1. The Constitution of Kenya, 2010.
2. 1969 Kenya Constitution (as amended to 1997)
3. Petroleum (Exploration and Production) Act, Chapter 308 of the Laws of Kenya.
4. Law of Contract Act, Cap 23, Laws of Kenya
5. Government Contracts Act, Chapter 25, Laws of Kenya
6. Petroleum Exploration, Development and Production Bill, 2015.
7. Access to Information Act, 2016
8. Natural Resources (classes of transactions subject to ratification) Act, 2016
9. Kenya Mining Ordinance (No. 1. of 1931).

INTERNATIONAL

1. Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007.
2. Tanzania Extractive Industries (Transparency and Accountability) Act, 2015

INTERNATIONAL CONVENTIONS & INSTRUMENTS

1. Universal Declaration of Human Rights
2. International Covenant on Civil and Political Rights
3. African Charter on Human and Peoples Rights

LIST OF CASES

Kenyan Cases

1. Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 6 Others, Petition No. 278 of 2011 [2013] e KLR
2. Cortec Mining Kenya Limited v. Cabinet Secretary Ministry of Mining & 9 others [2015] e KLR

Non- Kenyan Cases

1. Dagg v. Canada (Minister of Finance), [1997] 2 SCR
2. Esther Kiobel, individually and on behalf of her late husband, Dr. Barinem Kiobel, et al., (petitioners) v. Royal Dutch Petroleum Co., Shell Transport and Trading Co. Plc, Shell Petroleum Development Company of Nigeria Ltd (respondents), US Supreme Court, No. 10-1491.
3. Duppa v. Mayo (1969) 1 Saund 282

ABSTRACT

Many countries can attribute their development to financing through the extractive industry. However, there are many risks related to the extraction of natural resources. This research reviews the effectiveness of the legal regime as regards transparency and accountability initiatives in exploration and extraction of oil, a natural resource, in Kenya. The study examines the role of access to information as a key factor in ensuring that there is transparency and accountability. The study also examines the legal regime, policy and institutional frameworks in place and the efficacy of contractual agreements in relation to the exploration and extraction of oil deposits and the implication of transparency and accountability initiatives to such contracts between the government and other stakeholders in the industry. The study reviews jurisdictions that have grappled with issues of extraction of natural resources and the link to corruption, poverty and conflict; measures that have been put in place to further avert such concerns. In this regard, the study critiques the current Petroleum (Exploration and Production) Act, Cap 308, Laws of Kenya and the proposed Petroleum (Exploration, Development and Production) Bill, 2015 and Access to Information Act, 2016 with regard to transparency and accountability initiatives and suggests reforms in our laws to provide for transparency and accountability.

1. CHAPTER ONE

1.0 INTRODUCTION

At the height of the oil boom in the 1970's, a Nigerian military head of state allegedly boasted that money was no longer the country's problem, but how to spend it. This statement, whose veracity is shrouded in the realm of conjecture, nonetheless aptly captures the euphoria and sense of boundless wealth and power that petrodollars bestowed upon the Nigerian ruling class that had won a grueling 30-month civil war in 1970. The Nigerian civil war, which was ostensibly fought to preserve the unity of the nation-state, was also partly provoked by the struggle between the political elite of the secessionist Biafra (Eastern region) and the rest of Nigeria (Northern, Western and Midwestern regions), over the control of the oil resources of the Niger Delta.¹

1.1 Background to the Problem

The quest for and utilization of natural resources is intertwined with human's historical, political and economic development for as long as records of human history exist.² The exponential increase in natural resources in the last two centuries has greatly fueled economic and social development. Resource-hungry investors have in the recent past descended on Africa, which is considerably endowed with vast natural resources and mineral wealth.³ In fact, the African Development Bank forecasts that the continent's natural resources will contribute more than US\$30 Billion a year to the revenues of its governments by 2033.⁴ In Kenya, the discovery of oil

¹ Obi, C. I. (2004) Nigeria: The State and the Crisis of Nation-building in Africa, in, Nation-Building: A key concept for peaceful; Conflict Transformation, London, Pluto Press, p.111.

² V. Lehmann, (2015) 'Natural Resources, the Extractive Industries Transparency Initiative, and Global Governance.'

³ EY's attractiveness survey Africa 2015 Making choices available at www.ey.com/Publication/vwLUAssets/EY-africa-attractiveness-survey-2015-making-choices (accessed 15/8/2016).

⁴ "Africa's mineral wealth: A blessing or a curse?," African Development Bank Group available at www.afdb.org, accessed 15/8/2016

in the Tertiary Basin and gas in one of the offshore wells of Lamu Basin indicate the existence of viable quantities of oil and gas and the country's potential of becoming an oil and gas producing nation.⁵ Further, the discovery of oil in Turkana County has thrust to the fore the debate on the role of the oil and extractive sector in the country's socio-economic development.⁶

Exploitation, extraction, and development of natural resources did not escape the framers of the Constitution of Kenya, 2010. The Constitution vests in the Kenyan people an array of rights with regard to resources within its territory. Article 10 makes provision for national principles and values of governance that bind all State organs, State officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions.⁷ Further, the national values and principles of governance include *inter alia* good governance, integrity, transparency and accountability.⁸ With regard to mineral resources, the Constitution ordains that not only do they constitute public land;⁹ they are to be held by the national government in trust for the people of Kenya and to be administered on their behalf by the National Land Commission.¹⁰ The State is therefore under an obligation to ensure that it utilizes such natural resources for the benefit of the people of Kenya.

The thread of transparency and accountability runs through Constitution. In fact, to ensure that it is entrenched in dealings of the State that have an impact on the people, the Constitution provides for the right to access information.¹¹ Assertions of a right to freedom of information are usually based on the notion that people are entitled to have access to information in the possession of the state that impact on them.¹² This includes information that is specifically about the requester and, more generally, the information the state uses to make decisions affecting the requester.¹³ Access to information ensures that the people are able to hold the government accountable in its dealings. Accordingly, Article 35 of the Constitution provides that every

⁵ Kenya Vision 2030, Second Medium Term Plan, 2013-2017.

⁶ Report of the East African Public Interest Environmental Law and Litigation Workshop & Seminar held at the Heron Portico Hotel, Nairobi. <http://www.ilegkenya.org/> (accessed on 23/6/2016)

⁷ Article 10 (1) of the Constitution

⁸ Article 10 (2) (c) of the Constitution

⁹ Article 62 (1) (f) of the Constitution

¹⁰ Article 62 (3) of the Constitution

¹¹ Article 35 of the Constitution

¹² I. Currie, J. de Waal, (2005) 'The Bill of Rights Handbook', 5th Edition

¹³ Ibid

person has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom.¹⁴ The State is also required to publish and publicise any important information affecting the nation.¹⁵

Natural resources are non renewable resources. They are determinate. Exploitation and utilization should therefore be undertaken in a way that creates durable and sustainable social and economic capacity for the country.¹⁶ The potential of natural resource benefits to a country are immense to wit creation of employment, revenue generation, infrastructure development amongst others which would in turn transform the social outlook of a country. Mineral resources and revenues accruing there from also pose challenges of windfall revenue phenomenon and the paradox of plenty, if not well managed.¹⁷

These challenges have been elevated by the culture of corruption that is deep seeded in many African countries. Kenya, unfortunately, is one such country. Corruption, mismanagement of public resources and impunity continues to plague the country. It is this deep rooted culture that has seen the country ranking lowly in the Transparency International Corruption Index.¹⁸ With the discovery of oil of commercial viability, this may be a disaster in the making. More so, given that the country does not have an adequate legal framework in the extraction of oil, gas and other minerals that would effectively avert some of the concerns such as corruption that the country has and continues to grapple with. Apart from fears of corruption, concerns have also emerged as to Kenya's preparedness with oil discovery.¹⁹ It is widely acknowledged that the country is ill-prepared to deal with the complexities of petroleum revenue management and its potentially devastating impact on the economy including inflation and community expectations.²⁰

¹⁴ Article 35 (1) of the Constitution

¹⁵ Article 35 (3) of the Constitution

¹⁶ National Oil and Gas Policy for Uganda, 2008, Ministry of Energy and Mineral Development

¹⁷ Ibid.

¹⁸ Kenya was ranked no. 139 in the Transparency International Corruption perceptions Index 2015 available at www.transparency.org/cpi2015 (accessed on 15/8/2016)

¹⁹ Oil News Kenya, 'Kenya's Civil Society calls for transparency, efficiency in oil and gas', July 31, 2014 available at www.oilnewskenya.com/kenya-civ-l-society-calls-for-transparency-efficienty-in-oil-and-gas (accessed 5 July 2016).

²⁰ Ibid.

While exploitation of mineral resources can be of great benefit to a nation's economy as exhibited by countries like Norway, Canada, Australia, Botswana and Chile, conversely, extraction of mineral resources has been a curse for a number of resource-rich countries. Further to the resource curse, other countries have exhibited the 'Dutch disease'.²¹ Some countries rate of development has been slower than those countries without substantial natural resources. In such countries, the gap between the promise of petroleum and the perversity of its economic performance in recent times is enormous.²² As observed by Garry and Karl, countries dependent on oil as their leading export have performed worse than other developing countries on a variety of economic indicators; they have performed worse than they should have, given their revenue streams; and poverty within their borders has been exacerbated rather than alleviated over the past two decades.²³ Even more worrisome, the gap between the expectations created by oil riches and the reality produced is a dangerous formula for disorder and war.²⁴ Countries that depend upon oil exports over time are among the most economically troubled, the most authoritarian, and the most conflict-ridden states in the world today.²⁵ Indeed, the exploitation of natural resources has often been associated with economic mismanagement, growing inequality, political instability, and conflict.²⁶ Countries whose economies depended on other industries such as agriculture and the manufacturing industry have also fallen prey to the Dutch disease as a result of the discovery of oil. In fact, in countries where the resource curse and the Dutch disease have not yet occurred should be careful to avoid this phenomenon.

In Nigeria, for example, the discovery of oil in 1956 and subsequent extraction since 1958 has resulted in the term 'resource curse'. The Natural Resource Governance Institute²⁷ refers to the resource curse also known as the paradox of plenty as, '*the failure of many resource-rich*

²¹ The Dutch disease is a term that was coined in 1977 by the Economist (The Dutch Disease', THE ECONOMIST (26 November 1977), pp. 82-3 to describe the decline of the manufacturing sector in the Netherlands after the discovery of a large natural gas field in 1959, culminating in the world's biggest public private-partnership N.V. Nederlandse Gasunie between Esso (now Exxon Mobil), Shell and the Dutch government in 1963. To state it in a very simplistic form, the term suggests there is an apparent relationship between the exploitation of natural resources and a decline in the manufacturing, agricultural and other sectors of an economy.

²² I. Garry, T.L. Karl, (2003) "Bottom of the Barrel: Africa's Oil Boom and the Poor." Catholic Relief Services

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ H. Clerk: 'Avoiding the resource curse: Managing extractive industries for Human Development'. Keynote Speech. (<http://www.undp.org/content/undp>) Accessed on 23/6/2016

²⁷ See www.resourcegovernance.org/about-us

*countries to benefit fully from their natural resource wealth, and for governments in these countries to respond effectively to public welfare needs. While one might expect to see better development outcomes after countries discover natural resources, resource-rich countries tend to have higher rates of conflict and authoritarianism, and lower rates of economic stability and economic growth, compared to their non-resource-rich neighbors.'*²⁸ In fact, Nigeria is often portrayed as the poster child for countries experiencing the resource curse phenomenon.²⁹ Further, it is urged that the centrality of oil in national politics, against the backdrop of pre-oil politics, facilitated the full manifestation of the resource curse³⁰ thus transforming the state into an effective tool for corruption.³¹ Nigeria has also been characterized by military coups and counter coups that have dominated her between 1960 and 1999, well over 30 years.³²

In Kenya, apart from corruption, the discovery of oil has brought forth other concerns which include; weak legal and regulatory framework- inherent weaknesses in the Petroleum Exploration and Production Act Cap 308 and Model Production Sharing Contract (PSC) including the lack of provision for: Compensation regime; Licensing Rounds; Community awareness and participation; Windfall profits; Gas Sharing terms; Corporate Social Responsibility Requirements; Mechanism for working out government share out of monetary gains from transfer of a PSC; Defined Criteria for evaluation of terms provided in PSC applications for prudence and competitive bidding of blocks and environmental protection, conservation and management.³³ This is further compounded by the fact that the legal and regulatory framework in the petroleum sector is not aligned to the provisions, spirit and aspirations of the Constitution. Further to providing for transparency and accountability and access to information, the Constitution also attempts to protect natural resources in the country against misuse and corrupt dealings by requiring certain transactions to be ratified by Parliament if; it involves the grant of a right or concession by or on behalf of any person, including the

²⁸ Natural Resource Governance Institute, 'The Resource Curse', NRG Reader, March 2015 available at www.resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf (accessed on 15/8/2016)

²⁹ Owafiokun Idemudia: The resource curse and the decentralization of oil revenue; the case of Nigeria, International Development and African Studies, York University, Toronto, Canada M3J 1P3.

³⁰ Supra n. 1

³¹ Ibid.

³² Ibid.

³³ Kenya Vision 2030, Second Medium Term Plan, 2013-2017, page 67 and 68.

national government to another person for the exploitation of any natural resource of Kenya, and entered into on or after the effective date.³⁴

Having set out as above, the purpose of this research is therefore to, examine the legal framework in place and its ineffective application in Kenya and propose legal solutions and modification of that law by inclusion of provisions underpinned by the Constitution for purposes of enabling transparency and accountability in the exploitation and extraction of oil and in a bid to avert the resource curse. The study also examines access to information and contract transparency as key attributes in enabling transparency and accountability as a way of averting the resource curse. The study is further informed by other jurisdictions that have and continue to grapple with the issue of transparency and accountability in the extractive industry. Important to note, is that, issues of resource extraction, corruption, poverty and conflict are closely interlinked. Further to this and also of major concern as will be discussed, is that communities living around areas where there have been discovery of oil, gas and other minerals with commercial viability, have been plagued with volatile economic growth, violent civil conflicts and environmental degradation. Where there are regional/county governments, the national government has benefitted to the exclusion of the regional/county government. Corruption and mismanagement of revenues generated from the extractive industry has been strife.

1.2 Statement of the Problem

International experience points to challenges which are often faced by resource rich developing countries in translating mineral wealth into peace and prosperity. Much has been written about the “resource curse”. In Africa, the difficulties posed by oil wealth were well captured by Agustin Carstens, the then Deputy Managing Director of the IMF in remarks directed at African countries where he stated that the experience of some developing countries in the management of oil wealth offer dramatic illustration of the problems that could be posed by resource riches. He also stated that oil exploration generates very large and sudden revenue inflows and as such, this change alone creates significant challenges for developing countries not least because their administrative systems are often not well-equipped to handle such flows. Throw in uncertainty

³⁴ K. Muigua, D. Wamukoya & F. Kariuki, (2015) ‘Natural Resources and Environmental Justice in Kenya, (Glenwood Publishers Limited), p.16.

associated with volatile oil prices, and you have an added layer of complexity that further strains an already overburdened system. Further, he observed that such circumstances present a challenge to the most able policymaker in how to handle the new-found wealth, and at worst, they present prime opportunities for outright corruption.³⁵

Carstens further remarked that, access to reliable information allows elected representatives and the general public to participate in developing economic growth strategies based on the extraction of those resources. In Africa, developing countries that become reliant on oil and minerals can see a deepening of a range of political, economic and social challenges.³⁶

Apart from the resource curse, the discovery of oil, especially of commercial viability creates a fallacy that a country's economy will thrive based on oil alone. It is this illusion that further precipitates abandoning industries that were once a driving force of an economy. The so-called 'Dutch disease'³⁷ which is common in African economies, should be tackled or, where it has not yet occurred or set in a particular economy, avoided. Thus, in addition to aiming to maximize their share of the resources exploited, African economies must learn to better manage their takings. The Model adopted by Chad (in its Petroleum Management Law 1999), which was dictated by the World Bank as part of conditions for loans granted to Chad to make its petroleum production realisable, is something to consider.³⁸ Thus, whereas a country can fall under the prey of the resource curse, it could very well fall under the clutches of the Dutch disease.

Under the Kenya Vision 2030- Second Medium Term Plan, 2013-2017, it is acknowledged that there are inherent weak legal and regulatory frameworks in the oil and gas sector.³⁹ There are no

³⁵ Remarks by Agustin Carstens, the then Deputy Managing Director of the IMF at the Regional Workshop on Transparency and Accountability in Resource Management in CEMAC Countries, Equatorial Guinea, Jan. 2005, available at <http://iipdigital.usembassy.gov/st/english/texttrans/2005/02/20050201154926saikceinawz0.5425684.html#ixzz4HZvfMdyD>

³⁶ Oil and Gas Laws in Uganda: A Legislators' Guide, Oil Discussion Paper No. 1, May 2011.

³⁷ Supra, note 22

³⁸ See Karin Alexander and Stephan Gilbert, *Oil and Governance Report: A Case Study of Chad, Angola, Gabon and Sao Tome e' Principe*, IDASA (March 2008), <http://eitransparecny.org/node/795>; Ian Gary and N. Reisch. *Chad's Oil: Miracle or Mirage? Following the money in Africa's Newest Petro- State*, Catholic Relief Services Report (2005), available at http://www.justiceinitiative.org/db/resource2?res_id=102693. It must be noted that while the elements of the original regime have been successful, the Chadian government has amended various aspects to increase its take and re-arrange usage of the funds.

³⁹ Ibid

clear legal provisions to ensure transparency and accountability in the extractive industry, yet the Constitution makes an array of provisions calling for transparency and accountability in government dealings. This is further compounded by Constitutional provisions as to access to information. This means that, the public is entitled to access to information that pertains to all government dealings, especially where it is of public interest. With the discovery of viable quantities of mineral resources and the economic implications of such discovery, it is feared that the culture of corruption embedded in our society will continue to thrive. Lack of clear legal guidelines on how to deal with exploration, production and revenue from the exploration and extraction of oil is thus a major concern.

1.3 Justification of the Study

It is acknowledged that, although the Constitution makes provision for transparency and accountability in its dealings, it is necessary to review and align the energy and petroleum sector policy, legal and regulatory framework with the provisions, spirit and aspiration of the Constitution.⁴⁰ This study is also justified on the basis that, although there exists literature on transparency and accountability of revenues from oil exploration and development and the intertwined issues of corruption, poverty and conflict, there are no legal mechanisms to avert the problem. This paper therefore seeks to address these issues and what legal mechanisms can be put in place.

1.4 Theoretical Framework

The construct of ‘social contract’ has been used to present various and indeed conflicting political ideals. Thomas Hobbes used it in support of absolutism while John Locke in support of limited constitutionalism. To Locke, government’s only function was to preserve and protect the natural rights which men had ‘in the state of nature’; it had to be assumed that men in the state of nature had voluntarily consented to the establishment of the State by a ‘social contract’; it was this which gave legitimacy to laws and the State, and once the ruler neglected to do his job properly it was right and justifiable for the people to overthrow him by revolution.⁴¹ However, this study is based on the social contract as advocated by Jean Jacques Rousseau.

⁴⁰ Ministry of Energy and Petroleum, ‘Draft National Energy and Petroleum Policy’, June 16, 2015.

⁴¹ Atiyah P.S., Law and Modern Society, 2nd Ed., Oxford University Press, p. 150

1.4.1 Key Features of the Social Contract

The social contract approach to natural law culminated in the writings of Rousseau (1712-1778). To Rousseau, the social contract is a mystical construct by which the individual merges into the community and becomes part of the “general will”.⁴² The people, in an ideal situation should govern themselves. However, Rousseau acknowledged that, ‘*it is unimaginable that the people should remain continually assembled to devote their time to public affairs.*’⁴³ He postulates that Law is a reflection of the general will of a people. Thus, a government only exercises the will of the people and it is on this basis that it can be tolerated. On the other hand, in language reminiscent of twentieth-century totalitarianism, Rousseau insists that whoever refuses to obey the general will shall be compelled to do so by the whole body: “*he will be forced to be free*”.⁴⁴ Whereas this appears to be contradictory, according to Rousseau, it is not. Essentially, what he is saying is that disobedience is only morally illegitimate because it constitutes a failure to discharge a moral obligation a citizen incurred when acting as a citizen.⁴⁵ Rousseau is, however, refusing to draw a distinction between law and morality: the general will is the “moral will” of each citizen.⁴⁶

Rousseau espoused that ‘*every law the people has not ratified in person is null and void- is, in fact, not a law.*’⁴⁷ He thus espoused that direct citizen participation is a necessary condition of establishing the moral basis of obedience to law. Rousseau is a paradox: ‘the supreme prophet and theorist of modern democracy’⁴⁸ and yet the beginning of the road totalitarianism. D’Entrèves is surely right when he remarks that Rousseau’s definition of democracy ‘thus appears as a landmark as well as a warning.’⁴⁹ It provides the strongest argument in favour of democracy, indicating that the cleavage between legal and moral obligation can be overcome, in as much as that principle will ensure that the laws express a prevailing moral conviction. But it also indicates

⁴² Freeman M.D.A, Lloyd’s Introduction to Jurisprudence, 8th Edition, Sweet & Maxwell, page 111.

⁴³ Social Contract (trans. G.D.H. Cole), Bk. III, Chap. 4, p. 217.

⁴⁴ Social Contract, Bk. I, Chap. 7, p. 18.

⁴⁵ Supra n.48 p. 112

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Per D’ Entrèves, Natural Law (1970), p. 142. See further, A. Ryan, ‘Mill and Rousseau: Utility and Rights’ in G. Duncan, Democratic Theory and Practice (1983). p. 39.

⁴⁹ Supra n. 48

the dangers that lie at hand. Rousseau's 'general will', which is always right, is the prototype of the modern tyrant.⁵⁰

1.4.2 Critique/ Shortcomings Rousseau's Theory

Rousseau's social contract labours under the difficulty of proving superiority both of the organic community and of natural rights of man.⁵¹ Essentially his argument is that freedom and equality of men were the basis of their happiness, existent in primitive communities and lost in modern civilization. Further, the theory has been criticized in supposing that people in the earliest stages of civilization, without the previous experience in government, should deliberately agree to form a political organization. Even as a rational attempt to explain the nature of the state as a source of governing authority, the theory is faulty. A contract is a voluntary relation which individuals may enter into or not, as they choose.⁵² The relation of the individual to the state, however, is not a voluntary one, since man is born into the state and cannot avoid his obligations or withdraw from its control. Thus, the furtherance of the original contract could have no legal force. This is because; a contract implies the previous existence of a legal authority which can enforce it. Since no political organization existed to define or enforce contractual rights, the original agreement by which the state was formed would not be legally binding and all rights based upon it would be without legal basis.⁵³

1.4.3 Why this theory

Firstly, the social contract laid down the fundamental truth that obedience rested upon the consent of the governed and that the sovereign had no right to act arbitrarily. In working out this truth, the social contract theory served as the basis for modern democracy. It stressed the importance of the individual and the fact that ultimate political authority lies, at least potentially, in the people.⁵⁴

The second feature is of the sovereign. Rousseau contrives to justify the people's sovereignty, the "*volonté généralé*" on the one hand and the original and inalienable freedom and equality of

⁵⁰Per D' Entrèves, *op. cit.*, n. 7 p. 143

⁵¹Ibid., n.11

⁵²Prof. N. Aggarwal, (2012) Jurisprudence Legal Theory, 9th Ed. Central Law Publications, p. 30

⁵³Gettell R.G., Political Science (Revised Edition) 1956, p. 116

⁵⁴Supra n. 62

all men on the other.⁵⁵ Only the recognition by the individual of the rights of the community can give legal force to undertakings entered into between citizens, which, otherwise, would become absurd, tyrannical, and exposed to vast abuses.⁵⁶

This paper therefore seeks to look at the general will of the people of Kenya as contained in the Constitution, 2010. The people of Kenya spoke in stating that, in all the dealings by the State, the dictates of good governance have to be adhered to. To this end, it is required of all state officers to exhibit transparency and accountability. Any law that this therefore enacted stems from the will of the people. Further to this, the people of Kenya decreed that all mineral and mineral oil belongs to the people of Kenya and it is to vest in and held in trust for the people of Kenya.⁵⁷

In looking at how the law on transparency and accountability has emerged and evolved, this paper will be looking at how institutions have emerged to champion transparency and accountability. Further, the paper will look at the Extractive Industry Transparency Initiatives. Global reasons for its emergence and the background that informed this initiative. As discovery of natural resources continues, States will have to develop ways to deal with the society's expectations and how these resources will be used to their benefit and in accordance with their general will.

Kenya has had to deal with corruption and mismanagement of tax payers' money running into billions of shillings. The society acknowledges that corruption in government is a major concern and with the discovery of oil, the society will have to grapple with this new found fortune and the impact it will have on the economy. Further, Kenya has to learn from countries that have had this resource but have not been able to turn the fortunes of its citizens. The public needs to demand for transparency and accountability in such dealings such that every citizen is in the know. This is also informed by the fact that, minerals and mineral oils vest in the people of Kenya.⁵⁸

⁵⁵ Friedmann W., *Legal Theory*, 5th Ed., Stevens & Sons Limited, London, p. 125

⁵⁶ *Ibid* n. 4 p. 150

⁵⁷ Article 62 of the Constitution

⁵⁸ *Ibid*

1.5 Literature Review

The Constitution of Kenya, 2010, dedicates a whole chapter on land and environment, spelling out the general obligations of the State and individual persons towards the management of natural resources.⁵⁹ Under Article 10, sustainable development is one of the national values and principles of governance which binds all state organs, state officers, public officers and all persons whenever any one of them; applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁶⁰ By extension, these values and principles apply in equal measure to natural resource management.⁶¹ Sustainable development can only be achieved through sustainable utilization of the available natural resources.⁶² To ensure that this is achieved, the Constitution enjoins the State to ensure that there is sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.⁶³ The Constitution further envisages that principles of governance shall be upheld in this regard and in particular, that there shall be transparency and accountability in any dealings that involve natural resources.⁶⁴

Black's Law Dictionary⁶⁵ defines transparency as: openness; clarity; lack of guile and attempts to hide damaging information. The word is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organizations interact with the public.⁶⁶ Concise Oxford English Dictionary⁶⁷ on the other hand defines accountable as: (often accountable to/for) required or expected to justify actions or decisions.

Accountability and transparency are related principles which form the cornerstone of good governance and together ensure that governments (and public officials) are subjected to some

⁵⁹ K. Muigua, D. Wamukoya, F. Kariuki, (2015), *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers Limited, p. 15

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Article 69 (1) (a) of the Constitution

⁶⁴ Article 10 (2) (c) of the Constitution

⁶⁵ Black's Law Dictionary, (2009) 9th Edition Thomson Reuters..

⁶⁶ Ibid, page 1638.

⁶⁷ Concise Oxford English Dictionary, (2011), 12th Edition, Ed. A. Stevenson, M. Waite, Oxford University Press

form of control and/or oversight.⁶⁸ Accountability in the context of good governance simply refers to an available framework to subject actions and decisions of public officials to oversight. The broad aim of such oversight is to ensure that government initiatives meet their planned objectives, respond to the needs of the citizenry and contribute to better governance and the reduction of poverty.⁶⁹

Transparency on the other hand gives a clear picture and accessible rules that make government officials and agencies accountable to the country's citizens and also enables the citizens to interact with the government with a certain level of predictability and stability.⁷⁰ In other words, transparency may be described somewhat as an 'extension' of accountability wherein the responsibility to be 'open' extends beyond the citizens of the country in question to include the international community.⁷¹ The lack of accountability and transparency in governance breeds corruption, which is the hallmark of 'bad' governance and is capable of destabilizing the structures that exist to promote good governance.⁷²

To this end, transparency makes markets work more efficiently; enhances trust and cooperation; strengthens institutions; reduces corruption and mismanagement; enables people to hold others accountable for their actions; and increases the legitimacy of decisions and institutions.⁷³ Hautler⁷⁴ states that, the global promotion of transparency for the extractive sector-oil, gas and mining has become widely accepted as an appropriate solution to weak governance in resource-rich developing nations. She further argues that if firms disclose publicly payments to governments, citizens will be able to hold governments and firms accountable. This, she states will improve management in natural resources, reduce corruption, and mitigate conflict.

⁶⁸ Natural Resource Investment and Africa's Development, 2011, Edited by F.N. Botchway, Edward Elgar Publishing Limited, p.125

⁶⁹ Ibid

⁷⁰ S. Al-Jurf, 'Good Governance and Transparency: Their impact on Development', (1999) 9 *Transnational Law and Contemporary Problems* 193, 198-9.

⁷¹ Supra n. 80

⁷² Ibid

⁷³ Virginia Hautler, (2010) 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World' Massachusetts Institute of Technology, p. 55

⁷⁴ Ibid

Fenster⁷⁵ on the other hand argues that, transparency theory's flaws result from a simplistic model of linear communication that assumes that information, once set free from the state that creates it, will produce an informed, engaged public that will hold officials accountable. Transparency institutionalises public discourse and provides a credible reflection of the situation at hand, acting as a sieve in separating credible information from specious claims thereby focusing on facts, bringing compliance on the part of actors with their own internalized norms and facilitating self reflection by exposing actors to their own behavior.⁷⁶

As earlier stated, the Constitution now requires transparency and accountability in all dealings by the State. This is further compounded by the fact that, the general public has not been able to access information on dealings by the State. It is to be acknowledged that, much as the Constitution advocates for transparency and accountability, the biggest hindrance to such transparency and accountability in Kenya is corruption and/or corrupt practices. Further to this is the lack of access to reliable information that allows the general public to have meaningful participation and engagement in issues of governance. Kenya ranks 136 out of 177 countries on Transparency International's Corruption Perception Index.⁷⁷ In jurisdictions that have oil as a resource, studies have shown that corruption has contributed to conflict and poverty. Shelley argues that⁷⁸ where the economy is dominated by a sector that generates rent, politics is dominated by the competition for rent, and where institutions of government are not well established they are liable to be wholly suborned by the interests of those who take control of them. Therefore, it is important to acknowledge that, terms such as competition for rent is used as a coat when the same is outwardly, corruption.⁷⁹ Black's Law Dictionary⁸⁰ defines rent-seeking as economic behavior motivated by an incentive to overproduce goods that will yield a return greater than the cost of production. This term is often used in the field of law and economics.⁸¹

⁷⁵ Fenster, Mark, (2005-06) 'The Opacity of Transparency', , Iowa Law Review 91 (3): 885-949.

⁷⁶ Thomas N Hale, (2008) 'Transparency, Accountability and Global Governance', 14, Global Governance 85-86.

⁷⁷ See <http://cpi.transparency.org/cpi2013/results/> (accessed November 21, 2014).

⁷⁸ Toby Shelley, 'Oil – Politics, Poverty & The Planet', (Zed Books Limited, London & New York).

⁷⁹ Ibid

⁸⁰ Black's Law Dictionary, Supra n. 77

⁸¹ Supra n. 90 p. 1412

As alluded to earlier, oil in Nigeria has transformed the state into an effective tool for corruption. Corruption can and is attributed to weak governance structures. Alao,⁸² observes that a consensus seems to exist that suggests that it is not just the presence of natural resources that leads to the resource curse; but it is the governance structures and institutions around the extraction, processing and management of the general revenues that determine whether natural resources will be a blessing or a curse. Thus, a critical factor linking natural resources and negative political and economic outcomes is the interaction between institutions and resources. Strong institutions deter rent-seeking, political patronage and allow public sector accountability which helps mitigate the negative effects of the resource curse.

Of import is that, corruption and lack of transparency are perceived as political risks for foreign corporations as there are increased transactional costs, unpredictability in the business environment resulting in detriment of foreign investment, reducing economic development and resources revenue.⁸³

Another factor that is caused by lack of transparency is conflict. K. Muigua, *et al.*,⁸⁴ states that, conflicts are an inescapable part of societal interaction since the inception of human settlement. However, if not well taken care of and resolved early, conflicts can degenerate to pose a threat to national security, peace and stability, which are the basic parameters to measure the development of a nation. Further, conflicts and disputes are inevitable in the use, access and management of natural resources due to the differing needs and values of various persons and/or groups of persons in society in the wake of dwindling resources.⁸⁵

Shelley⁸⁶, argues that, the coincidence of oil and natural gas with civil conflict is intuitively obvious-Sudan, Angola, Yemen, Iraq, Colombia, Burma/Myanmar, Indonesia, Nigeria, Algeria, Congo-Brazzaville quickly come to mind.⁸⁷ Idemudia⁸⁸ explains that conflict in the Niger Delta

⁸² Alao A., (2007) 'Natural Resources and Conflict in Africa: The Tragedy of Endowment', (University of Rochester Press, USA.).

⁸³ Abdullah Al Faruque, (2006) 'Transparency in Extractive Revenues in Developing Countries and Economies in Transition: a review of emerging best practices', Vol.24 No.1 Journal of Energy and Natural Resources Law, 70.

⁸⁴ K. Muigua, D. Wamukoya, F. Kariuki, (2015), Natural Resources and Environmental Justice in Kenya, Glenwood Publishers Limited, p 401

⁸⁵ Ibid

⁸⁶ Supra n. 90

⁸⁷ Ibid

area where oil is extracted has increased both in intensity and scale. Further, incidences of oil bunkering, kidnapping and ransom demand, electoral violence, and inter/intra community violence occur almost on a daily basis.⁸⁹ In Kenya, the extraction of natural resources has in some instances triggered or fueled violent conflict in some regions.⁹⁰

Conflict has however not been totally linked to starting oil conflicts. But it has provided a basis for ongoing conflict before oil discovery. Shelley argues that, in some cases oil and gas may not be significant factors in the commencement of hostilities but may rather, legitimize existing conflicts or provide new justifications for their continuance. The writer also argues that Sudan is a case in point. She states that oil was not an original cause of Sudan's civil war, a conflict that dates back almost 50 years, but it is one of the reasons why it resumed in 1983 and has led to an escalation in fighting as the reserves, and the land above them have become increasingly important to the government of Sudan. The oil fields are currently the only region of the country in which there is significant conflict.

With further regard to Sudan, Flint⁹¹ states that until oil was discovered, Western Upper Nile was considered of little strategic importance. It was regularly affected by flooding and drought and its swampy terrain restricted conventional warfare. But with the discovery of oil in 1998, in areas accessible to the Northern government its forces began 'cleaning' territory inhabited by Southerners as a prelude to constructing roads that had a dual purpose: to open the way for oil exploration and to facilitate military advances.⁹²

As regards poverty, Shelley⁹³ argues that what income distribution data is available for oil production suggests that income from oil has failed to filter down the social scale and lift the poor out of impoverishment.

The Petroleum (Exploration and Production) Act⁹⁴ does not make any provision for transparency and accountability initiatives with regard to oil extraction. This research will argue that lack of

⁸⁸ Idemudia U,(2009) 'The changing phases of the Niger Delta conflict: implications for conflict escalation and the return of peace. *Conflict, Security and Development*', 9 (3), 307-331.

⁸⁹ Ibid

⁹⁰ Supra n.96

⁹¹ Julie Flint, 'writing in *Middle East International*, 7 February 2003.

⁹² Ibid

⁹³ Shelley (n16) 68.

legal and institutional framework on transparency and accountability in oil extraction and exploration agreements is fatal especially for purpose of accounting for revenues generated from the exploration and extraction of oil and the link to economic development. Revenue sharing contracts, concessions, rights conferred pursuant to law such as licences and permits, all encapsulating investment treaties⁹⁵ have to be made public. This can only be achieved by making public all information pertaining to the oil industry and further ensuring that there is contract transparency as regards oil extraction and exploration.

Internationally, and as a step in the right direction, there is the establishment of The Extractive Industries Transparency Initiative (EITI), which is an international standard for openness around the management of revenues from natural resources.⁹⁶ This initiative is for purposes of improving accountability and public trust for revenues paid and received for a country's oil, gas and mineral resources.⁹⁷ Under the initiative, companies are required to publish what they pay for in oil, gas, quarrying and mining. Governments are also asked to disclose what they receive from oil, gas, quarrying and mining.⁹⁸ The figures are then audited by an independent administrator and published along with contextual information in the EITI report.⁹⁹ In order to show commitment, there are countries that have enacted legislation in order to enhance transparency in the extraction of natural resources.

Nigeria is one of the countries that have shown commitment in ensuring that there is transparency and accountability in the extractive industry. In fact, it has enacted the Nigeria Extractive Industries Transparency Initiative (NEITI).¹⁰⁰ The NEITI Act, 2007 which is a relatively novel kind of legislation in the history of Nigeria is a major component of the ongoing anti-corruption reform in Nigeria.¹⁰¹ The NEITI Act, 2007 provides for the establishment of Nigeria Extractive Industry Transparency Initiative (NEITI). This agency is tasked with the responsibility of developing a framework for the promotion of transparency and accountability in

⁹⁴ Chapter 308 of the Laws of Kenya.

⁹⁵ Bernard Mommer, (2002)'Global Oil And The Nation State' ,(Published by the oxford University Press For The Oxford Institute for Energy Studies).

⁹⁶ www.gov.uk/guidance/extractive-industries-transparency-initiative

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ NEITI Act, 2007.

¹⁰¹ A.O. Were, 'The NEITI Act 2007 and the need to sustain Nigeria's EITI compliant status'.

the reporting and disclosure of revenue due/paid to the federal government by the extractive industries operating in the country among other things.¹⁰² However, Nigeria, which relies extensively on oil revenues to finance its budget, is unsure of the quantity of oil that is exploited within the country despite its recent commitments to promote transparency in the oil sector and the adoption of the Extractive Industries Transparency Initiative (EITI).¹⁰³ Thus, Nigeria stands out as a country that has suffered the resource curse and yet, despite her commitment to ensure transparency and accountability in the oil sector, continues to grapple with the negative effects of oil.

Norway, as will be discussed in the ensuing chapters is one of the richest countries in the world. This is attributed to its resource wealth. Norway provides a good example of a country that has managed its petroleum resources even though it does not have laws for the promotion of transparency and accountability. The country has been able to achieve this through its strong institutions. The government has promoted transparency in oil, gas and mining revenues and has even participated in the Extractive Industries Transparency Initiative (EITI). The EITI criterion as will be discussed has also been promoted.

Stevens and Dietsche¹⁰⁴ argue that, institutions could serve as a device that connects the otherwise negative linkage between natural resource wealth and poor outcomes. The writers also observe that, countries where institutions are good, politicians are less able to use patronage to influence election outcomes. Where institutions are bad, perverse political incentives will dominate and these will have a negative impact on income. The writers also state that equally straightforward is the policy recommendation. Thus, they urge that countries should improve on the quality of their institutions to undermine the negative political-economic impact that natural resources will otherwise have.

While looking at all the institutions that should be put into place, it is important to note, in oil extraction while the other actors are equally important, the Government is obviously enough, the

¹⁰² Supra n. 30

¹⁰³ Oxfam, (2009) 'Lifting the Resource Curse: How poor people Can and Should Benefit From the Revenues of Extractive Industries', Oxfam Briefing Paper 134, 18.

¹⁰⁴ P. Stevens & E. Dietsche, (2008) 'Resource Curse: An analysis of causes, experiences and possible ways forward', Energy Policy 36, 56-65.

most complex actor. Mommer¹⁰⁵ observes that the government's special involvement derives from the fact that, on the one hand it holds the eminent domain rights of the state, but on the other hand, it has to take into account all the interests at stake; it has to make sure that the specific governance structure actually delivers the goods at an acceptable price and fits into the general governance of the country. By seeking a clear law on transparency, it underscores the importance attached to this issue in other jurisdictions in order to make it more effective. Harford and Klein argue that strong political will and strong institutions should be adequate to ensure that the economies of resource revenues are properly managed.¹⁰⁶ In essence, it may be argued that it is the quality of (good governance) institutions that determines whether the impacts of resource revenues will be positive or negative.¹⁰⁷

As a development in the right direction, the Petroleum (Exploration, Development and Production) Bill, 2015 has been published.¹⁰⁸ With regard to transparency, the Bill is deficient. Although it proposes for Transparency under Part X, the Bill does not make provision for the establishment of an institution to ensure transparency and accountability. The Bill presupposes that the Cabinet Secretary shall develop a framework for reporting, transparency and accountability in the upstream sector. It does not make provision of inclusion of stakeholders in the transparency and accountability framework. Further, it does not give a timeframe within which the Cabinet Secretary will ensure that there is compliance. The Bill also makes reference to a framework. I do opine that the issue of transparency and accountability ought to be institutionalized with an independent body in charge. The reporting channels envisaged are not clear and thus, there are no clear mechanisms as to how it will achieve the right to access information with regard to oil extraction and development. This in my opinion is very important as this research will show if we truly are to embody transparency in oil extraction in Kenya.

¹⁰⁵ Mommer (n 78) 110.

¹⁰⁶ T. Harford and M. Klein, 'Aid and the Resource Curse: How Can Aid Be Designed to Preserve Institutions?', (2005) Public Policy for the Private Sector, Note Number 291,1.

¹⁰⁷ M. Mehrara, S. Alhosseini and D. Bahramirad, 'Resource Curse and Institutional Quality in Oil Countries', (2008) Munich Personal RePEc Archive (MPRA) Paper No. 16456, http://mpra.ub.uni-muechen.de/16456/1/MPRA_paper_16456.pdf accessed 22 March 2010.

¹⁰⁸ A Bill published in the Kenya Gazette Supplement No. 128 of 2015 and passed by the National Assembly, with amendments, on May 3rd, 2016.

Further, as stated by Odote¹⁰⁹, the solution for Kenya is to develop robust laws and policies, and credible institutions.¹¹⁰

As stated above, there is already a robust constitutional dispensation which can enable the country realize the benefits from oil and its mineral wealth.¹¹¹ Further to this, and as an alternative to legislation, there is need to entrench strong institutions that will be tasked with solely ensuring the promotion of transparency and accountability in oil exploration and extraction. Further, while it is acknowledged that there are various aspects in oil exploration and extraction such as fiscal aspects, local content compliance and environment, health and safety concerns, this paper deals with laws and the regulatory framework in oil and contract transparency in line with constitutional dictates of transparency and accountability.

All in all, the bill as well as other legislation does not effectively address the deficiencies in our legal regime in transparency and accountability in oil extraction and exploration. There are also no institutions that can be an alternative to legislation. The research will propose inclusion of various stakeholders in the framework for reporting transparency in line with the international guidelines set by the Extractive Industries Transparency Initiative (EITI).

1.6 Statement of Objectives

The objective of this research paper is to critically discuss oil extraction and exploration and the need for transparency and accountability initiatives to avert issues of corruption, conflict and poverty especially in developing countries and in particular Kenya.

1.7 Research Questions

1. To what extent does the current legal framework as regards oil extraction and exploration make provision for transparency and accountability?
2. To what extent does the current legal framework align with provisions, spirit and aspirations of the Constitution as regards transparency and accountability and access to information?
3. To what extent does the current legal, policy and institutional framework make provision for contract transparency?

¹⁰⁹ C. Odote, (2014) 'Kenya need not suffer oil, minerals curse,' as re-printed from Business Daily, September 21.

¹¹⁰ Ibid

¹¹¹ Ibid

4. To what extent will the weaknesses in the current legal framework address society concerns as regards oil extraction and exploration?
5. To what extent will the transparency and accountability initiatives in oil extraction and exploration avert concerns such as corruption, conflict and poverty?

1.8 Hypothesis

Transparency and accountability in oil extraction and exploration in Kenya is lacking and may undermine efforts to ensure that the country effectively benefits from this resource. Further, transparency and accountability in oil extractive will play big role in ensuring that conflict associated with oil resources is averted at both community and country level.

1.9 Methodology

This research is based on library and internet research. Through library research, I will seek to analyse various texts on the issue of oil extraction and exploration and its relation to corruption, conflict and poverty in various jurisdictions. I will also use the internet to review various journals, data and media footage to analyse and assess the viability of transparency and accountability initiatives as an answer. This research paper will be based on case study as well as comparative methods of inquiry in order to prove or disprove the hypothesis.

1.10 Chapter Breakdown

1.10.1 Chapter 1

This Chapter contains the proposal to the research setting out the background to the problem, statement of the problem, literature review and the objectives of the research. The Chapter shows the significance of the research, in that, with the discovery of oil, there is a deficiency in the current legal, policy and institutional regimes regulating oil and generally, the extractive industry in Kenya. In this absence thereof, and given the mismanagement culture of resources by our institutions, we are likely to fall into the trap of the ‘resource curse’ that has plagued many developing countries that have mineral resources of economic viability.

1.10.2 Chapter 2

Chapter Two will critically analyse the current legal framework and its effectiveness in the regulation of the extractive industry with particular emphasis on oil and as regards transparency

and accountability. It will therefore seek to analyse the law as regards access to information for purposes of enhancing transparency and accountability in the extractive industry with particular emphasis on oil. In this regard, there will be a review of the Petroleum (Exploration and Production) Act, Cap 308, the Petroleum Exploration, Development and Production Bill, 2015 and the Access to information Bill, 2015.

1.10.3 Chapter 3

Chapter Three will review contractual obligations and the role that contracts play in transparency and accountability in the extractive industry. In particular, this Chapter will discuss how disclosure of such contracts either by choice or legislation is key in combating the ‘resource curse’ and therefore advocate for contract transparency and accountability.

1.10.4 Chapter 4

Chapter Four will carry out a comparative analysis of oil producing countries. The Chapter will discuss the steps some of these countries have taken to ensure transparency and accountability in their dealings with oil, gas and other natural resources either through enactment of domestic legislation, policies or institutions set up by these States to manage their mining and/or oil industry. The case study will also be used to show States that have been successful either through sound oil policy, laws and institutions and have used them in legislation or policy. In this regard, this Chapter will discuss the case of Norway. This Chapter will further look at states that have been engulfed in the quandary of the resource curse and how their economies have been affected by this phenomenon and the initiatives that they are undertaking to further avert the ‘resource curse’. In this regard, this Chapter will examine the case of Nigeria.

1.10.5 Chapter 5

Chapter Five will make key legal and policy recommendations in line with international best practices. This Chapter will sum up the study and give conclusions and recommendations.

2.0 CHAPTER TWO

2.0 THE POLICY, INSTITUTIONAL AND LEGAL FRAMEWORK IN OIL EXPLORATION AND EXTRACTION

2.1 Introduction

In order to ensure that there is transparency and accountability in the exploration and extraction of oil in Kenya, it is essential that policies, institutional framework and sufficient legal regimes are developed and put in place to provide for increased transparency. Transparency and accountability is actualized by ensuring that information about how the government interacts with those involved in the oil sector is readily and easily accessible. This information pertains to contracts that are signed; the amounts the government received; the amount of oil produced; and the uses to which the funds are put. It is important to recognize that, openness and access to information are fundamental rights in activities that may positively or negatively impact individuals, communities and the State. It is also important that information that will enable the public and any other stakeholder assess how their interests are being affected is disclosed.¹¹²

This chapter seeks to analyze the current policy, institutional and legal framework and its effectiveness in the regulation of the extractive industry and with particular regard to transparency and accountability. Access to information is a key prerequisite in ensuring that there is transparency and accountability in the extractive sector and in particular, the exploration and extraction of oil. In response to requirements of the Constitution and the discovery of oil, Kenya is in the process of updating its legislation applicable to the oil sector.¹¹³ In this regard, this chapter seeks to look at the policy, institutional and legal underpinnings in oil exploration and exploitation. Further, the chapter will discuss the law as regards access to information for purposes of enhancing transparency and accountability in the extractive industry with particular emphasis on oil. In this regard, this chapter will discuss the Access to Information Act, 2016 and its adequacy in the exploitation and extraction of oil. This chapter will also demonstrate that, access to information is key if the country is to meet the Constitutional threshold of transparency and accountability. This chapter will also therefore be looking at the current petroleum policy

¹¹² Section 5.1.3, National Oil and Gas Policy for Uganda, 2008.

¹¹³ Golombok, R., Jones, M.I. (2015) Oil Governance in Uganda and Kenya: A review of efforts to establish baseline indicators on the impact of the oil sector in Uganda and Kenya. UNEP, Nairobi, Kenya

and the institutional framework. With regard to laws, the chapter will discuss the Petroleum (Exploration and Production) Act, Cap 308, the Petroleum (Exploration, Development and Production Bill), 2015 and the Access to information Act, 2016. This chapter will further test and confirm the hypothesis that Kenya lacks adequate laws and policies, regulator regimes as well as institutions to deal with the emerging concerns in the exploration and extraction of oil in light of Constitutional dictates of transparency and accountability.

2.1.1 Historical Perspective

2.1.1.1 Oil Exploration History in Kenya

The quest for oil exploration in Kenya begun in the 1950s, with the first well being drilled in 1960. In 1975, several consortia acquired acreage in the upper part of Lamu Basin. Texas Pacific *et al* drilled Hargaso-1 in 1975 and encountered oil and gas shows in the Cretaceous rocks.¹¹⁴ An interest in the offshore portion of the Lamu Basin resulted in the drilling of three deep wells, Simba-1, Maridadi-1 and Kofia-1 by a consortium of Cities Services, Marathon and Union in 1982. Seismic data revealed that salt diapiric structures were present along the Kenyan margin.¹¹⁵

In 1986, the petroleum exploration and production legislation in Kenya was revised to provide suitable incentives and flexibility to attract international exploration interest in the country,¹¹⁶ thus the Act¹¹⁷ that commenced on 16th November, 1986. The Petroleum (Exploration and Production) Act¹¹⁸ will be discussed later in this chapter.

Various consortiums continued exploration works with results of dry wells but with indications of oil and gas.¹¹⁹ In 1991, National Oil initiated an in-house study of the Lamu Basin as part of a long-term strategy to re- evaluate the existing geological, geophysical and geochemical data

¹¹⁴ Available at nationaloil.co.ke/site/3.php?id=1

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ The Petroleum (Exploration and Production) Act, Chapter 308.

¹¹⁸ Chapter 308, Laws of Kenya

¹¹⁹ In 1986 the Government of Kenya entered into a joint venture exploration programme with Petro-Canada International Assistance Corporation. Seismic work was conducted and Kencan-1 was drilled to test deeper strata on the structure adjacent to Garissa-1 well. A group of companies led by Amoco and Total drilled ten (10) wells, 8 of them in Anza Basin and 2 in Mandera Basin between 1985 and 1990. The wells were dry but with indications of oil and gas. Total exploration drilled Ndovu-1, Duma-1 and Kaisut-1 in North Anza Basin while Amoco drilled Sirius-1, Bellatrix-1 and Chalbi-3 in the Northwest of Anza Basin and Hothori-1 well in South Anza Basin.

relating to each of the sedimentary basins in Kenya. The Lamu Basin study was completed in 1995.¹²⁰ Based on the above reports Kenya subdivided the Lamu embayment (both onshore and offshore) into ten (10) exploration blocks, each with a specific exploration play. Two (2) more exploration blocks have been created since the year 2001. Promotion efforts generated new interests in the offshore Lamu Basin, and resulted in the signing of seven (7) Production Sharing Contracts covering blocks L5, L6, L7, L8, L9, L10 & L11 between 2000 and 2002. A total of 7884 km of 2D seismic data covering Blocks L5, L6, L7, L8, L9, L10, L11 & L12 was acquired offshore Lamu Basin by Woodside between August and October 2003.¹²¹

In 2012, President Mwai Kibaki said that oil has been discovered in Kenya after exploratory drilling by Anglo-Irish firm, Tullow Oil. While acknowledging that it was the beginning of a long journey in making the country an oil producer, the President affirmed that the nation will be informed as the process of oil exploration continues."¹²²

2.1.1.2 Legal perspective of oil exploration and land with mineral deposits

2.1.1.2.1 Definition of land

Land includes land of any tenure, and mines and minerals, buildings or any other parts of buildings, and other corporeal hereditaments, also, a rent and other incorporeal hereditaments, and an easement, rights, privilege, or benefit in, over or derived from land.¹²³ Land is therefore, far more than mere the physical soil-the 'corporeal hereditament'- more than the physical clods of earth which make up the surface layer of land, mines and minerals beneath the surface, and buildings or parts of buildings erected on the surface.¹²⁴ Land is unique; it is permanent, almost indestructible, has an income value and is capable of almost infinite division and subdivision.¹²⁵

In order to be so capable, land must be more than merely three-dimensional, and the doctrine of estates introduced into land the fourth dimension of time.¹²⁶ In addition, two maxims- *cuius est*

¹²⁰ Supra n. 94

¹²¹ Ibid

¹²² Kenya Oil discovery after Tullow drilling, March 26, 2012 available at www.bbc.com/news/world-17513488, (accessed on 26/9/2016)

¹²³ Law of Property Act 1925, s 205 (1) (ix).

¹²⁴ Gray, K.J. and Symes, P.D., (1981) Real Property and Real People, London: Butterworths, p. 51

¹²⁵ Lawson F.H. and Rudden B. (2002) Law of Property , 3rd Edition, Oxford University Press, p 22

¹²⁶ Chappelle D., (2008) 'Land Law', 8th Edition, Pearson Longman, p. 23

solum est usque ad coelum et ad inferos (he who owns the land owns everything extending to the heavens and the depths of the earth), and *quicquid plantatur solo, solo cedit* (whatever is attached to the ground becomes a part of it) - helped to achieve the extra dimension required.¹²⁷ However, certain restraints and limitations have been placed upon these maxims.¹²⁸ It can no longer be said that he who owns the land owns everything extending to the heavens and to the depths of the earth, for a combination of common law and statute has redrawn these apparently limitless entitlements.¹²⁹ Coming down to earth, literally, it was held in *Duppa vs. Mayo*¹³⁰ that though '*fructus naturales*' (the natural produce of the soil which grows without human labour, such as grass) may be 'land', '*fructus industriales*' (that which does not require human endeavour, such as annual crops) are not.¹³¹ With regard to minerals and mineral oils, common law as well as Laws of England¹³² enunciates that they belong to the Crown, the landowner (that is the holder of the legal estate in the land), the finder and the nation.¹³³

Prior to colonization, land ownership in Kenya was communal. However, with regard to minerals and mineral oils, the earliest indication of ownership of such resources was provided under the Kenya Mining Ordinance (No. 1, of 1931). It provided that, minerals obtained in the course of prospecting under a prospecting right is the property of the Government and may not be removed or disposed of except with the consent of the commissioner of mines.

Prior the promulgation of the Constitution 2010, reference to matters mineral resources was with regard to Trust land and protection against arbitrary search or entry.¹³⁴ Section 115 (1) (ii) of the 1969 Kenya Constitution (as amended to 1997) provided that:

115. Trust land to vest in county councils.

(1) All Trust land shall vest in the county council within whose area of jurisdiction it is situated:

Provided that there shall not vest in any county council by virtue of this subsection-

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ (1969) 1 Saund 282

¹³¹ Ibid

¹³² S.23 (1), Water Resources Act 1963, S. 132, Land Registration Act, 2002

¹³³ Supra n. 138

¹³⁴ Section 76 (2) (a) of the 1969 Kenya Constitution (as amended to 1997).

(ii) any minerals or mineral oils.

Further section 115 (3) provides that, 'Notwithstanding subsection (2), provision may be made by or under an Act of Parliament enabling a person to be granted right of interest to prospect for minerals or mineral oils on any area of Trust land, or to extract minerals or mineral oils from any such area, and the county council in which the land is vested shall give effect to that right or interest accordingly: Provided that the total period during which minerals or mineral oils may be prospected for on, or extracted from, any particular area of land by virtue of any grant or grants while the land is not set apart shall not exceed two years. Trust land may also be set aside by the county councils through an Act of Parliament for purposes of prospecting for or extraction of minerals or mineral oils.'¹³⁵ Trust land for purposes of government was also set aside for purposes of prospecting for or the extraction of mineral or mineral oils.

Under the 1969 Kenya Constitution, minerals and mineral oils vested in the government. However, unlike the Constitution, 2010 the Constitution was silent on whether they were to be held in trust for the people of Kenya.

Under The Draft Constitution of Kenya 2004 (Bomas Draft)¹³⁶, clause 78 classified land in Kenya as public, community or private. Public land under clause 79 includes all minerals as defined by any law. Since then, there has not been deviation as to what constitutes minerals with regard to land. This has been echoed under the Constitution 2010, which provides for public land as constituting all minerals and mineral oils as defined by law.¹³⁷

2.2 The Policy Framework for oil exploration and extraction

The energy and petroleum sector has been guided by the policy set out in Sessional Paper No. 4 of 2004 and governed by a number of statutes, principally the Energy Act, No. 12 of 2006, the Geothermal Resources Act. No. 12 of 1982 and the Petroleum (Exploration and Production) Act,

¹³⁵ Section 117 (1) (b) of the 1969 Kenya Constitution (as amended to 1997).

¹³⁶ The Draft Constitution of Kenya, 2004 that was prepared by the Constitution of Kenya Review Commission (CKRC) and endorsed by the National Constitution Conference held at the Bomas of Kenya, hence the term 'Bomas Draft'.

¹³⁷ Article 62 of the Constitution

Cap 308.¹³⁸ Adoption of the Kenya Vision 2030 and the promulgation of the Constitution of Kenya 2010, made it necessary to review both the policy and all these statutes so as to align them with the Kenya Vision 2030 and the Constitution.¹³⁹ Among the energy and petroleum policy objectives include: to ensure that prudent environmental, social, health and safety considerations, as well as issues of climate change are factored in energy and petroleum sector developments; ensure that a comprehensive, integrated and well informed energy and petroleum sector plan is put in place for effective development; foster international co-operation in energy and petroleum trade, investments and development; promote cost effective and equitable pricing of energy and petroleum products; provide incentives for local and international investments in the energy and petroleum sector; ensure that investors and operators in energy and petroleum sector comply with local content requirements; and promote an elaborate response strategy in the management of energy and petroleum related disasters.¹⁴⁰

The African Development Bank and the African Union in its supplement to the African Development report have recognized the inadequacy of policies and legal frameworks in the management of oil and gas resources. It has further been observed that other countries have unstable observed policy frameworks.¹⁴¹ In Kenya, the energy and petroleum policy acknowledges the need to align and review the energy and petroleum sector policy, legal and regulatory framework with the provisions, spirit and aspirations of the Constitution.¹⁴² This is further compounded by the fact that, quite often, laws do not meet the requirements of international organizations in terms of transparency, accountability, and other good governance criteria.¹⁴³ Also, lack of modern oil and gas exploitation policies is a severe drawback to the development of the sector. These include policies guiding contracts, documentation of exploitation, code of conduct and exploitation practice, training and development of local staff and community members, oil and gas research, fiscal aspects, financial guidelines, and environment health and safety regulations.¹⁴⁴ In some countries, the oil and gas sector has been

¹³⁸ Ministry of Energy and Petroleum, 'Draft National Energy and Petroleum Policy, June 16, 2015

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ African Development Bank and the African Union, (2009), 'Oil and Gas in Africa,' Supplement to the African Development Report, Oxford University Press.

¹⁴² Ministry of Energy and Petroleum, 'Draft National Energy and Petroleum Policy.

¹⁴³ Supra n.153

¹⁴⁴ Ibid

driven by annual ministerial policy statements on the budget.¹⁴⁵ Yet the importance of the sector in the African economy requires a long-term planning approach.¹⁴⁶

Therefore, policies and laws should be developed through an open legislative process that encourages public participation and should also include modern oil and gas exploitation policies. Further, the laws and policy should include constitutional requirements of transparency and accountability. The laws should therefore require that all information on oil production be made public.

2.3 Institutional Framework in oil exploration and extraction

Experience shows that institutional and governance failures are the root causes of much underdevelopment.¹⁴⁷ Thus, lack of institutional, technical, and human capacity: traditional and new oil-producing countries usually lack adequate infrastructures to manage the oil and gas sector; in addition, the lack of technical and human capacity undermines the ability to maximize the gains from oil resources.¹⁴⁸

The Ministry of Energy and Petroleum is responsible for overall policy coordination and development in the Energy sector in Kenya. It is responsible for formulation and articulation of energy and petroleum policies through which it provides an enabling environment for all stakeholders.¹⁴⁹ The Energy Regulatory Commission (ERC) that works under the supervision of the Ministry of Energy and Petroleum was established as an energy sector regulator under the Energy Act, 2006, with the responsibility for economic and technical regulation of electric power, renewable energy, and downstream petroleum sub-sectors.¹⁵⁰ Its functions include tariff setting, review, licensing, enforcement, dispute settlement and approval of power purchase and network service contracts.¹⁵¹ Thus, the ERC only deals with downstream sub-sectors and not the exploration and extraction of oil.

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Supra n. 155

¹⁵⁰ Ibid

¹⁵¹ Ibid

In order to consolidate the legal provision for energy matters, there is currently the Energy Bill, 2015. The preamble to the Bill states that it is an Act of Parliament to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes. The Bill establishes the Energy Regulatory Authority. Its functions *inter alia* include to issue, renew, modify, suspend licenses and set, review and approve contracts.¹⁵²

The National Oil Corporation of Kenya Limited (NOCK) is a wholly owned state corporation mandated to stabilize the petroleum supply market by participating in all aspects of the Petroleum industry namely upstream, mid-stream and downstream activities.

As seen above, the Ministry of Energy and Petroleum is tasked with formulation and articulation of energy and petroleum policies. However, as earlier stated, there are no adequate policies in place for purposes of ensuring that transparency and accountability in oil exploration is achieved. Further, from the mandate of the government entities, none of them is tasked with ensuring that access to information, transparency and accountability is promoted. It is envisioned that such Constitutional requirements ought to be grounded in law for example, under The Petroleum (Exploration and Production) Act, Chapter 308. Further there ought to be institutions in place to breathe life into the Constitutional requirements of transparency and accountability. However, as will be discussed later in this study, the law is insufficient and is not aligned to the Constitutional principles of transparency and accountability. Thus, in such absence of policies and laws, it is difficult to set up adequate infrastructures in oil exploration and extraction that would adequately deal with transparency and accountability. Further to this, there are no institutions mandated to deal with oil exploration and extraction in Kenya. As earlier discussed, strong institutions would, in the absence of laws as to transparency and accountability in oil exploration and extraction ensure that resource revenues are properly managed. These institutions determine whether the impact of resource revenues will be positive or negative thus averting the resource curse. Also,

¹⁵² Section 11 of The Energy Bill, 2015

the quality of these institutions which are determined by the principles of good governance would adhere to the Constitutional principles of transparency and accountability.

2.4 The current legal framework and its adequacy

2.4.1.1 Constitutional provisions

The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.¹⁵³ Sovereign power belongs to the people of Kenya and is exercised only in accordance with the Constitution.¹⁵⁴ Further, sovereign power under the Constitution is delegated to various State organs which perform such functions in accordance with the Constitution.¹⁵⁵ The Constitution of Kenya establishes the national governance framework and sets the scene for substantial legislative reforms including those relating to land tenure, environmental protection, citizen participation, benefit sharing, transparency and access to information, which are all relevant to oil development.¹⁵⁶ These are being addressed through a raft of new policy and legislation including: Vision 2030 and its implementation plans, which identify that oil development is for the benefit of the people.¹⁵⁷

The Constitution provides that all minerals and mineral oils as defined by law constitute public land.¹⁵⁸ Under Article 62 (3) of the Constitution, public land shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. Further, public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. With regards to utilization of natural resources, the Constitution provides that the State shall utilize the environment and natural resources for the benefit of the people of Kenya.¹⁵⁹ Further, all agreements relating to natural resources is subject to ratification by Parliament if it involves the grant of a right or concession by or behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and is entered into on or

¹⁵³ Article 2 (1) of the Constitution

¹⁵⁴ Article 1 (1) of the Constitution

¹⁵⁵ Article 1 (3) of the Constitution

¹⁵⁶ Golombok, R., Jones, M. I. (2015) Oil Governance in Uganda and Kenya: A review of efforts to establish baseline indicators on the impact of the oil sector in Uganda and Kenya. UNEP, Nairobi, Kenya

¹⁵⁷ Ibid, note 34

¹⁵⁸ Article 62 (1) (f) of the Constitution

¹⁵⁹ Article 69 (1) (h) of the Constitution

after the effective date.¹⁶⁰ Parliament is required to enact legislation providing for the classes of transaction subject to ratification.¹⁶¹

Article 35 of the Constitution states that every citizen has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right of fundamental freedom. Further, the State must publish and publicise any important information affecting the nation.¹⁶² As will be seen in the ensuing discussion, access to information is a prerequisite to transparency and accountability in the extractive industry and in particular, the oil industry.

Article 225 of the Constitution provides that Parliament shall enact legislation to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation.¹⁶³

The values and principles of public service include accountability for administrative acts and transparency and provision to the public of timely accurate information.¹⁶⁴ These values and principles of public service apply to public service in all State organs in both levels of government and all State corporations.¹⁶⁵ Parliament is required to enact legislation to give full effect to the values and principles of public service.¹⁶⁶

2.4.1.2 Statutory provisions

2.4.1.2.1 Petroleum (Exploration and Production) Act, Cap 308, Laws of Kenya

In Kenya, petroleum exploration and production is governed by the Petroleum (Exploration and Production) Act.¹⁶⁷ The preamble to the Act states that, it is an Act of Parliament to regulate the negotiation and conclusion by the Government of petroleum agreements relating to the exploration for, development, production and transportation of, petroleum and for connected

¹⁶⁰ Article 71 (1) of the Constitution

¹⁶¹ Article 71 (2) of the Constitution

¹⁶² Article 35 (3) of the Constitution

¹⁶³ Article 225 (2) of the Constitution

¹⁶⁴ Article 232 (1) (e) and (f) of the Constitution

¹⁶⁵ Article 232 (2) of the Constitution

¹⁶⁶ Article 232 (3) of the Constitution

¹⁶⁷ Cap 308, Laws of Kenya

purposes. Further to the Act, there is the Petroleum (Exploration and Production) Regulations, 1984.

Prior to the discovery of oil of economic viability, the Petroleum (Exploration and Production) Act can be said to have served adequately. However, with new developments in the Petroleum sector, the Act needs to be reviewed to incorporate a host of provisions and in particular, transparency and accountability initiatives and in particular, access to such information in accordance to Article 35 of the Constitution. It has been acknowledged that weak legal and regulatory framework- inherent weaknesses in the Petroleum Exploration and Production Act Cap 308 and Model Production Sharing Contract (PSC) include lack of provision for: Compensation regime; Licensing Rounds; Community awareness and participation; Windfall profits; Gas Sharing terms; Corporate Social Responsibility Requirements; Mechanism for working out government share out of monetary gains from transfer of a PSC; Defined Criteria for evaluation of terms provided in PSC applications for prudence and competitive bidding of blocks and environmental protection, conservation and management.¹⁶⁸ Further, the Petroleum (Exploration and Production) Act¹⁶⁹ does not conform to the edicts of the Constitution 2010 especially with regard to transparency and accountability initiatives in the exploration and production of oil in Kenya.

The Act is deficient in that it does not make provision for disclosure of information pertaining to any activities in the exploration and production of oil. The Act¹⁷⁰ provides that, notwithstanding any other written law and subject to the Act, there shall be an implied in every petroleum agreement an obligation on the contractor to furnish such other information and reports concerning petroleum operations as the Minister may require.¹⁷¹ The Act states that petroleum information means all or any of the operations related to the exploration for, development, extraction, production, separation and treatment, storage, transportation and sale of dispels of, petroleum up to the point of export, or the agreed delivery point in Kenya or the point of entry

¹⁶⁸ Kenya Vision 2030, Second Medium Term Plan, 2013-2017, page 67 and 68.

¹⁶⁹ Cap 308, Laws of Kenya

¹⁷⁰ Petroleum (Exploration and production) Act, Cap 308, Laws of Kenya

¹⁷¹ Section 9 (1) (j) of the Petroleum (Exploration and production) Act, Cap 308, Laws of Kenya

into a refinery, and includes natural gas processing operations but does not include petroleum refining operations.¹⁷²

The Act provides that the information required is to be furnished to the Minister and not any other person and thus does not conform to Article 35 of the Constitution. The general public does not have a way to access petroleum information. Which information they ought to access by virtue of Article 35 of the Constitution. Further, the contractors and players in the oil industry are not obliged to share this information with the Kenyan public.

As stated above, it has been acknowledged that there is weak legal and regulatory framework inherent in the current Act. Further, that it ought to align to the provisions, spirit and aspirations of the Constitution. The ensuing discussion will be interrogating the Petroleum (Exploration, Development and Production) Bill, 2015 and whether it conforms to the provisions, spirit and aspirations of the Constitution.

2.4.1.2.2 The Petroleum (Exploration, Development and Production) Bill, 2015

The preamble to the Petroleum (Exploration, Development and Production) Bill, 2015 states that it is an act of Parliament to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations; and for connected purposes. Of particular interest and with regards to this discussion is the provision for framework for reporting, transparency and accountability. This is provided under section 111 of the Bill. It states that:

- (1) The Cabinet secretary shall develop a framework for reporting, transparency and accountability in the upstream petroleum sector, which includes the publication of all petroleum agreements, annual accounts and reports of all revenues, fees, axes, royalties and other charges, as well as, any other relevant data an information to support payments made by the contractor and payments received by the national government, county government and local communities.

¹⁷²Ibid. Section 2

- (2) For reporting purposes, the transparency and accountability framework for upstream petroleum sector shall be disaggregated into each petroleum agreement, non-exclusive permit, drilling permit, production permit, and plug and abandonment permit in the following categories-
- (a) payment type by each contractor (i.e., taxes, fees, royalties, and other charges);
 - (b) production volumes by each contractor measured at the delivery point of sale;
 - (c) transfers of all upstream petroleum sector revenues from the national government to county governments and communities, including royalties; and
 - (d) all contractor contributions in cash or in kind to county governments and local communities.

2.4.1.2.2.1 Inadequacies of the Bill as regards transparency and accountability

The Bill is deficient in that, even though there is a provision for reporting, transparency and accountability, the Bill makes reference to a framework instead of a more cogent structure like regulations or better yet, a law that is in tandem with the Constitutional provisions. Secondly, such a 'framework' should involve all key stakeholders in the upstream sector and throughout the petroleum chain. This is important in that, information tends to flow from the top and where a party is not required not provide information, then it becomes difficult to compel such persons to provide any information that is required. This is to ensure that transparency and accountability exists for both contracts at the national level and the county level and also with respect to revenues.

Thirdly, there are no timeframes within which the framework should be implemented, thus, it leaves a lot of room for the non implementation of this provision.

Fourthly, transparency and accountability should be vested in an independent yet accountable body. Further, for purposes of contract transparency, there is need to dispense with confidentiality clauses that largely exist within contracts in order to achieve the objective of transparency and accountability.

Since oil falls in the category of mineral oils in accordance with the Constitution, the Constitution under Article 71 provides that agreements relating to natural resource is subject to ratification by Parliament 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 of Kenya. The Constitution calls on Parliament to enact legislation to this effect. Thus, the Bill may not be the right forum to provide for a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations.

2.4.1.2.3 Inadequacies of the Bill as regards access to information

Part V of the Bill makes provision for information and reporting. Section 72 provides that:

The contractor shall submit to the Authority reports on-

- (a) all geological, geochemical, geophysical surveys, drilling, completion and production data and any other information in accordance with the petroleum agreement and regulations made under this Act;
- (b) the rates and volume of petroleum produced, its composition including test production and the recovery of petroleum in connection with formation testing;
- (c) the volumes and other results of production monitoring as well as monitoring procedure; and
- (d) the use, injection, venting and flaring of natural gas or petroleum which information shall be based on metering.

Section 73 of the Bill provides that information obtained under section 72 relating to any matter shall not be published or otherwise disclosed to a third party without the prior consent in writing from the person from whom the information was obtained. However, the Bill further states that, such information shall only be disclosed to the Cabinet Secretary for the time being responsible for petroleum; to any officer or authority having functions in relation to upstream petroleum, policy development, economic planning of upstream petroleum operations, tax administration or environmental management; and in furtherance of a right to a person provided under the Constitution and other relevant laws; or the use of such information in any manner, which the Authority deems necessary or expedient in connection with the objects of the Act¹⁷³.

¹⁷³ Section 73 (a) and (b) of the Petroleum (Exploration, Development and Production) Bill, 2015

The contractor is expected to furnish the Cabinet Secretary and the Authority as the case may be at such times and in such form and manner, such information as the Cabinet Secretary and the Authority may in writing require.¹⁷⁴ The Bill also provides that, a person who refuses to furnish the information requested under section 74 or who makes a false statement or a statement which he has reason to believe is untrue, to the Cabinet Secretary, and to the Authority, as required under the Act, commits an offence and shall, on conviction, be liable to a fine of not less than twenty million shillings or to a term of imprisonment of not less than five years or both.¹⁷⁵

Section 76 of the Bill provides for information required by the Authority. It states that:

- (1) Where the Authority has reason to believe that a person is in possession of any information or data relating to upstream petroleum operations or any petroleum obtained or the value thereof, the Authority may, by notice in writing, require that person to-
 - (a) furnish to the Authority with that information or data within the period and manner specified in the notice;
 - (b) attend before the Authority or its representatives at such time and place as may be specified to answer questions pertaining to upstream petroleum operations or any petroleum obtained or the value thereof; or
 - (c) furnish to a person identified in the notice at such time and place specified such information or data in their custody or domain relating to upstream petroleum operations or any petroleum obtained or the value thereof.
- (2) A person shall not be excused from furnishing information or data or answering a question when required to do so under this section on the ground that the information or data so furnished or the answer to the question might tend to be incriminating or expose them to liability or penalty.
- (3) Where any information or data is furnished pursuant to a requirement under subsection (1) (c), the person to whom it is made available may make copies or take extracts from the data.

¹⁷⁴ Section 74 of the Petroleum (Exploration, Development and Production) Bill, 2015

¹⁷⁵ Section 75 of the Petroleum (Exploration, Development and Production) Bill, 2015

(4) Any person who-

- (a) refuses or fails to comply with the requirement in a notice under subsection (1) to the extent to which he or she is capable of complying with it; or
 - (b) in purported compliance with any requirement referred to in subsection (1), knowingly or recklessly makes a statement or furnishes any information or data that is false is misleading in a material particular,
- commits an offence and shall on conviction, be liable to the penalty provided under section 75.

As has been seen from the provisions constituting reporting information and reporting under the Bill¹⁷⁶, the contractor is only obligated to disclose information to the Authority. Such information cannot be published or otherwise disclosed to a third party without prior consent in writing from the person whom the information was obtained.¹⁷⁷ However, the same proviso seems to make a turnaround and states that, disclosure of such information can be made *inter alia* in furtherance of a right to a person as provided for under the Constitution and other relevant laws. This, in my opinion flies in the face of Article 35 of the Constitution which among others requires the State to publish and publicise any important information affecting the nation. As already seen above, minerals and mineral oils in Kenya are to be held in trust for the people of Kenya and administered on their behalf by the National Land Commission.¹⁷⁸ Given the anxiety and excitement that discovery of abundant natural resources generates, it beats logic to treat information as pertains the same to only a few persons. Further, the provisions under the Bill¹⁷⁹ that states that information may be disclosed in furtherance of a right under the Constitution presupposes that any person who requires such information has to prove that it is in furtherance of a Constitutional right. This can only be done by way of filing a Constitutional reference to the High Court.¹⁸⁰ This creates an unnecessary hurdle for the public in that, any time they need to enforce a right that pertains to acquisition of information on natural resources, the same can only be achieved through litigation.

¹⁷⁶ The Petroleum (Exploration, Development and Production) Bill, 2015

¹⁷⁷ Section 73 of the Petroleum (Exploration, Development and Production) Bill, 2015

¹⁷⁸ Article 62 (3) of the Constitution.

¹⁷⁹ Supra n. 189

¹⁸⁰ Article 165 of the Constitution gives the High Court jurisdiction to determine the question whether right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

From the discussion above, it is clear that, just like the Act, the Bill does not conform to the aspirations of transparency and accountability as entrenched under the Constitution.

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

This Act was enacted to give effect to Article 71 of the Constitution. The Act provides for classes of transactions that are subject to ratification by Parliament. Thus, crude oil and natural gas requires Parliamentary ratification.¹⁸¹ Further, with regard to minerals, mineral agreements with a threshold of US\$ 500 million, these also require ratification.¹⁸²

The Act, under section 13 makes provision for confidentiality. It states that:

- (1) The Cabinet Secretary responsible for the transaction that is subject to ratification may, pursuant to Article 35 of the Constitution, grant a request that the agreement or portions of it ought not to be publicly disclosed on account of commercial confidentiality, national security or other public interest considerations.
- (2) Where the request for confidentiality is granted, the Cabinet Secretary responsible for the natural resource that is subject of the transaction shall submit the agreement to Parliament which shall conduct the process of ratification in camera without disclosing any confidential material, but a summary of the agreement shall be made available to the public.
- (3) The decision of the Cabinet Secretary on the request for confidentiality may be challenged by any person through appropriate proceedings in the High Court, and the High Court shall have the power to call for and examine the Agreement in camera before determining the matter.

2.4.1.2.4.1 *Inadequacies of the Act as regards Transparency and Accountability and Access to Information*

¹⁸¹ Section 4 (1) and the Schedule to the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016

¹⁸² Ibid

The Act is deficient as regards making provisions for transparency and accountability. The confidentiality clause places a bottleneck with regard to accessing contracts and or agreements. The Act does not oblige such agreements to be published on account of commercial confidentiality, national security or other public interest considerations. This, however goes against the grain of transparency and accountability. The Act also provides that the decision of confidentiality may be challenged through the courts. As stated in the preceding discussion, this creates an unnecessary hurdle for the public. It creates a tedious process of having to go to court. Further, the decision to determine whether or not to disclose an agreement is solely left to the Cabinet Secretary. Such a decision ought not to be vested in an individual but a body that would sieve and determine whether the threshold for the requirement for confidentiality has been met. Otherwise, the Cabinet Secretary may be compromised or may be advancing a personal agenda. This in turn festers corruption, a vice that transparency and accountability seeks to fight.

2.4.2 The law on Access to Information in Kenya

As earlier stated, claims of a right to freedom of information are usually based on the idea that people are entitled to have access to information in the possession of the state that has an impact on them.¹⁸³ This specifically includes information that the State uses to make decisions affecting the persons requesting for it. Access to information also operates on a political level. In an authoritarian society, power is exercised arbitrarily, without reason or explanation.¹⁸⁴ In an open and democratic society, by contrast, government should be accountable for its actions and decisions, which should be informed by rational considerations that are explicable to those affected by them: democracy is government by explanation.¹⁸⁵ Accountable government is impossible if the government has a monopoly over the information that informs its actions and decisions.¹⁸⁶ When a government refuses to speak its mind candidly or intelligibly or at all, freedom of information is the interest that citizens have in being able to find out what their government is up to. It is the claim that they should have access to its records, to its meetings, to the occasions where policy is formulated and where decisions are taken about the use of public

¹⁸³ Supra, n. 13

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid

power.¹⁸⁷ Public access to information is fundamental to encouraging transparency and accountability in the way government and public authorities operate.¹⁸⁸ It is also an important weapon in the fight against corruption. At both levels, freedom of information combats governmental arbitrariness and contributes to the ideal of an open and democratic society, in which power is exercised rationally and with due deliberation.¹⁸⁹

Transparency is a means towards two ends.¹⁹⁰ Firstly, it aims to promote the accountability of government. Secondly, to promote greater public participation in government. Access to information legislation therefore provides a basis for the informed discussion of government policies and actions.¹⁹¹ Transparency and, by extension, access to information are also important weapons in the fight against corruption.¹⁹²

The objective of access to information is the notion that citizens can obtain information in the State's possession and in some countries private entity information that impact on citizens of that country and for purposes of being informed about the activities of the State. Invariably, there are some limitations on the public's ability to access certain types of documents and information. However, decision-makers are called upon to presume disclosure with parliament being at the forefront in promoting the culture of openness.

Sweden enacted the first access to information legislation in 1766 when the government passed the Swedish Freedom of the Press Act. Since then, over fifty countries around the world have enacted legislation to facilitate access to records for press research and reporting and dozens of countries have legislation pending. Access to information facilitates the public's 'right to know' and helps build an informed society.

As has been seen, access to information is all about openness, transparency, accessibility and accountability. The law on access to information in Kenya is provided under Article 35 of the

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ E. Mureinik (1993) 'Reconsidering Review: Participation and Accountability,' *Acta Juridica*

¹⁹¹ Ibid

¹⁹² Ibid

Constitution. It states that, every citizen has the right to access information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom.¹⁹³ The State is under obligation to publish and publicise any important information affecting the nation.¹⁹⁴ Thus, it can be correctly stated that the right to access information is widely recognized as a fundamental human right. Universally, this right is captured under the Universal Declaration of Human Rights adopted in 1948. Access to information is captured under Article 19 of the Declaration that states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The right to information can only be enjoyed when an individual is able to freely access relevant information when they so desire. As such, access to information is the practical implementation of the right to information. This right to information in many jurisdictions is usually enshrined by governments in access to information or freedom of information legislation and regulations. As earlier stated, the right to access to information is entrenched under Article 35 of the Constitution. Kenya has recently enacted the Access to Information Act, 2016 that gives effect to Article 35 of the Constitution whose date of commencement was 21st September, 2016.

Prior to the enactment of the Access to Information Act, the courts nevertheless had occasion to deal with the questions falling under Article 35 of the Constitution. In the case of *Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 6 Others*¹⁹⁵, the Constitutional and international dictates of the right to access information were aptly addressed where the court held that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. It has been recognized expressly in the Constitution of Kenya 2010 and in international conventions - article 19 of Universal Declaration of Human Rights (UDHR); article 19(2) of the International Covenant on Civil and Political Rights (ICCPR); and article 9 of the African Charter on Human and Peoples Rights. These international conventions form part of Kenyan law by dint of article 2(6) of the Constitution of Kenya, 2010.

¹⁹³ Article 35 (1) of the Constitution

¹⁹⁴ Article 35 (3) of the Constitution

¹⁹⁵ Petition No. 278 of 2011 [2013] e KLR

The court in *Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 6 Others*¹⁹⁶ further held that, the recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.

In particular, Mumbi J. observed thus;

[T]he right to information implies entitlements to the citizen to information, it also imposes a duty on the State with regard to provisions of information. Thus the State has a duty not only to proactively publish information in the public interest- this, I believe, is the import of Article 35 (3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicize any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State.

In furtherance of Article 232¹⁹⁷, the court in *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 6 Others*¹⁹⁸ also held that, as State organs or public entities, the 1st respondent (KENGEN) and the 2nd Interested Party (Kenya Revenue Authority) had a constitutional obligation to provide information to citizens as of right under the provisions of

¹⁹⁶ Ibid

¹⁹⁷ Article 232 of the Constitution provides that, ‘ (1) The values and principles of public service include- (a) high standards of professional ethics; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of the people in the process of policy making; (e) accountability for administrative acts; (f) transparency and provision to the public of timely, accurate information; (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions; (h) representation of Kenya’s diverse communities; and (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of- (i) men and women; (ii) the members of all ethnic groups; and (iii) persons with disabilities. (2) The values and principles of public service apply to public service in- (a) all State organs in both levels of government; and all State corporations. (3) Parliament shall enact legislation to give full effect to this Article.

¹⁹⁸ Supra n. 90

Article 35(1) (a) and the relevant legislations with regard to the information and reports that they should provide.

2.4.3 Access to Information Act, 2016

Prior to the enactment of the Access to Information Act, 2016, the only legislation on access to information is the Constitution, and in particular, Article 35. The importance of the enactment of legislation as regards access to information cannot be gainsaid. Access to information is more of the tenets of a free society and the base of our democracy. It is a right that allows citizens to access to government information, which is a pillar of our democracy. In fact, Mr. Justice La Forest on behalf of the entire Supreme Court of Canada in the *Dagg v. Canada (Minister of Finance)*¹⁹⁹ aptly observed that:

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.

Without further legislative underpinnings as to access to information, citizens are hamstrung in ensuring that the government is brought to book and ensuring meaningful participation in the democratic process. Thus, access to information legislation is important so that the public is able to fully understand and appreciate what is going in sectors that deal with natural resources. This then promotes transparency and accountability. Further, this deters unrest and prevents conflict that has been witnessed in other resource rich countries.

As earlier stated, the Access to Information Act, 2016 is to give effect to Article 35 of the Constitution, thus providing a framework for proactive and systematic information disclosure by Government Ministries and other public authorities. Prior to coming into force of the Act, the Memorandum of Objects and reasons, under the Access to Information Bill (2015) stated that it recognized access to information as a right bestowed on the Kenyan people, and sought to promote proactive publication, dissemination and access to information by the Kenyan public in the furtherance of this right. The Bill further spelt out the mechanisms for ensuring public access

¹⁹⁹ [1997] 2 SCR 403

to information, as well as the factors that may hinder this right to access. The Memorandum of objects and reason further stated that the Bill was borne of the realization that access to information held by the Government and public institutions is crucial for the promotion of democracy and good governance. Principals of good governance include transparency and accountability.

Section 4 of the Access to Information Act²⁰⁰ provides for the right to information. It states that:

‘(1) Subject to this Act and any other written law, every citizen has the right of access to information held by-

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

(2) Subject to this Act, every citizen’s right to access information is not affected by-

(a) any reason the person gives for seeking access; or

(b) the public entity’s belief as to what are the person’s reason’s for seeking access.

(3) Access to information of a public entity or private body shall be provided expeditiously and inexpensively.

(4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted inky in circumstances exempted under section 6.

(5) Nothing in this Act shall limit or otherwise restrict any other legislative requirement for a public entity, or a private body to, disclose information.

Section 5²⁰¹ makes provision for disclosure of information by public entities. It among others states that a public entity shall facilitate access to information, and the information may include- the particulars of its organization, functions and duties; the powers and duties of its officers and employees; the procedure followed in the decision making process, including channels of

²⁰⁰ The Access to Information Act, 2016

²⁰¹ Ibid

supervision and accountability; salary scales of its officers by grade; the norms set by it for the discharge of its functions; any guidance used by it in relation to its dealings with the public or with corporate bodies, including the rules, regulations, instruction, manuals and records, held by it or under its control or use by its employees for discharging its functions; and a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be consulted by any person.

Section 5 further provides that the State shall publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.²⁰²

With regard to contracts, the Act²⁰³ provides that, a public entity shall, upon signing any contract, publish on its website or through other suitable means various aspects with regards to the particulars of the contract. This includes the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference; the contract sum; the name of the provider, contractor or individual to whom the contract has been granted; and the periods within which the contract shall be completed. The Act further provides that, at a minimum, the material referred to in subsection (1) shall be made available for inspection by any person without charge; by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made; and on the internet, provided that the materials are held by the authority in electronic form.²⁰⁴

The Act also makes provision for limitation of the right to access information. Section 6 *inter alia* states that:

²⁰² Section 5 (1) (c) of the Access to Information Act, 2016

²⁰³ Section 5 (1) (e) of the Access to Information Act, 2016

²⁰⁴ Section 5 (3) of the Access to Information Act, 2016

- (1) Pursuant to Article 24 of the Constitution, the right to access information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to-
- (a) undermine national security of Kenya;
 - (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

Despite provision for limitation of the right to access information, a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests.²⁰⁵ Further, and in considering public interest, the Act states that particular regard shall be had to the constitutional principles on the need to promote accountability of public entities to the public; ensure that the expenditure of public funds is subject to effective oversight; promote informed debate on issues of public interest; keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.²⁰⁶

2.4.3.1 Exceptions to the right to access to information

While access to information is an inherent right, it has to be recognized that there are certain exceptions to this right. However, these exceptions to the public's right to access information held by state or its authorities should be narrow and should only apply where the harm of disclosing the information is greater than the public interest in having that information disclosed. This was held in the case of *Nairobi Law Monthly Company Limited v. Kenya Electricity*

²⁰⁵ Section 6 (4) of the Access to Information Act, 2016

²⁰⁶ Section 6 (6) of the Access to Information Act, 2016

*Generating Company & 6 Others*²⁰⁷ which stated that the scope of exceptions to disclosure of information should be limited, and such exceptions should be clear, narrow and subject to strict ‘harm’ and ‘public interest’ tests, and to the rights and interests of others. Therefore, it is important that there is legislation to identify categories of information to which access is guaranteed and the exceptions thereto.

As stated earlier, the Constitution provides that all minerals and mineral oils as defined by law constitute public land.²⁰⁸ Further, public land shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.²⁰⁹ Thus, any dealings with regards to minerals and mineral oils constitute dealings on behalf of the people of Kenya and as such, the people of Kenya are entitled to information with regards to such dealings. It can correctly be stated that such dealings do not fall within the exceptions to the right of access to information since it passes the test of public interest.

2.4.3.2 Inadequacies of the Access to Information Act, 2016 as regards transparency and accountability in the exploration and extraction of oil

Apart from section 6 (6) (a) of the Act as regards accountability, there is no other provision on transparency initiatives. Further, the provision as to contracts does not specifically talk about agreements with regards to natural resources as envisaged by Article 71 of the Constitution that calls for ratification of such transactions by Parliament. Further, the Constitution states that Parliament shall enact legislation providing for classes of transactions subject to ratification.²¹⁰ This legislation as will be discussed has been enacted through the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016. This Act will be discussed further in this chapter. It is envisaged that contracts relating to the exploration and extraction of natural resources are complex and highly sensitive. Thus, there is need to have express provisions with regard to information pertaining such contracts that can be made accessible.

²⁰⁷ Supra n. 202

²⁰⁸ Article 62 (1) (f) of the Constitution

²⁰⁹ Article 62 (3) of the Constitution

²¹⁰ Article 71 (2) of the Constitution

The Act also provides for limitation of the right to access information to include information that would infringe on the commercial interest. However, this provision presents a bottleneck with regard to exploration and extraction of natural resources since such ventures are highly commercial and any information thereto can easily be termed as commercially sensitive. This would therefore infringe on a party's commercial interest. This is further informed by clauses contained in such contracts.

2.4.4 Why Transparency and Accountability

A host of provisions under the Constitution advocate for transparency in government dealings.²¹¹ It is a precursor to good governance, a tenet that all institutions should strive to achieve. This is achieved through dissemination of information in accordance with Article 35 of the Constitution and under the Access to Information Act, 2016. Access to information is captured in several pieces of legislation and policies. For example, the National Land policy and legislations on land advocate for access to information pertaining land. The National Land Commission Act²¹² provides that one of the Commission's functions is to develop and maintain an effective land information management system at national and county levels.

Transparency facilitates the aspect of accountability and oversight. It shines light on secrecy and unearths the cost of opaque deals to the state, communities and citizens. Information on the other hand permits the public to scrutinize oil activities to ensure that they support the national agenda and serves their benefit. However, to ensure that the information is properly scrutinized, there ought to be a mechanism for purposes of oversight. Oversight mechanisms will ensure that there is review and evaluation of government and its activities in the oil industry. These include annual internal and external audits, and independent committees comprised of government officials, business representatives, and private citizens to oversee the production process or monitor spending.²¹³ Further, civil society can also act as the people's watchdog. Formal and informal monitoring allows the public to demand that the government change course when officials' private concerns usurp public ones.²¹⁴ Thus, without transparency and accountability, the public

²¹¹ See Articles 10, 225 and 232 of the Constitution

²¹² Act No. 5 of 2012

²¹³ For examples, see World Bank (2006), Experience with Oil Funds: Institutional and Financial Aspects.

²¹⁴ Ibid.

would not be able to ensure that oil revenues are used for development and therefore, the country would not be able to avert the resource curse.

As earlier discussed, the Constitution makes provision for access to information under the Bill of Rights.²¹⁵ However, legislation in the oil industry makes provision for non-disclosure agreement which is not only inconsistent with the Constitution but also provides convenient avenues to perpetuate secrecy in the oil industry. In any event, as stated by the court in the case of *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 6 Others*²¹⁶ it should be the obligation of the public body to prove that it is legitimate to deny access to information. Thus, the provision for non-disclosure would go against the grain of access to information thus stifling the principles of transparency and accountability.

The current licensing regime for oil and gas concessions in Kenya does not promote transparency in the contracting process. There is requirement for the application of open and competitive bidding in licensing for oil concessions, no mandatory contract disclosure and also no requirement for the disclosure of beneficial ownership information. These non-disclosures increase governance risks around petroleum contracts by strengthening the perception of “too lucrative legal benefits for firms”²¹⁷ Further, currently, there is no framework for disclosure of petroleum revenues, as well as any other information with regard to accounting for and managing revenues such as crude oil production volume, petroleum receipts, sales price and expenditure from petroleum revenues.

Kenya has not acceded to the EITI process. EITI principles as will be seen in the ensuing discussion aspire to genuinely open, transparent and thorough auditing of oil revenues, which in turn informs meaningful multi-stakeholder scrutiny.²¹⁸ The government should see the initiative as an invaluable tool in guaranteeing that oil revenues contribute to socio-economic development, especially in the absence of laws and institutions in the promotion of transparency and accountability in the exploration and extraction of oil.

²¹⁵ Article 35 of the Constitution

²¹⁶ *Supra* n. 207

²¹⁷ Joseph Ayee, Tina Søreide, G. P. Shukla and Tuan Minh Le “Political Economy of the Mining Sector in Ghana”, The World Bank Africa Region, Public Sector Reform and Capacity Building Unit, July 2011.

²¹⁸ www.gov.uk/guidance/extractive-industries-transparency-initiative

2.5 International Best Practices on Transparency and Accountability in Oil exploration and extraction

2.5.1 Extractive Industry Transparency Initiative (EITI) in context

Launched in September 2002 by Tony Blair as a complement to efforts of improving governance, the EITI provides a good entry point for broader work and discussion on revenue management.

The Extractive Industries Transparency Initiative (EITI) is a voluntary initiative with the objective of improving transparency and accountability in countries rich in oil, gas, and mineral resources.²¹⁹ Once a host country endorses the initiative, the EITI process is mandatory for all extractive industry operators (including those that are state-owned) operating within that country.²²⁰

By encouraging greater transparency and accountability in countries dependent on the revenues from oil, gas and mining, the potential negative impacts of mismanaged revenues can be mitigated and these revenues can instead, become an important engine for long-term economic growth that contributes to sustainable development and poverty reduction.²²¹ Resource-rich countries, extractive industry companies and the international community have a common interest in supporting efforts to increase transparency and accountability.²²²

The G8 countries issued a Declaration on Fighting Corruption and Improving Transparency at Evian in 2003. At Sea Island in 2004 Transparency Compacts was agreed with four countries. The IMF has promoted fiscal transparency in member countries via the Code of Good Practices on Fiscal Transparency and the associated manual, while implementation of the code is monitored through the production of Reports on the Observance of Standards and Codes (ROSCs).²²³ Both the IMF and the World Bank promote more effective resource revenue

²¹⁹ Available at europa.eu/rapid/press-release_MEMO-13-541_en.htm accessed on 17/8/2016

²²⁰ Ibid

²²¹ Available at https://eiti.org/sites/default/files/documents/sourcebookmarch05_0.pdf accessed on 17/8/2016

²²² Ibid

²²³ Ibid

management through policy advice, policy-based lending, project lending and technical assistance.²²⁴

From its inception, the EITI has enjoyed wide international support. But the focus for the initiative is at the national level. Country ownership of EITI and company participation in the initiative provides a domestic and international signal of a commitment to high standards of transparency and accountability in public life, government operations and in business.²²⁵

The EITI aims at improving governance. Improved governance of the resource revenues allows better management of those resources which in turn promotes greater economic and political stability. The resultant effect is that it prevents conflicts in the extractive sector. There is also improved investor climate which provides a clear signal to investors and the international financial institutions that the government is committed to greater transparency by implementation of EITI.²²⁶

Benefits to companies and investors centre on mitigating political and reputational risks. Civil conflict and political instability caused by opaque governance is a clear threat to investments. In extractive industries, where investments are capital intensive and dependent on long-term stability to generate returns, reducing such instability is beneficial. Transparency can also contribute to a level playing field for companies, and by making public their payments to a government a company can help to demonstrate the contribution that its investment makes to a country.²²⁷

Benefits to civil society come from increasing the amount of information in the public domain about those revenues that governments manage on behalf of citizens, thereby making governments more accountable. Thus, the role of the civil society cannot be underestimated.

²²⁴ Ibid

²²⁵ Ibid

²²⁶ Ibid

²²⁷ Ibid

2.5.1.1 EITI Stakeholders

At the national level, the EITI is a government-led initiative. However, the EITI Principles and Criteria call for the active involvement of other partners from wider society. Broad local leadership and participation are essential, and active public engagement from a range of stakeholders is required.

A stakeholder is defined as an individual, community, group or organisation with an interest in the outcome of the EITI, including both those who are affected by it (positively or negatively) and those who are able to influence it (in a positive or negative way).²²⁸ Stakeholders will be drawn from within state institutions, the private sector and civil society. There are both key and wider stakeholders, defined by the level of their interest and degree of influence over implementation. The grouping varies with each country. However, similar actors are likely to be involved in all countries.

2.5.1.2 The EITI Principles

The EITI principles affirm some of Kenya's Constitutional underpinnings. This includes the affirmation that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction. However, if not managed properly, can create negative economic and social impacts; affirmation that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development; recognition that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development; underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability; recognition that achievement of greater transparency must be set in the context of respect for contracts and laws; recognition that the enhanced environment for domestic and foreign direct investment that financial transparency may bring; belief in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public

²²⁸ Ibid

expenditure; commitment to encouraging high standards of transparency and accountability in public life, government operations and in business; belief that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use; belief that payments' disclosure in a given country should involve all extractive industry companies operating in that country; in seeking solutions, all stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations.²²⁹

2.5.2 Conclusion

This chapter sought to test whether the current polices regulator regimes / institutions and laws are adequate to deal with the emerging concerns in the exploration and extraction of oil in light of Constitutional dictates of transparency and accountability. From the foregoing discussion, it emerged that there are no institutions and or adequate institutions in place to deal with the exploration and extraction of oil in Kenya with the required constitutional underpinnings of transparency and accountability. It is also evident that the current laws and policies do not address the issue of transparency and accountability and access to information in oil development. Neither do the newly enacted laws, that is, the Access to Information Act as well as the Natural Resources (Classes of Transaction Subject to Ratification) Act, 2016 address this issue. The purpose entrenching legal regimes as has been discussed is to ensure that there is promotion of the principles of transparency and accountability and access to information with regards to public resources. This in turn enables citizens make informed decisions and demand for greater and prudent use of national resources for sustainable economic growth. An accountable government and an informed citizenry contribute to greater political stability, economic prosperity, increased energy security as well as promotion of improved investment climate. This greatly averts the issue of conflicts, thus averting the resource curse.

The promotion and adoption of the EITI initiatives would also highly promote transparency and accountability in the exploration and extraction of oil in Kenya. However, there is need for

²²⁹ Ibid

strong institutions to achieve this greater good. The EITI initiatives echo the aspirations of the people of Kenya as underpinned under the Constitution, 2010 and in particular, the ethos of transparency and accountability that run through the Constitution.

As stated by Odote,²³⁰ there is need to ensure that the law when enacted responds to the specific challenges of the extractive industry, is in line with and does not negate the constitution and also is popularised and implemented effectively.²³¹ Unfortunately, the newly enacted Access to information Act, 2016 that commenced on 21st September 2016 is silent and does not respond to specific challenges of the extractive industry. The nature of the extractive industry, given that the revenues generated therein are prone to corruption, the technical nature of the industry, and the complexity of the issues to be addressed all justify the need for availability of information.²³² Information will help demystify myths, enable citizens to understand the industry, empower citizens to engage with the processes and decisions thus enhancing accountability and transparency.²³³

This chapter has thus confirmed the hypothesis that Kenya lacks adequate laws and policies and regulator regimes/ institutions to deal with the emerging concerns in the exploration and extraction of oil in light of Constitutional dictates of transparency and accountability.

Further to this discussion is the issue of contract transparency which can be achieved through access to such contract held by the actors in the oil development sector. The next chapter seeks to analyse the issue of contract transparency and what role it plays in the promotion of transparency and accountability in the exploration and exploitation of oil.

²³⁰ C. Odote, 'Why access to information law is vital' Business Daily, Posted Sunday, October 5, 2014.

²³¹ Ibid

²³² Ibid

²³³ Ibid

3.0 CHAPTER THREE

3.0 CONTRACT TRANSPARENCY – ITS ROLE IN PROMOTING TRANSPARENCY AND ACCOUNTABILITY IN OIL EXPLORATION AND EXTRACTION IN KENYA

3.1 Introduction

The preceding chapter discussed the adequacy of laws and policies and regulator regimes/institutions to deal with the emerging concerns in the exploration and extraction of oil in light of Constitutional dictates of transparency and accountability in a bid to avert the resource curse. This chapter continues the discussion in bringing out another key component that will ensure that Constitutional principles of transparency and accountability are achieved with regards to exploration and extraction of natural resources. While it is acknowledged that there are aspects in oil exploration and extraction such as environment, health and safety aspects, local content compliance, contractual terms among others that greatly impact on its administration and require that there ought to be transparency and accountability, this chapter deals with the aspect of contract transparency that in some instances would incorporate issues such as fiscal aspects, profits as well as local content compliance.

Natural resources in most African countries are vested in the State. Kenya is no exception. It therefore follows that contracts on natural resources that may range from permits or licences for exploration and discovery to a substantive contract for development, production and distribution, are often between the investor and the State (or its agencies).²³⁴ The primary objective of the investor is to procure profits, obtaining the maximum possible risk-adjusted return on its investments over the life of the investment.²³⁵ This informs issues of interest of the investor when it comes to arranging for and agreeing to contractual terms of engagements.²³⁶ Of particular interest to the investor would be the area of land that is perceived or proved to contain the resources to be extracted. The investor will seek to obtain security over or non-interference with, the investment assets. The investor would seek to obtain assurances of fair, equitable and non-discriminatory treatment, and stability of the legal environment within which it

²³⁴ Supra n. 80 p. 107

²³⁵ Ibid

²³⁶ Ibid

operates.²³⁷ Further, the investor would also be interested in consistency, continuity and predictability in the actions of the host State, and the need to subject the agreement to international legal order and to secure a credible forum for the resolution of any dispute that may eventuate.²³⁸ Conversely, the State's primary objective is to protect its citizen's public interest of economic development. This interest would in turn translate into expectations of maximum revenue from the exploited resources, job creation (direct and indirect) from the investment, provision of training and skills upgrade, transfer of technology to the host State, increased capital stock, and spin-off of new and allied industries.²³⁹

When oil was discovered in Turkana, the then Minister for energy Kiraitu Murungi promised the country that contracts with companies relating to the extractive industry would be availed to the public, including through dedicated website.²⁴⁰

There is a growing movement for contract transparency with regard to contracts entered into by parties in oil exploration and extraction. This has been supported by an increasing number and diversity of organizations and institutions.²⁴¹ Civil society organizations such as Revenue Watch Institute and the Publish What You Pay Campaign have been on the forefront in pushing for further openness.²⁴² International financial institutions such as the World Bank, the International Monetary Fund and the International Finance Corporation are beginning to encourage contract transparency; the strongest of these proponents being the International Monetary Fund, which endorsed contract transparency as key to good governance of extractives.²⁴³ Kenya for example requires that all agreements relating to natural resources be subject to ratification by Parliament if it involves a grant of a right or concession by or on behalf of any person, including the national

²³⁷ Ibid

²³⁸ Ibid

²³⁹ Ibid

²⁴⁰ Kenya Debating Transparency of Natural Resource Contracts, 16 August 2013, Available at www.freedominfo.org/2013/08/Kenya-debating-transparency-of-natural-resource-contracts/ (Accessed 3/11/2016)

²⁴¹ P. Rosenblum & S. Maples (2009), 'Contracts confidential: Ending secret deals in the extractive Industries', Revenue Watch Institute.

²⁴² Ibid

²⁴³ International Monetary Fund Guide on Resource Revenue Transparency, 2007

government, to another person for the exploitation of any natural resource.²⁴⁴ Very recently, contract transparency in Kenya was advocated by the IMF, which as has been seen above, has supported more contract transparency.²⁴⁵

All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.²⁴⁶ Public land constitutes all minerals and mineral oils as defined by law.²⁴⁷ Therefore, it can be stated that oil and minerals are the property of the nation. Essentially, the country and its citizen own these resources. Governments, as representatives of the people, often sign licenses or contracts with companies giving the companies the right to extract the natural resources in exchange for a share of profits. The contract represents the terms of the agreement between the company and the State. In addition to scale terms, contracts often also include information about local content, environment impact, infrastructure and production timing. It is of the utmost importance that a government negotiates the right contract to ensure that it benefits from its natural resources. As is the norm, large investment projects are built upon a series of contracts that may in turn require many other contracts for purposes of implementation.²⁴⁸ Some experts estimate that a typical large international project has “forty or more contracts uniting fifteen parties in a vertical chain from input to supplier to output purchaser.”²⁴⁹ Resource extraction projects are no exception: one expert interviewed estimated that a typical oil project could have around 100 contracts supporting and flowing from the project.²⁵⁰ Most of these contracts are between private parties, such as contractor and sub-contractors, private banks, and individual financiers.²⁵¹ This paper however seeks to look at the contract between the State and the company (or consortium of companies) that is superior to the other contracts and which is concerned with exploration and extraction of the natural resource. Such contracts would include

²⁴⁴ Article 71 of the Constitution, See further, Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016. The preamble to the Act states that it is an Act of Parliament to give effect to Article 71 of the Constitution

²⁴⁵ Supra n. 253

²⁴⁶ Article 61 (1) of the Constitution

²⁴⁷ Article 62 (1) (f) of the Constitution

²⁴⁸ B. Esty, (2004) *Modern Project Finance: A case Book* (John Wiley and Sons, Inc New Jersey), 2

²⁴⁹ *Ibid*

²⁵⁰ Supra n. 254

²⁵¹ *Ibid*

concession agreements, license agreements, production sharing agreements and service agreements.²⁵²

Contract transparency as will be discussed under this chapter requires that governments must publish contracts and agreements with oil companies; both must report on extraction rates and revenues earned, paid, and received; the government must document and publicize oil revenue spending.²⁵³ Transparency must also infuse the production process—leases should be awarded through open competitive auctions and companies should provide the public with annual production forecasts.²⁵⁴ Further, contracts, ought to address the all important public interest concerns such as issues concerning the environment that are oft neglected in contract negotiations.

This chapter therefore seeks to test the hypothesis that, contract transparency, just like the legal, policy and institutional regimes are lacking in furtherance of transparency and accountability in the exploration and extraction of oil in Kenya. This chapter will exhibit the importance of contract and the answer the question of what contract transparency seeks to cure with regard to transparency and accountability in oil exploration and extraction.

3.2 The Legal Hierarchy of Contract laws in Kenya

Contracts generally and obligations that fall thereunder, do not exist in a vacuum. They are anchored in existing laws. In Kenya, the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.²⁵⁵ No person may therefore claim or exercise State authority except as authorized under the Constitution.²⁵⁶ The Constitution includes information on the Bill of Rights²⁵⁷ and values of the country, potentially including

²⁵² Ibid

²⁵³ See International Monetary Fund (2005), Guide on Resource Revenue Transparency, for more on transparency best practices in oil revenue governance.

²⁵⁴ Ibid

²⁵⁵ Article 2 (1) of the Constitution

²⁵⁶ Article 2 (2) of the Constitution

²⁵⁷ See Chapter Four of the Constitution

natural resource ownership. Parliament is vested with authority to enact legislation;²⁵⁸ therefore, such laws flow from the constitutional structure and thus form the next level of laws which include statutory laws and policies that govern various industries. With regard to governance of natural resources, and in particular the exploitation and exploration, such laws include the Petroleum and mining laws, environmental laws, health and safety laws as well as tax and labour laws. Regulations on the other hand are more specific and are usually set forth in accordance with a law by an executive, ministry or department.

Some countries have constitutions, laws and regulations that are very specific about the rules governing extractive industries.²⁵⁹ As a result, there may be less information in the contract and less for the government and company to negotiate about each deal. While theoretically the laws and policy are supposed to have more authority than contract, in legal speak, contracts can also be written to explicitly override the laws and regulations.²⁶⁰ This is done through inclusion of clauses or terms that may override the laws that are in place. This, however, can and in most instances does have a negative overall impact on extractive industry governance, as too much variance from one project to another makes it more difficult to effectively monitor and enforce agreements.²⁶¹ In practice, the prevalence of contract-specific arrangements means that even when legal frameworks have many details about the extractive policy, oversight is impossible without the contract.²⁶²

Contract laws in Kenya stem from the Constitution as well as statute and other regulations. The ensuing discussion will look at the law of Contract in Kenya and its place in industry, that is, the exploration and extraction of natural resources and the Constitutional parameters of transparency and accountability in this sector.

3.2.1 Historical precepts to the law of contract in Kenya

The imposition of English law in Kenya on August 12, 1897 determined the present law of contract in Kenya. Admittedly, the Indian Contract Act that applied to Kenya was largely a

²⁵⁸ Article 94 (5) of the Constitution

²⁵⁹ Natural Resource Governance Institute, (2015) 'Contract Transparency, Creating Conditions To Improve Contract Quality, NRG Reader.

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² Ibid

codification of English Common Law principles.²⁶³ The English contract law applies to Kenya by virtue of the Judicature Act of Kenya.²⁶⁴ Section 3 provides for the mode of exercise of jurisdiction. It states that:

- (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—
 - (a) the Constitution;
 - (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
 - (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

Currently, the sources of law in Kenya are the Constitution, the general rules of international law shall form part of the law of Kenya,²⁶⁵ any treaty or convention ratified by Kenya forms part of the law of Kenya under the Constitution,²⁶⁶ Kenya Acts, certain United Kingdom Acts, and in the rules of common law and equity as developed in England.²⁶⁷ In practice however it is the last category that proves to be the most important for the simple reason that there are statements in the Constitution and only a handful of Acts directly concerned with general law.²⁶⁸ Consequently it is what the courts have done in the area of contract that proves to be of paramount importance.²⁶⁹

²⁶³ R.A. Hodgkin, *Law of Contract in East Africa*, Kenya Literature Bureau, p. 1

²⁶⁴ Act No. 16 of 1967

²⁶⁵ Article 2 (5) of the Constitution

²⁶⁶ Article 2 (6) of the Constitution

²⁶⁷ *Supra* n. 176, p. 2

²⁶⁸ *Ibid*

²⁶⁹ *Ibid*

3.2.2 Law of Contract Act

The law of contract in Kenya is governed by the Law of Contract Act.²⁷⁰ In its preamble it states that it is an Act of Parliament to apply the English common law of contract to Kenya, with certain modifications. Thus, the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of subsection (2) of the Law of Contract Act and by the Acts of Parliament of the United Kingdom specified in the schedule to the Act, to the extent and subject to the modifications mentioned in the schedule shall extend and apply to Kenya; provided that no contract in writing shall be void or unenforceable by reason only that it is not under seal.²⁷¹ The Law of Contract Act further provides for certain contracts to be in writing.²⁷² Contracts with regard to land should be in writing, signed by all parties.²⁷³ Further, the signature of each party signing has to be attested by a witness who is present when the contract was signed by such party.²⁷⁴ The requirement as to writing and signing does however not apply to contracts made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.²⁷⁵

3.2.3 Government Contracts Act

Contracts entered into by the government are governed by the Government Contracts Act.²⁷⁶ The Act²⁷⁷ which commenced on 1st July, 1957 when Kenya was still under British colony largely makes reference to 'Colony'. It *inter alia* provides that, any contract made in the Colony on behalf of the Government shall, if reduced to writing, be made in the name of the Government of the Colony and Protectorate of Kenya and shall be signed either by the accounting officer or by the receiver of revenue of the Ministry or for the department of the Government concerned, or by the public officer duly authorized in writing by such accounting officer or receiver of revenue, either specifically in any particular case or generally for any contracts below a specified value in

²⁷⁰ Chapter 23, Laws of Kenya

²⁷¹ Section 2 (1) of the Law of Contract Act, Cap 23, Laws of Kenya

²⁷² Section 3 of the Law of Contract Act, Cap 23, Laws of Kenya

²⁷³ Section 3 (a) (i) and (ii) of the Law of Contract Act, Cap 23, Laws of Kenya

²⁷⁴ Section 3 (b) of the Law of Contract Act, Cap 23, Laws of Kenya

²⁷⁵ Ibid

²⁷⁶ Chapter 25, Laws of Kenya

²⁷⁷ Government Contracts Act, Chapter 25, Laws of Kenya

his department or otherwise as may be specified in such authorization.²⁷⁸ Contracts made for the Government outside Kenya by a person whether generally or specifically authorized in writing in that behalf by the Minister shall, so far as the same comes within the jurisdiction of the courts of Kenya, be deemed a contract made on behalf of the Government.²⁷⁹

3.2.3.1 Adequacy of the current legal framework with regard to transparency and accountability in contractual obligations

The Government Contract Act²⁸⁰ and the Law of Contract²⁸¹ were enacted before the promulgation of the Constitution, 2010. In fact, the Government Contract Act still makes reference to Kenya as a Colony. This just shows how outdated the Act is. As regards extraction and exploration of oil and the constitutional principles of transparency and accountability, the aforesaid Acts are largely lacking and do not address the emerging concerns in the oil sector. As such, the proviso under the constitution calling for transparency and accountability in any dealings by the State and with particular regard to natural resources is not reflected under both statutes.

3.3 Why contract transparency

As stated in the introductory bit of this chapter, when oil was discovered in Turkana, the then Minister for energy Kiraitu Murungi promised the country that the contracts with companies relating to the extractive industry would be availed to the public, including through dedicated website.²⁸² Very few countries disclose contracts made with private companies to develop natural resources. However, pressure for more transparency has been on the rise, as is now on display in Kenya.²⁸³

It is against this backdrop that the government recently cancelled contracts with mining companies over questions about their adequacy and transparency.²⁸⁴ The IMF has also been at

²⁷⁸ Section 2 of the Government Contracts Act, Chapter 25, Laws of Kenya

²⁷⁹ Section 3 of the Government Contracts Act, Chapter 25, Laws of Kenya

²⁸⁰ Chapter 25, Laws of Kenya

²⁸¹ Chapter 223, Laws of Kenya

²⁸² Supra n.253

²⁸³ Ibid

²⁸⁴ Ibid

the forefront in pressuring Kenya to disclose the terms of their contracts.²⁸⁵ Transparency of extractive sector foreign investment contracts is considered desirable to permit the public to assess whether company payments are adequate, evaluate other contract terms and monitor compliance.²⁸⁶

The first step in contract transparency is for the government and the companies to agree that the contracts can be shared openly, or for the government to pass a law requiring contract transparency in line with the provisions under Article 35 of the Constitution as to access to information. For the management of natural resources and the growth and economic development that resources provide, contract transparency is essential.²⁸⁷ All parties to such contracts, to wit the host State, citizens, and investors have much to gain from contract transparency.²⁸⁸ The case for contract transparency is buttressed by the fact that governments will be able negotiate better contracts if they have access to contracts other than their own, as industry certainly does.²⁸⁹ Co-ordination among government agencies in enforcing and managing the contracts will also be made easier.²⁹⁰

Minerals and mineral oils are classified as public land.²⁹¹ As earlier stated all minerals and mineral oils vest in and is to be held by the national government in trust for the people of Kenya and is to be administered on their behalf by the National Land Commission.²⁹² This was acknowledged in the case of *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*²⁹³ where Mutungi J., in dealing with the cancellation of special mining licences to the Applicant acknowledged and *inter alia* held that:

Article 62(1) (f) of the Constitution “**all minerals and mineral oils as defined by law**” are classified as public land and by article 62(3) of the Constitution minerals are vested in

²⁸⁵ Ibid

²⁸⁶ Ibid

²⁸⁷ P. Rosenblum & S. Maples, (2009) ‘Why Contracts confidential: Ending secret deals in the Extractive Industries’, Revenue Watch Institute.

²⁸⁸ Ibid

²⁸⁹ Ibid

²⁹⁰ Ibid

²⁹¹ Article 62 (1) (f) of the Constitution

²⁹² Article 62 (3) of the Constitution

²⁹³ [2015] e KLR

and are held by the national government in trust for the people of Kenya and thus the Commissioner of Mines is placed in a position of trust to execute the functions and exercise powers as a trustee for the people of Kenya.

Further, because the citizens of the country are co-owners of these resources, they have a right to understand the terms contained in the exploration and extraction of oil. They need to be informed and have a right to know how their government is selling their resources.²⁹⁴

In most- countries, as is the case in Kenya, sub-soil resources such as minerals, oil and gas are the property of the State, not the individual property owner of the surface rights.²⁹⁵ Citizen ownership is not such a simple proposition when it comes to particulars, however; in countries with mineral and hydrocarbon resources, the ways in which the region, community and nation divide the benefits of these resources can be highly controversial.²⁹⁶ Accordingly, with regards to contracts involving oil, gas and mineral resources, they may cover a range of information to which citizens should rightly have access, as they are the owners of such resources.²⁹⁷

The “value” of a contract cannot be captured in a single number; contracts typically contain information about fiscal terms and/or aspects and the allocation of risk that are essential to understanding the benefits and risks- the real value of the deal.²⁹⁸ Beyond the fiscal aspects that are necessarily involved, contracts may also contain provisions covering many other areas that directly affect citizens, including (but not limited to) environmental mitigation and protection measures, sections on land use and rights, and provisions dealing with the displacement of local

²⁹⁴ See e.g.,

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

U.N. General Assembly Resolution 1803 (XVII) of 14 December 1962, “Permanent Sovereignty over Natural Resources.”

²⁹⁵ See for e.g. Article 62 of the Constitution of Kenya (2010), Article 27 of the Mexican Constitution of (1917), Section 2 of the Constitution of Philippines (1987) and section 257 of the Constitution of the Republic of Ghana (1992).

²⁹⁶ *Supra* n.300

²⁹⁷ *Ibid*

²⁹⁸ *Ibid*

communities and their rights.²⁹⁹ Therefore, a government is expected to use its regulatory power to protect the public interest and in the same breath, create an enabling investment climate that promotes economic growth. These competing interests have to be carefully balanced. A government is also expected to stay true to the dictates and the laws that be.

As discussed in chapter 2, information as regards contracts in the extractive industry is extremely vital. The nature of the extractive industry is such that the revenues generated coupled with the complexity and issues emerging from oil exploration and extraction are prone to corruption, thus the necessity of availability of information.³⁰⁰ When contracts remain secret, citizen and oversight actors cannot properly monitor the implementation of the deal, and the country is at high risk of corruption and leakage. This is also compounded by the fact that contracts are essentially, the law of a public resource project, and a basic tenet of the rule of law is that laws shall be publicly available.³⁰¹ In Kenya for example, the Constitution dictates that the principles of governance include the rule of law as well as transparency and accountability.³⁰² The size and scope of many extractive projects is so large that they directly affect the lives, livelihoods and living conditions of a large population for decades.³⁰³ The contracts governing these projects may constitute the most significant rules affecting a country's populace.³⁰⁴ Where contracts create their own law- because they modify existing laws, freeze the application of those laws, or elaborate on outdated or incomplete laws- it is all the more important to disclose their contents for democratic accountability and promotion of good governance.³⁰⁵ More so, in keeping with the fact that, such contracts are with regard to a resource that is owned by the citizens and do not constitute private property.³⁰⁶ Further, minerals and mineral oils are to be held in trust for the people of Kenya.³⁰⁷

²⁹⁹ Ibid

³⁰⁰ Supra n. 243

³⁰¹ Ibid

³⁰² Article 10 of the Constitution

³⁰³ Supra n. 300

³⁰⁴ Ibid

³⁰⁵ Ibid

³⁰⁶ See Article 62 of the Constitution

³⁰⁷ Supra n. 300

3.3.1.1 Contracts are part of the ‘value chain’

In the legal framework that regulates the extractive industries, contracts are an essential missing piece.³⁰⁸ They have to establish key issues. They spell out the rights and obligations of each party. They also spell out how profits are to be divided between the host State and the investor. They also spell out how costs are to be treated. Contracts are just but one piece in understanding the “value chain” of multiple, interconnected points for natural resource development.³⁰⁹ The government may further enact laws to dictate how it divides its revenue with say, the county government which still forms part of the value chain. At each point in the chain-from the decision to exploit the resources to the exploration and exploitation, revenue collection, and eventual state expenditure of the revenues- there are critical opportunities to improve or undermine the value for the population. It is of import to note that, whereas contract transparency may not be a panacea for improving the use of resources for broad-based growth and development,³¹⁰ without access to such contracts, a full picture of the value chain is impossible, and meaningful citizen participation in the process is undermined.³¹¹ Transparency is particularly critical for the effective enforcement of contracts, most critically for potential social and environmental violation, where the citizens are best placed to monitor compliance.³¹²

3.3.1.2 Key in averting conflict

Without contract transparency, fears of the worst flourish, and mistrust and conflict are magnified among stakeholders. As Shelley³¹³ argues, the coincidence of oil and natural gas with civil conflict is intuitively obvious-Sudan, Angola, Yemen, Iraq, Colombia, Burma/Myanmar, Indonesia, Nigeria, Algeria, Congo-Brazzaville quickly come to mind. While Idemudia³¹⁴

³⁰⁸ Supra n. 306

³⁰⁹ Ibid

³¹⁰ Ibid

³¹¹ Ibid

³¹² Ibid

³¹³ Supra n. 90

³¹⁴ Idemudia U, (2009) ‘The changing phases of the Niger Delta conflict: implications for conflict escalation and the return of peace. Conflict, Security and Development’, 2 9 (3), 307-331.

explains that conflict in the Niger Delta area where oil is extracted has increased both in intensity and scale.

Following several high-profile reports on contracts, national debates in a number of countries, and campaigns by international organizations like Oxfam, Amnesty International and Global Witness, citizens and local civil society organizations are increasingly aware of the critical role of contracts and some of their worst excesses.³¹⁵ It has been argued that contract transparency is critical in averting conflict and it acts as an impetus in managing expectations and most importantly, keeping the public in the know. Access to information pertaining contracts in the extractive industry improve the extent and accuracy of coverage by the media of the industry and consequently ensure that both citizens and investors engage more freely and from a common factual base.³¹⁶ This plays a big role in averting conflict. National campaigns in Liberia and the Democratic Republic of Congo have for example brought attention to the problems of contracts concluded without transparency during protracted wars and hesitant transitions.³¹⁷ In the face of clarion calls for transparency and accountability, entities that fail to disclose, or to provide plausible explanations for non-disclosure are seen as having something to hide,³¹⁸ thus spurring conflict which would otherwise have been averted.

3.3.1.3 Stifles corruption/ A tool for bargaining by governments to get a better deal with their resources

While advocating for contract transparency, Moberg stated that, transparency is good for minimising the risks of corruption and mismanagement, and for ensuring accountability.”³¹⁹ It has been argued that contract transparency will help governments get a better deal for their resources, provide an incentive for governments and companies to make more durable deals, and most importantly, in a corruption plagued society like Kenya, deter corruption.³²⁰ In ensuring governance reforms, the government of Kenya, under the flagship of Vision 2030 states that it will continue to intensify the anti-corruption programme already in place through; better investigation and prosecution; eliminating discretionary decision making in a public service that

³¹⁵ Supra n. 300

³¹⁶ Sura n. 243

³¹⁷ Ibid

³¹⁸ Ibid

³¹⁹ J. Moberg, Head of the Extractive Industries Transparency Initiative (EITI) Secretariat.

³²⁰ Ibid

is prone to bribery; public education and judicial and legal reform. Further, Vision 2030 also states that the Government also recognizes that in an open, democratic society, the people themselves, Parliament, civil society, and a vigilant press are the ultimate defence against abuse of office.³²¹ Under the Vision 2030, contract transparency is a tool to deter corruption not only in governance, but also in the exploration and extraction of natural resources.

Contract secrecy reinforces a culture of impunity whereby public officials are not held accountable for the secret deals they make.³²² The resultant effect is that, corruption festers as these public officials are not held accountable for the questionable decisions they make. Many energy deals that involve huge investment costs and vast profits are hot beds for corruption. It is acknowledged that extractives are imperfect markets and as such, governments are often at a disadvantage when negotiating with companies.³²³ The asymmetry of information can lead to sub-optimal deals, even if the government is negotiating in the interest of its citizens.³²⁴ Contract transparency levels the field between the government and investor companies.³²⁵ Governments may however not behave in their citizens' best interests, not necessarily for nefarious reasons, but because of the "principal-agent" problem.³²⁶ However, when citizens have more information about government policy and actions, the government has a greater incentive to respond to the citizens' interests, thus reducing the principal-agent problem.³²⁷ This is also further achieved by entrenching laws for purposes of ensuring that there is greater dissemination of information as regards contracts. As discussed in the preceding chapter, access to information is a key component in achieving transparency and accountability. Citizens are able to interrogate their government when they know what is going on. Civil society is also able to fully play its role as the people's watchdog. It thus follows that, public access to contracts and greater contract literacy will provide governments with an incentive to satisfy as many constituencies as possible; this will in turn lead to more durable contracts and lessen the need for renegotiation over time.³²⁸

³²¹ Kenya Vision, 2030

³²² Natural Resource Governance Institute, (2015) 'Contract Transparency, Creating Conditions To Improve Contract Quality, NRG Reader.

³²³ Ibid

³²⁴ Ibid

³²⁵ Ibid

³²⁶ Ibid

³²⁷ Ibid

³²⁸ Ibid

The end result of this will be to stifle corruption as avenues for breeding corrupt tendencies will have been curbed.

Further, contract transparency provides a strong incentive for government officials and company representatives to operate within the bounds of the law and not to deviate from general contract forms and terms, as any discrepancies would be publicly disclosed. While it may not prevent lower-level corrupt acts that are beyond contractual terms, it is a deterrent to the manipulation of contract terms due to corruption.³²⁹

Systematic publication of contracts will deter special provisions in contracts that are the product of corruption. As such, deviations in contracts may indicate that favours were negotiated. Such provisions include confidentiality clauses as will be discussed later in this chapter. This is especially true when countries have model contracts with few variables.

3.3.1.4 Government management of the industry is enhanced by contract transparency

Effective government management of the industry will be enhanced by contract transparency. Conflict over natural resources issues can extend to branches or agencies of the government- such as legislatures or taxing authorities- that are bypassed when natural resource contracts are treated as the exclusive preserve of one agency, as they sometimes are.³³⁰ Co-ordination within government is enhanced through transparency. Thus, various branches and agencies of government are able to fulfill their respective legislative and regulatory obligations to ensure accountability.³³¹ Further, it will ease the way of doing business and enhance efficiency in doing business.

3.3.1.5 Public Interest

As earlier stated, minerals and mineral oils belong to the people of Kenya and are to be held in trust by the Government on behalf of the citizens.³³² This was well observed by the High Court

³²⁹ Ibid

³³⁰ Ibid

³³¹ Ibid

³³² See Article 62 of the Constitution

in the case of *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*.³³³ Mutungi J., while addressing the doctrine of public trust and public interest stated that:

Having regard to section 4 of the Mining Act, Article 10(1) of the Constitution that enjoins state officers and public officers to embrace National Values and principles of Governance in the execution of their duties and article 62 of the Constitution where minerals are classified as public land and therefore a national resource vested in the national government in trust for the people of Kenya my view is that the doctrine of public trust and public interest cannot be expunged from these proceedings. The Minister as earlier observed is the ultimate custodian of the public trust and interest in the various matters that fall under his docket and it matters not that there are other officers charged to do various tasks. It is him as Minister who takes responsibility and the buck rests at his desk. Under the Mining Act this hierarchy of responsibility is well recognized and articulated and that explains why under section 27 of the Mining Act the Minister has the final word on the revocation of licences. The Minister's decision once exercised under section 27 can only be challenged by way of an appeal and not by way of judicial review. In the circumstances of this case the Minister was right and was entitled to act in the manner he did in public interest once he was satisfied the Commissioner of Mines had in issuing the licence to the Applicant acted in violation of the law.

The issue of public interest is further buttressed by the need for access to information as discussed in chapter 2. As stated in chapter 2, the court in the case of *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 6 Others*³³⁴ stated that, the case for exceptions to disclosure of information should be clear and should be subjected to the public interests tests and the rights and interests of others.

3.3.2 Confidentiality clauses in exploration and extraction of oil contracts

Wahome³³⁵ states that the IMF is pushing the government to make public details of a number of contracts it has signed with oil exploration and mining firms.³³⁶ Further, that the IMF assessment

³³³ [2015] e KLR

³³⁴ Ibid

³³⁵ M. Wahome, 'Kenya denies IMF access to secret mining agreements', Africa Review, Monday July 22, 2013

was prepared ahead of meeting with government officials and found that the Ministry of Environment and Mineral Resources “treats these agreements as confidential and did not release them to the mission.”³³⁷

While contract transparency is growing, previously, it was never quite an issue in focus. However, the resource curse phenomenon and the increasing demand for transparency and accountability in the extractive industry have necessitated the relooking of industry practice. This is against the backdrop that investor companies and the State have always argued that confidentiality clauses keep them from disclosing information, particularly contracts.³³⁸ This argument is circular, this is because, the State and the companies put these clauses in the contract.³³⁹ Parties often dictate what is to be contained in a contractual agreement, thus confidentiality clauses are not an impediment to disclosure as would be claimed by parties.³⁴⁰ Parties can generally disclose by consent or unilaterally, pursuant to law.³⁴¹ As it turns out, there is considerable margin for action if and when contract parties decide to make disclosures.³⁴²

Generally, confidentiality clauses form part of a contract. Therefore, it is important to point to contract transparency and the consequences of its inclusion as starting point. In any contractual agreement, parties oft choose to make anything confidential. As such, the parameters of freedom of contract permit them to keep even mundane information secret. Rosenblum³⁴³ *et al* states that, a survey of more than 150 oil and mining contracts between companies and countries or state-owned companies conducted shows that governments and companies are doing just that: using confidentiality clauses to cover a broad range of information, most of which need not remain confidential.³⁴⁴ In many situations, there are exceptions in confidentiality clauses that allow disclosure of information including the contracts themselves.³⁴⁵ There may be an argument that, confidentiality clauses in a contract do not permit contract transparency. However, this argument

³³⁶ Ibid

³³⁷ Ibid

³³⁸ Supra n. 300 p. 23

³³⁹ Ibid

³⁴⁰ Ibid

³⁴¹ Ibid

³⁴² Ibid

³⁴³ Ibid

³⁴⁴ Ibid

³⁴⁵ Ibid

is rebutted by instances where legislation or even mutual consent requires contract transparency. This therefore supersedes confidentiality clauses.

In addition to declaring all information confidential, some contracts cite clauses in the contract that is confidential.³⁴⁶ These claims might be viewed as establishing a higher tier of information that is unquestionably secret.³⁴⁷ The uniformity of confidential clauses in extraction agreements appears to be an exception among commercial agreements.³⁴⁸ In a survey of more than 250 confidentiality clause in many types of commercial contracts beyond those solely concerning extractive industries, researchers found that “it is noticeable that the confidentiality provisions are often more carefully crafted than other clauses on the contract.”³⁴⁹ While contracts in some industries contain similarly uncomplicated confidentiality clauses regarding the subject matter of the information to be kept confidential (“The term ‘confidential information’ shall mean all information disclosed under this agreement”).³⁵⁰ Contracts in many other industries are very detailed in their subject matter descriptions, specifically listing over several pages the kind of information that must be kept confidential.³⁵¹

3.3.2.1 *When does information stop being confidential/ When information stops being confidential*

3.3.2.1.1 Information in the public domain

Information that is in the public domain would not form part of a confidentiality clause. However, there is need to define what constitutes ‘public domain’. The Constitution provides for access to information³⁵² and further provides that minerals and mineral oils constitute public land.³⁵³ Minerals and mineral oil are to be held in trust for the people of Kenya by the National Land Commission. Thus, as has been discussed in this chapter, the people of Kenya have a right to be kept informed about how the State is using their resources for their benefit. This has been reinforced by the court in the case of *Nairobi Law Monthly Company Limited v. Kenya*

³⁴⁶ Ibid, p. 25

³⁴⁷ Ibid

³⁴⁸ Ibid

³⁴⁹ Marcel Fontaine & Filip de Ly, *Drafting International Contracts: An Analysis of Contract Clauses*, Chapter 5: Confidentiality Clauses in International Contracts (Transnational Publishers, Inc. 2006), 272-274.

³⁵⁰ Supra n. 300 p. 25

³⁵¹ Ibid

³⁵² See Article 35 of the Constitution.

³⁵³ See Article 62 of the Constitution

*Electricity Generating Company & 6 Others*³⁵⁴ where it aptly stated that, the right to information implies entitlements to the citizen to information; it also imposes a duty on the State with regard to provisions of information. The court further stated that the State has a duty not only to proactively publish information in the public interest which is the import of Article 35 (3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicize any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State.

Information that is in the public domain, or constitutes information that ought to be in the public domain cannot be categorized as confidential. Oft, confidentiality clauses generally include exceptions to information that is in the public domain. At first blush, this may seem rather obvious, but it is significant because the definition of what constitutes the “public domain” can be very broad.³⁵⁵ In the Kenyan context, public interest with regard to information connotes important information affecting the public. It is to be noted that, contracts are much more widely available to private industry than to citizens; however, under the United States of American jurisprudence, industry knowledge is sufficient for information to be considered “in the public domain.” Thus, contracts in pay-for- access databases, industry publications and on industry forums and electronic mailing lists are all “in the public domain,” from a legal perspective.³⁵⁶

3.3.2.1.2 Information That Must Be Disclosed by Law

In some instances, the law requires disclosure. This is a common exception to confidentiality clauses. Statutory enactments make specific requirements which are cited as exceptions making such disclosures a requirement for issues like arbitration, stock exchanges or other legal proceedings. Many provisions do not just require compliance with the law of the host state; they also usually state that the parties may make disclosures under any law to which the party is subject.³⁵⁷ Such laws, requiring contract transparency place a requirement on companies operating within a jurisdiction that requires disclosure under law. Similarly, home states could also require the disclosure of contracts for their companies, though a host state may argue that

³⁵⁴ Petition No. 278 of 2011 [2013] e KLR

³⁵⁵ Supra n. 300 p. 27

³⁵⁶ Ibid

³⁵⁷ Ibid

this would run afoul of its sovereign right to selectively disclose information as it sees fit and regulate activity occurring within its territory.³⁵⁸

3.3.3 Counter-arguments

3.3.3.1 *The Argument for commercially sensitive information and public interest*

The clamour for contract confidentiality is that it protects commercially sensitive information. However, the clamour is the beginning of the talking point of actualization of contract transparency. What then constitutes commercially sensitive information? There is no technical definition of commercially sensitive information. Everything, from the existence of a contract, to facilitation fees ‘illegal bribes,’ to most of what is disclosed under securities regulations, can be classified as “commercially sensitive” in the broadest sense of the term.³⁵⁹ However, greater public interest may require disclosure of such information. In some cases it may be obvious; but in others, it may require tools to measure and balance public interest in transparency against the private interest in confidentiality.³⁶⁰

Further, information needed to be disclosed would not meaningfully impact on a company’s competitiveness. As discussed earlier, the most important public interest at stake is the right to information, which enables democratic accountability. The public’s right to government-held information has been recognized by international human rights courts.³⁶¹ Additionally, the European and Inter-American Human Rights Courts have both recognized the right to information.³⁶² In a case involving the disclosure of documents in a Chilean forestry investment, the Inter-American Court specifically recognized the “principle of maximum disclosure,” linking democratic accountability to expansive access to information, including the documents sought on the project.³⁶³

³⁵⁸ Ibid

³⁵⁹ Ibid, p. 33

³⁶⁰ Ibid

³⁶¹ Ibid

³⁶² Ibid

³⁶³ Claude Reyes et l. vs. Chile (Trillium Case), Inter-Am.Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006) at 86-87.

3.3.4 International practice in contract transparency

Contract transparency requires a government to make all of its contracts, past and present, in all extractive industries easily accessible to the public. Ideally, access to contracts would be at no fee. Under the Constitution³⁶⁴ the state is required to publish and publicise any important information affecting the nation. This notion was fortified by the High Court in the case of *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 6 Others*.³⁶⁵

In some countries, an individual can apply to the relevant ministry or parliamentary library to gain access to contracts.³⁶⁶ However, other countries have laws requiring parliamentary ratification of foreign investment contracts or the ratification of oil and mining contracts, specifically.³⁶⁷ Under the Kenya Constitution for example, a transaction relating to exploitation of any natural resource is subject to ratification by Parliament.³⁶⁸ Therefore, given that parliament's ratification is required, and as a matter of law, the contracts ought to be public documents. In most countries, the drafting and negotiation of contracts is the responsibility of executive branch ministries or state-owned enterprises.³⁶⁹ After this process, some countries require the final, negotiated contract or selected bid in an auction to be ratified by parliament for it to come into effect.³⁷⁰

Parliamentary ratification of contracts is not grounded, as a general matter, in a government policy of contract transparency. In some instances, it is one among many tools that companies use to secure their investment and safeguard it from change and expropriation.³⁷¹ In some countries, the constitution requires parliament to give a vote on natural resources contracts, thus

³⁶⁴ See Article 35 of the Constitution.

³⁶⁵ Petition No. 278 of 2011 [2013] e KLR

³⁶⁶ In fact, that remains the case with Liberia, though the government intends to create a library of contracts that citizens can access at the National Investment Commission. Representatives from the National Investment Commission, August 2008 field study in Monrovia, Liberia. Similarly, mining contracts in Peru are available by application to the relevant government agency. January 2009 field research, Lima, Peru.

³⁶⁷ *Supra* n.243

³⁶⁸ See Article 71 of the Constitution,

³⁶⁹ *Supra* n. 300

³⁷⁰ *Ibid*

³⁷¹ T. Walde, (2007) "Rule of Law and the Resource Industries' Cycles: Acquired Rights versus the Pressure Inherent in the Political Economy of the International Energy and Resource Industries".

providing a check on the executive.³⁷² In other countries, contracts with foreign countries are treated essentially as treaties, or “foreign agreements,” and must be ratified by parliament as such.³⁷³ Even if not a part of a contract transparency policy, parliamentary ratification of contracts is yet another example of the regularity with which contracts come into the public domain with no discernable harm to the country or company.³⁷⁴

The following countries differ in geographic area, political system, and resources produced; however, they are all states that require parliamentary vetting of contracts.³⁷⁵

- Azerbaijan. The Azeri Constitution gives the Azeri Parliament the power to ratify or veto international agreements. Such international agreements include extractive industry contracts such as PSAs. All international agreements must be approved by the parliament, at which point they become Azeri law.³⁷⁶
- Egypt. PSCs must have legislative approval to become operational.³⁷⁷
- Georgia. Foreign investment contracts are international treaties and must therefore be approved by parliament.³⁷⁸
- Kyrgyzstan. If a foreign legal entity or individual is a party to a PSA, it should be ratified by the parliament.³⁷⁹
- Liberia. Parliament must ratify investment contracts after negotiation and signature by executive ministries.³⁸⁰

³⁷² Supra, n. 300

³⁷³ Ibid

³⁷⁴ Ibid

³⁷⁵ Ibid

³⁷⁶ See, e.g., <http://permanent.access.gpo.gov/lps3997/9902subs.htm> “Each PSA must be approved separately by the Azerbaijan Parliament. See also www.uea.ac.uk/env/all/teaching/eiaams/pdf_dissertations/2005/Salimov_Parviz.pdf stating that “[t]he PSA is a contractual agreement between [the contractor-foreign oil company] and the Azerbaijan Government (normally represented by...SOCAR) for the exploration or development of oil and gas fields. The PSAs...get ratified by the Milli Majlis. After ratification by parliament, [the] PSA constitute[s] a law of [Azerbaijan]” and takes precedence over any other current or future law, decree or administrative order.”

³⁷⁷ Adeoye Adefulu, “Fundamental Legal Issues in the Oil and Gas Industry III: A Brief Discussion of Production Sharing Contracts” available at <http://www.scribd.com/doc/6412033/Fundamental-Legal-Issues-in-the-Oil-and-Gas-Industry-III> (accessed 20/9/2016).

³⁷⁸ See Law of Georgia on Normative Acts available at http://www.irisprojects.umd.edu/georgia/Laws/English/law_normative_acts.pdf (accessed 20/9/2016).

³⁷⁹ See “Information Report about Business in Kyrgyzstan” http://www.kyrgyzembassy.ru/data/Business_in_kyrgyzstand.pdf (accessed 20/9/2016).

³⁸⁰ Constitution of the Republic of Liberia, Article 34 (f).

- Sierra Leone. Parliament should have access to mining contracts before they are signed, though its powers are limited to an advisory capacity, i.e., it can suggest changes.³⁸¹
- Yemen. Contracts are made Acts of Parliament and become part of Yemeni law; this is required by its Constitution and the policy was recently upheld in an international arbitration proceeding against the country, after executive ministries signed and negotiated an extension to a PSA but the parliament vetoed it.³⁸²

3.3.5 Embracing contract transparency through disclosure

While many jurisdictions have not traditionally made their oil, gas and mineral contracts available to the public, more recent developments have shown that contract disclosure is feasible and desirable for a wide range of countries.³⁸³ The National Resource Governance Institute's 2013 Resource Governance Index (RGI) found that of 58 countries studied, 20 countries publish all or some of their extractive contracts. Of countries that publish all or most of their contracts, include Australia, Canada, Democratic Republic of Congo, Ecuador, Guinea, Liberia, Norway, Peru, United Kingdom and the United States of America. Countries that publish some of their contracts include Afghanistan, Azerbaijan, Colombia, Ghana, Iraq, Mexico, Mongolia, Timor-Leste, Venezuela and Yemen.³⁸⁴

Contract transparency is also recognized internationally. The new Extractives Industries Transparency Initiative (EITI) Standard adopted in 2013 as discussed in chapter 2 encourages contract disclosure, as does the International Monetary Fund (IMF) Guide on Resource Revenue Transparency, the International Finance Corporations' Performance Standards, and the Natural Resource Charter.³⁸⁵

³⁸¹ See www.daco-sl.org/encyclopedia/1_gov?1_2/MMR/MMR_newsletter_July%202008.pdf.

³⁸² Parliamentary approval was not obtained for the extension of the PSA with joint venture partners Hunt Oil and ExxonMobil. The companies initiated arbitration proceedings against the government in the International Chamber of Commerce in Paris for \$7 billion, which, as noted above, were ultimately unsuccessful, as the arbitration panel reaffirmed that the parliamentary approval necessary for a valid contract. See <http://www.arabianbusiness.com/537650-exxon-mobil-and-hunt-oil-rocked-by-iccs-unprecedented-ruling>.

³⁸³ Natural Resource Governance Institute, 'Contract Transparency, Creating Conditions To Improve Contract Quality, NRG Reader, 2015.

³⁸⁴ Ibid

³⁸⁵ Ibid

Companies in the extractive industry are increasingly beginning to speak out on the benefits of contract disclosure through publication arguing that it helps increase trust and their social license to operate and to more effectively manage citizen expectations.³⁸⁶ This then averts conflicts and propaganda as to the true nature of the revenues collected. It is important to note that such initiatives promote transparency and go to the core issue of governance. Managing citizen expectation also tremendously averts dissatisfaction thus averting conflict. Among those that have made statements in favor of contract disclosure are oil companies like Tullow and Kosmos, mining companies Newmont and Rio Tinto, and the International Council on Mining Metals (ICMM), an association of the world's leading companies in the mining and metals industry.³⁸⁷

3.3.6 Beyond contract disclosure

The first step in contract transparency is for the government and the companies to agree that the contracts can be shared openly, or for the government to pass a law requiring contract transparency³⁸⁸ in line with the provisions under Article 35 of the Constitution as to access to information. Once contracts are disclosed, then the state should ensure that they are published or publicized as such information is important and greatly affects the nation. Oversight actors then have the responsibility to use the information disclosed in the contracts, together with other publicly available information, to monitor the company's performance and test whether it is in compliance with the contract.³⁸⁹

3.4 Conclusion

This chapter sought to test the hypothesis whether there exists contract transparency in the extractive industry in Kenya. It also sought to answer the question of what contract transparency seeks to cure with regard to transparency and accountability in oil exploration and extraction.

Wahome³⁹⁰ states that, an IMF team is pushing the Kenya government to make public details of a number of deals it has signed with oil exploration and mining firms. But officials on the IMF team have disclosed that the government has denied them access to the documents, a fact that

³⁸⁶ Ibid

³⁸⁷ Ibid

³⁸⁸ Ibid

³⁸⁹ Ibid

³⁹⁰ Supra, n. 349

can only leave Kenyans guessing how the country is faring with regard to the exploration and exploitation of minerals.³⁹¹ Wahome further states that, the IMF team preparing the report ahead of the ongoing engagement with the government, miners and other industry players is citing the requirement of transparency as basis for making the recommendations.³⁹²

Countries have no justification for secrecy.³⁹³ All of these extractive industry investment agreements will be made public in the future³⁹⁴ given that, as society evolves, people become more aware of their rights and increasingly demand for an accountable government. Through the development of technology, people are also becoming increasingly aware of what is going on around the world. Occurrences in other jurisdictions are simply at the click of a button. Just as the IFC insists that countries have no justification for secrecy, they also have no justification for not requiring disclosure of investment agreements for all of its Extractive Industry projects.

Contract transparency has various benefits for stakeholders in the extractive industry. For example, the civil society is able to analyse government decisions, access to contracts enables checks on oil companies and government compliance with terms of the contract, reduces corruption and unequal distribution of wealth, as contracts are made with more focus of national development and increases information on management of public resources.³⁹⁵ Contract transparency is beneficial to a government in that, it increases trust between government and citizens, increases independent analysis of contracts; increases support for contract renegotiations and reviews; provides information for future contract negotiations; increases the government's reputation for investor as well as increases capacity in contract negotiation.³⁹⁶ With regard to oil companies, contract transparency creates better relationships and increased trust with communities, decreases community complaints, more stable contracts and decreased pressures to renegotiate as well as decrease in the risk of corruption in negotiations and follow-

³⁹¹ Ibid

³⁹² Ibid

³⁹³ R. Kaldany, World Bank's International Finance Corporation (IFC)

³⁹⁴ The Economist, December 20, 2005.

³⁹⁵ Natural Resource Governance Institute, (2015) 'Contract Transparency, Creating Conditions To Improve Contract Quality, NRG Reader.

³⁹⁶ Ibid

up.³⁹⁷ States have to look at the greater good, of ensuring that there is maximum satisfaction of interests and minimum friction.

As has been seen, the current legal framework in Kenya is not adequate for purposes of ensuring transparency and accountability in the exploration and extraction of oil. Currently, under the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, section 12 obliges the Cabinet Secretary to maintain a register of transactions on agreements relating to natural resources. Further, the Cabinet Secretary on an annual basis is required to publish a report of the transactions submitted.³⁹⁸ It should be noted that the Act does not have a wide berth as to the publication of the agreements relating to natural resources. As regards confidentiality under the Act³⁹⁹, the Cabinet Secretary is given the responsibility to grant requests as to confidentiality. This, as was discussed in chapter 2 is likely to breed corruption as opposed to leaving such decisions to an entity. Further, it defeats the whole purpose of contract transparency and the issues against confidentiality as have been discussed in this chapter.

Therefore, there is need for review so that it echoes provisions under the Constitution especially as regards transparency and accountability in oil development. Further, contract transparency as has been seen discussed above is a necessary tool for averting conflict; curbing corruption as well as enabling governments get a good deal for their natural resources. Natural resources are finite, thus, it is important that a nation is able to collectively benefit from them.

From the foregoing discussion, it is evident that there is no requirement for contract transparency in the exploration and extraction of oil in Kenya. This chapter has thus confirmed the hypothesis that Kenya lacks adequate modalities for contract transparency either through laws or policies. It has further been seen that the issue of contract transparency can be achieved through access to such contracts held by the actors in the oil development sector.

The next chapter will look at the example of Norway and how it has been able to use its oil resources to avert the resource curse. Conversely, the chapter also seeks to look at Nigeria and the lessons to be learnt in order to avert the resource curse.

³⁹⁷ Ibid

³⁹⁸ Section 12 (4) of the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016

³⁹⁹ Section 13 of the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016

4.0 CHAPTER FOUR

4.0 A COMPARATIVE ANALYSIS

4.1 Introduction

The preceding chapter discussed the issue of contract transparency and the role that it plays in the wider realm of transparency and accountability in oil exploration and extraction. This chapter deals with the best and worst practices- hence the term resource curse in dealing with oil extraction.

The “curse of natural resources,” “paradox of plenty,” or “resource curse” is a political economic phenomenon that often occurs in countries with great natural resource wealth, making the country’s economy grow slower than in a resource-poor country.⁴⁰⁰ The examples are numerous, but countries that have experienced the curse include Colombia, Nigeria, Sierra Leone, DR Congo, Liberia, and Ivory Coast.⁴⁰¹ Although the economic aspect is often thought of as the main issue, the consequences of the curse can be subdivided into five components:⁴⁰² Macroeconomic instability and export concentration; slow growth and poverty; corruption; authoritarianism and conflict. As these outcomes often are mutually reinforcing, the resource curse often leads to a downward spiral of poverty and political instability⁴⁰³ due to conflict.

However, not all countries with abundant natural resources have fallen victim to the resource curse. There are countries that have a success story which should be emulated. The foregoing chapter seeks to discuss the steps countries that have been able to turn the natural resources into fortunes for their citizens and how they have ensured transparency and accountability in their dealings with oil, gas and other natural resources either through enactment of domestic legislation, policies or institutions set up by these States to manage their mining and/or oil

⁴⁰⁰J. Sachs and A. Warner, (2001“Natural Resources and Economic Development,” *European Economic Review*, 45

⁴⁰¹Kvelland, Even (2013) "A New Nation, A Brighter Future? Strategic Norwegian Oil Development Assistance in South Sudan, “*The Macalester Review: Vol. 3: Iss. 1, Article 1*. Available at:<http://digitalcommons.macalester.edu/macreview/vol3/iss1>, accessed on 10/9/2016. Examples of ‘success stories’ include Botswana, Chile, Indonesia, and Norway.

⁴⁰²T. Moss compiles a list of five categories, based on individual sources. Todd Moss, “Oil-to-Cash: Fighting the Resource Curse Through Cash Transfers,” *Yale Journal of International . Affairs*, Vol. 6, Issue 2, (2011)

⁴⁰³Ibid

industry. Further, this chapter will use case studies to show how States have been successful either through sound oil policy, laws and institutions and have used them in legislation or policy.

In particular, this chapter will discuss the case of Norway. On the flipside, this Chapter will further look at states that have been engulfed in the quandary of the resource curse and how their economies have been affected by this phenomenon and the initiatives that they are undertaking to further avert the 'resource curse'. In this regard, this Chapter will examine the case of Nigeria.

4.2 Norway

4.2.1 Introduction

*Conditions often summed up as 'the resource curse' can, in fact be avoided. And there is no better place to talk about this than in Norway, a country that has given the world a model showing how to exploit finite natural resources in the long-term interests of all its citizens.*⁴⁰⁴

Norway, one of the world's richest economies, is a model of the prudent economic management of resource wealth. It presents a classic example of a country whose transparent and forward looking management of its petroleum resources provides a good example for other countries.⁴⁰⁵

Oil exploration on the Norwegian continental shelf began in the early 1960s. The Norwegian authorities declared ownership of the resources, but the first explorations were to a large extent conducted and financed by international oil companies. At that time there were no Norwegian oil companies, and very few Norwegian institutions, official or private, had any knowledge of petroleum-related activities.⁴⁰⁶ From the start, national administration and control over the petroleum activities on the Norwegian continental shelf have been fundamental requirements.⁴⁰⁷ The challenge for Norway in developing its petroleum activities was to establish a system of

⁴⁰⁴ Remarks by Mr. Taatoshi Kato, Deputy Managing Director, International Monetary Fund at the Extractive Industries Transparency Initiative (EITI) 2006 High Level Conference Oslo, Norway (October 17, 2006)

⁴⁰⁵ A.J. Onyeukwu, (2007), Resource Curse in Nigeria: Perception and Challenges, Open Society Institute.

⁴⁰⁶ Transparency in the Norwegian Petroleum Sector, available at <http://www.regjeringen.no/globalassets/upload/kilde/ud/bro/2006/0038/ddd/pdf/293033-tnps.pdf>

⁴⁰⁷ Ibid

managing the petroleum resources that maximised the values for the Norwegian people and the Norwegian society.⁴⁰⁸

4.2.1.1 The importance of policies

Norway's ability to avoid the resource curse is wholly attributed to the country's policies which were well implemented by the institutions that were put in place to manage its oil and gas activities.⁴⁰⁹ Initially, the Norwegian government selected a model in which foreign companies carried out all petroleum activities on the Norwegian continental shelf. However over time, the Norwegian involvement was strengthened by the creation of a wholly owned state oil company, Statoil as well as Norsk Hydro.⁴¹⁰ Further, a private Norwegian company, Saga Petroleum, was also established, but was later acquired by Norsk Hydro.⁴¹¹ Different technical, organisational and commercial expertise is attributed to the cooperation and competition between the various companies on the Norwegian continental shelf. This policy has also contributed to ensuring that Norway today has its own oil companies and a competitive supplier industry, and that the nation secured substantial revenues from the sector.⁴¹² This is further buttressed by the fact that the petroleum sector is an important part of the economy. For example, in 2012, the petroleum sector constituted 23 percent of GDP, 30 percent of government revenues, 29 percent of total investments and 52 percent of total exports.⁴¹³

4.2.1.2 Political Institutions

Further, the quality of Norway's political institutions has tremendously contributed to its ability to avert the resource curse. In countries with producer friendly institutions, with good protection of property rights, reliable public bureaucracy, and little corruption, natural resources are more likely to lead to economic growth.⁴¹⁴ When oil was discovered in Norway, it already had a

⁴⁰⁸ Ibid

⁴⁰⁹ Larsen, E., (2006) 'Escaping the Resource Curse and the Dutch Disease: When and Why Norway Caught Up with and Forged Ahead of Its Neighbors, American Journal of Economics and Sociology, vol. 6, No. 3.

⁴¹⁰ Supra n. 300

⁴¹¹ Ibid

⁴¹² Ibid

⁴¹³ Norwegian Petroleum Directorate, 2013.

⁴¹⁴ Mehlum, H., K. Moene and R. Torvik (2006). Institutions and the resource curse. Economic Journal 116, 1-20. ; Mehlum, H., K. Moene and R. Torvik (2008). Mineral rents and social development in Norway. Mimeo, University of Oslo.

long and stable tradition of democratic rule.⁴¹⁵ It also had a well-functioning state bureaucracy.⁴¹⁶

4.2.2 Norway's Petroleum Industry Framework

4.2.2.1 National organisation of the petroleum sector

4.2.2.1.1 The Storting

The Norwegian Parliament- the Storting, creates the framework for Norwegian petroleum activities. Such frameworks include enactment of legislation and adoption of propositions as well as discussing and responding to white papers concerning petroleum activities.⁴¹⁷ Major development projects or matters of great public importance must be discussed and approved by the Storting.⁴¹⁸ Further, The Storting also supervises the government and the public administration.⁴¹⁹

4.2.2.1.2 The Government

The government holds the executive power over petroleum policy and is responsible vis-à-vis the Storting for this policy.⁴²⁰ In applying policy, the government is supported by various ministries and subordinate directorates and agencies. The responsibility for executing the various roles within the petroleum policy is shared as follows: The Ministry of Petroleum and Energy- responsible for resource management and the sector as a whole; The Ministry of Labour and Social Inclusion – responsible for health, the working environment and safety; The Ministry of Finance – responsible for state revenues; The Ministry of Fisheries and Coastal Affairs – responsible for oil spill contingency measures; The Ministry of the Environment – responsible for the external environment.⁴²¹

⁴¹⁵ S. Holden, 'Avoiding the Resource Curse, The case Norway', University of Oslo, August, 2013

⁴¹⁶ Ibid

⁴¹⁷ Supra n. 300

⁴¹⁸ Ibid

⁴¹⁹ Ibid

⁴²⁰ Ibid

⁴²¹ Ibid

The Ministry of Petroleum and Energy holds the overall responsibility for management of petroleum resources on the Norwegian continental shelf. They further ensure that guidelines drawn by the Storting and the government on petroleum activities are carried out.⁴²² Further, there is the Norwegian Petroleum Directorate which is administratively subordinate to the Ministry of Petroleum and Energy. In addition, the ministry holds a particular responsibility for monitoring the state-owned corporations, Petoro AS, Gassco AS and Gassnova, and the partly State owned Statoil ASA.⁴²³

4.2.3 The Case for Transparency - (EITI)

The Norwegian Government is a strong promoter of increased transparency in oil, gas and mining revenues, and has participated in the Extractive Industries Transparency Initiative. In fact, the EITI in Norway was launched in 2002. The Norwegian government has supported this initiative since 2003. In the autumn of 2007, Norway announced its decision to implement the EITI criteria and the Ministry of Petroleum and Energy (MPE) was given the responsibility of leading this work.⁴²⁴

As at February 2009, Norway was accepted as a candidate for the Extractive Industries Transparency Initiative. This meant that Norway was required to establish an organizational structure for the reporting and reconciliation of the revenue streams in line with the guidelines acceptable for EITI. Further, the implementation of the EITI criteria in Norway is passed through a separate regulation for the reporting and reconciliation of cash flows from the petroleum industry.⁴²⁵ Since then, the Norwegian Government has consistently given reports to the EITI on the state of affairs in the petroleum industry in the country.

The rationale for adopting the EITI initiative is that, for oil companies to make rational investment decisions, the framework conditions must be predictable and transparent. This is the general

⁴²² Ibid

⁴²³ Ibid

⁴²⁴ Validating the Norwegian EITI Implementation, Validation of the Extractive Industries Transparency Initiative in Norway, Oxford Policy Management available at http://eiti.org/sites/default/files/documents/2010-11-21_Final_Validation_Report_Norway_0.pdf

⁴²⁵ Regulations on reporting and reconciliation of cash flows from petroleum activities available at <http://lovdata.no/dokument/SF/forskrift>

basis for the incentive system Norway has established on the Norwegian continental shelf. Organisation of the activities and the division of roles and responsibilities shall ensure that important social considerations are safeguarded and that the value created benefits society as a whole.⁴²⁶ At the same time, consideration for the external environment, health, working environment and safety plays an important role.⁴²⁷ Further, openness to issues such as tax revenues received from companies operating on the Norwegian continental shelf is a fundamental principle in Norway's management of its petroleum resources and, in accordance with the standard Norway is promoting in the EITI, the Norwegian Government and the petroleum sector are seeking to make this information more accessible.⁴²⁸

4.3 Nigeria

4.3.1 Introduction

*At the height of the oil boom in the 1970's, a Nigerian military head of state allegedly boasted that money was no longer the country's problem, but how to spend it. This statement, whose veracity is shrouded in the realm of conjecture, nonetheless aptly captures the euphoria and sense of boundless wealth and power that petrodollars bestowed upon the Nigerian ruling class that had won a grueling 30-month civil war in 1970. The Nigerian civil war, which was ostensibly fought to preserve the unity of the nation-state, was also partly provoked by the struggle between the political elite of the secessionist Biafra (Eastern region) and the rest of Nigeria (Northern, Western and Midwestern regions), over the control of the oil resources of the Niger Delta.*⁴²⁹

The discovery of oil by the Royal Dutch Shell in 1956 near the village of Oloibiri was followed by the extraction since 1958 with the first barrels of crude oil departing from Port Harcourt on 17 February 1958.⁴³⁰ Shell-BP (as it then was) sunk seventeen more wells in Oloibiri and the field

⁴²⁶ S. Holden, (2013) 'Avoiding the Resource Curse, The case Norway', University of Oslo

⁴²⁷ Ibid

⁴²⁸ Transparency in the Norwegian Petroleum Sector, available at <http://www.regjeringen.no/globalassets/upload/kilde/ud/bro/2006/0038/ddd/pdf/293033-tmps.pdf>

⁴²⁹ Obi, C. I. (2004) Nigeria: The State and the Crisis of Nation-building in Africa, in, Nation-Building: A key concept for peaceful; Conflict Transformation, London, Pluto Press, p.111.

⁴³⁰ M. J. Watts, *Blood Oil: A Petro-Insurgency in the Niger Delta*, in Andrea Behrends et al, *Crude Domination: An Anthropology of Oil*, p.52.

came to yield, during its lifetime, over twenty million barrels of crude oil before oil operations came to a close twenty years after its discovery.⁴³¹ Nigeria has roughly 40 billion barrels of proven oil reserves. The oil's low sulfur content –so-called “sweet” crude –is much sought after by refineries in the United States, which purchases about 40% of current production, providing about 10% of American oil imports –the fifth largest source.⁴³² This is down from previous years due to civil unrest and disruption to production efforts.⁴³³ Nigeria was estimated at having a capacity to produce about 2.9 million barrels of oil per day in 2010, but rates fell to between 1.7 and 2.1 million barrels of oil per day due to direct attacks on oil infrastructure.⁴³⁴ Even with such enormous endowments, oil production in Nigeria is synonymous with the term resource curse. The country has embraced the term even being referred to as the poster child for the term ‘resource curse’.⁴³⁵

4.3.2 What went wrong

In early 1967, oil-related disputes motivated an insurrection by a major ethnic group in the Niger Delta (the repository of almost the entire region's oil and gas reserves).⁴³⁶ Less than a year after, the nation experienced a civil war (the Biafran war of 1967-70), which was not unconnected with disagreements over the sharing of oil revenues.⁴³⁷ After the Biafran war, Nigeria has been able to maintain an agile state on the brink of war constituting conflict in the oil rich Delta region. Further, the country has been characterized by military coups amid renewed calls for self-determination and/or local control of oil resource.⁴³⁸ These conflicts, often attended by kidnapping of foreign oil workers for ransom (hostage-taking), vandalism and sometimes blow-up of oil installations, have taken on frightening dimensions over the years.⁴³⁹ According to

⁴³¹ Ibid

⁴³² Kew, Darren and Phillips, David L. (2013) "Seeking Peace in the Niger Delta: Oil, Natural Gas, and Other Vital Resources," *New England Journal of Public Policy*: Vol. 24: Iss. 1, Article 12. Available at: <http://scholarworks.umb.edu/nejpp/vol24/iss1/12>

⁴³³ Ibid

⁴³⁴ Ibid

⁴³⁵ Owafiokun Idemudia: *The resource curse and the decentralization of oil revenue; the case of Nigeria*, International Development and African Studies, York University, Toronto, Canada M3J 1P3.

⁴³⁶ The reference is to the ‘rebellion’ led by Issac Boro and some youths from the *Ijaw* ethnic extraction in February 1967

⁴³⁷ Ibid

⁴³⁸ Ibid

⁴³⁹ Ibid

a report by Hamilton and others⁴⁴⁰, violence in the Niger Delta alone is estimated to have killed about 1000 persons a year between 1999 and 2004 on a par with conflicts in Chechnya and Columbia.⁴⁴¹ In addition, tension between the various ethnic groups over access to oil revenues and wealth has been experienced through the clamour for government control. The ever increasing incidence of oil-induced civil conflict is also taking place against the background of dismal economic performance and a high level of poverty, as well as an emerging “new African oil boom.”⁴⁴²

4.3.2.1 The Niger Delta

The concentration of Nigeria’s massive oil wealth in the Niger Delta has meant that the region has suffered severely from the nation’s overall governance failures.⁴⁴³ Further, there have been conflicts between oil companies and local communities in the Niger Delta which basically revolved around land ownership and compensation for land appropriation as well as compensation for environmental damages due to oil operations.⁴⁴⁴ Additionally, there have been disputes as to environment degradation as a result of oil spills that has abraded the source of livelihood for the people of the Niger Delta and whether oil companies are eligible to pay compensation, and if so, to what extent.⁴⁴⁵ Nigeria has earned over \$400 billion since 1970 from Niger Delta oil, yet the region still shows little sign of economic development. Indeed, oil production has created an environmental disaster for the Niger Delta, killing off local fish populations and polluting drinking water.⁴⁴⁶ At the national level, conflicts have centered on the sharing of oil revenues and the allocation of public goods between various ethno regional groups, and the failure of the Nigerian government to take adequate measures to mitigate the

⁴⁴⁰ Hamilton, J., Stockman, L., Brown, M., Marshall, G., Muttitt, G., and Rau, N. (2004). “The case for an oil-free future”, available at www.nonewoil.org

⁴⁴¹ Ibid

⁴⁴² I. Garry, T.L. Karl, (2003) “Bottom of the Barrel: Africa’s Oil Boom and the Poor.” Catholic Relief Services

⁴⁴³ Supra n. 300

⁴⁴⁴ For example, a report by the Essential Action and Global Exchange (2000) document cases of environmental pollution arising from gas flaring, acid rain and oil/gas pipeline leaks. Depending on the location, oil spills can poison water, destroy vegetation and kill living organisms (van Dessel, 1995; A major 1985). The situation is made worse in the Niger Delta where as a result of floods; waters carry the oils to villages and onto farm lands (Moffat and Linden 1995:527). This also renders the cleaning of oil spills all the more difficult. According to a Report prepared by the Center for Social and Corporate Responsibility, Port Harcourt, Nigeria, (Emmanuel, 2004), less than 50 percent of oil spills in the Niger Delta are cleaned up. A 2001 Report by the Minister of State for Environment also shows that about 68 percent of the associated gas production in the Niger Delta is flared (The Guardian, Lagos, 1 October 2001).

⁴⁴⁵ A. Oyefusi, (2007) ‘Oil-dependence and civil conflict in Nigeria,’ University of Benin, Nigeria.

⁴⁴⁶ Ibid

environmental effects of oil operations on local communities or to adequately compensate for such damages.⁴⁴⁷ Beginning with the Ogoni uprising of the late 1980s to the Kiama Declaration by the Ijaws in 1998 and the emergence of militant groups such as the Niger Delta People Volunteer Force (NDPVF) and the Movement for the Emancipation of the Niger Delta (MEND), protests in the Niger Delta has taken on a more violent and militarized form.⁴⁴⁸ To date, the government of Nigeria has not been able to resolve the conflicts in the Niger Delta; instead, the country continues incurring costs of the oil insurgency.

4.3.2.2 *The role of the Nigeria military governments*

Nigeria's military governments centralized control of the oil industry under the presidency. The geo-strategic interest in oil means that military and other forces are part of the local oil complex.⁴⁴⁹ The 1999 Constitution, which vests predominant powers in the executive branch, places the president in a commanding position over all Nigerian political and economic life.⁴⁵⁰ The Niger Delta was hit particularly hard by the 1969 Oil Revenue Act, which transferred all energy earnings to the federal government.⁴⁵¹ This was compounded by the 1978 Land Use Act that made the Federal Government the ostensible owner of all land in the country, and which the government applies in practice far more than the 1999 Constitution's individual right to own land.⁴⁵² The constitution does, however, insist that 13% of oil revenues be returned to the oil-producing states in addition to their share of federal revenues given to all 36 states.⁴⁵³ However, the long periods of military rule in Nigeria (especially between 1983-1999) has meant that the people in the Niger Delta have not experienced a sense of political participation be it, in the national, state or local arena, meaning that their concerns have not been addressed politically. Instead, there has been a rise in militancy that has remained under the influence of political elites. The militia activities have continued to incense violence in the region with the government using its military to suppress the disquiet in the region.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid

⁴⁴⁹ M. J. Watts, (2008) *Blood Oil: The Anatomy of a Petro-Insurgency In the Niger Delta, Nigeria*, Working Paper No. 22, University of California Berkeley, USA.

⁴⁵⁰ Supra n. 300

⁴⁵¹ Ibid

⁴⁵² Ibid

⁴⁵³ Ibid

4.3.2.3 Lack of policies, institutional weaknesses and governance issues

Nigeria is not only ethnically and religiously fragmented but is also marked by the fragmentation of its political structure, something which results in the persistent weakness of the political institutions and a lack of central coordination.⁴⁵⁴ Reinforced by the regional tripartition of colonial rule⁴⁵⁵ and the existing cultural fragmentation, the weakness of the political system was not at all remedied when Nigeria became independent in 1960.⁴⁵⁶ The historically weak political institutions, which undermined the effectiveness of the political output and reduced the state's capacity to provide internal stability, were never sustainably consolidated.⁴⁵⁷ Moreover, the rudimentary political institutions were further destroyed and delegitimized by the successive military regimes, which reinforced paternalistic patterns of political rule. The military dictators, especially Babangida and Abacha, used the oil rents to co-opt the traditional rulers (for example, chiefs or, in the north, emirs) of the country in order to bolster their political legitimacy, thereby fostering a culture of rent seeking and endemic corruption.⁴⁵⁸

Further, Nigeria's military rule over the years further compounded the government's failure to implement policies to deal with environment protection, accountability of oil revenues as well as transparency and community concerns in a bid to curb the issues surrounding resource control and the violent nature in the oil regions of the country. The Niger Delta has endured a long history of economic exploitation. However, a country with constant power struggles cannot be properly entrusted to entrench policies and regulations for the benefit of its citizenry especially where petro-dollars are the cause of the insurgency. However, now that the country is more politically stable, more focus has shifted in resolving the conflicts in the Niger Delta. Additionally, reversing the governance crisis in the Niger Delta requires credible elections, respecting political opposition, and disarming the militias. In order to achieve this, a serious public dialogue process is necessary to address the fundamental governance crisis in the region

⁴⁵⁴ Lewis, Peter M. (2007): Growing apart. Oil, Politics, and Economic Change in Indonesia and Nigeria. Ann Arbor: Univ. of Michigan Press page 282.

⁴⁵⁵ Brunner, Markus (2002); The Unfinished State: Demokratie und Ethnizität in Nigeria. Hamburg; IAK.

⁴⁵⁶ Annegret Mahler, (2010) 'Nigeria: A prime Example of the Resource curse? Revisiting the Oil-Violence Link in the Niger Delta, German Institute of Global and Area Studies, Working Paper No. 120.

⁴⁵⁷ Ibid

⁴⁵⁸ Ibid

and to build confidence among the many communities of the Niger Delta that the democratic system can meet their legitimate needs for socioeconomic development.⁴⁵⁹

4.3.2.4 Corruption

*'I call petroleum the devil's excrement. It brings trouble...waste. Corruption, consumption, our public services fall apart, and debt- a debt we shall have for years...'*⁴⁶⁰ Idemudia states that oil in Nigeria has transformed the state into an effective tool for corruption.⁴⁶¹ Pervasive, systematic corruption is at the heart of Nigerian politics in a pattern of political behavior known across the developing world as neopatrimonialism – the so-called “Big Man” or godfather phenomenon, in which powerful individuals capitalize on political and economic centralization to develop strong, hierarchical loyalty networks.⁴⁶² These pyramid-structured networks are fueled by patronage sourced both legitimately and illegally from government coffers: “The essence of neopatrimonialism is the award by public officials of personal favors, both within the state (notably public sector jobs) and in society (for instance, licenses, contracts, and projects).⁴⁶³ In return for material rewards, clients mobilize political support and refer all decisions upward as a mark of deference to patrons.”⁴⁶⁴ “Big Men” from across the nation have sought to build their political empires on oil from the Niger Delta, either indirectly through access to federal and state government shares of the earnings, or directly through occasionally legitimate business interests in the region or, as they are more frequently accused, illegitimate oil smuggling and other operations.⁴⁶⁵

Although three presidents have taken modest steps to fight this systematic corruption through the NEITI, the 2012 reports, and other initiatives, little definitive action has been taken to alter it fundamentally and the only major political figures jailed for graft were either indicted abroad or

⁴⁵⁹ Kew, Darren and Phillips, David L. (2013) "Seeking Peace in the Niger Delta: Oil, Natural Gas, and Other Vital Resources," *New England Journal of Public Policy*: Vol. 24: Iss. 1, Article 12. Available at: <http://scholarworks.umb.edu/nejpp/vol24/iss1/12>

⁴⁶⁰ Juan Perez Pablo Alfonso, the Co-Founder OPEC, *The Economist*, May 22, 2003.

⁴⁶¹ Owafiokun Idemudia: *The resource curse and the decentralization of oil revenue; the case of Nigeria*, International Development and African Studies, York University, Toronto, Canada M3J 1P3.

⁴⁶² *Supra* n. 300

⁴⁶³ *Ibid*

⁴⁶⁴ Micheal Bratton and Nicolas Van de Walle, “Neopatrimonial regimes and political transitions in Africa,” *46 World Politics* 4 (July 1994): 458.

⁴⁶⁵ *Supra* n. 300

ran foul politically of one of the presidents.⁴⁶⁶ For instance, President Jonathan Goodluck fired the managing director and several executives of the state oil company in 2012, but none of them have been indicted.⁴⁶⁷

4.3.2.5 The role of oil extracting companies

Oil companies have majorly contributed to oil-extraction woes. In Nigeria, they have contributed to community disempowerment. The oil industry knows full well its centrality to the functioning of the Nigerian government, as well as the neopatrimonial pattern of politics that dominates.⁴⁶⁸ Since the international outcry over Shell's alleged complicity in the Nigerian military's hanging of Ogoni nationalist Ken Saro- Wiwa in 1995,⁴⁶⁹ Shell and the other major multinationals have taken steps to increase the amount of development aid they give to communities.

For the Ogoni people, oil and oil companies have been a manifestation of environment degradation, widespread poverty and human rights abuses. The Ogoni case⁴⁷⁰ involved Nigerians who sued Shell in the United States Supreme Court under the Alien Tort Statute⁴⁷¹ of complicity in human rights violations committed against the Ogoni people of the Niger Delta from 1992-1995. The violence towards the Ogoni people included extra-judicial executions, torture as well as crimes against humanity. Shell began oil exploration in the Niger Delta in 1958. During this period, the company worked with the government in quelling resistance and would finance the Nigerian soldiers who used deadly force on the Ogoni people to suppress the resistance. The case was settled in favour of the plaintiff with Shell paying U.S. \$ 15.5 million in settlement. Further to the atrocities by the companies, Chevron in particular, has also lent their helicopters and equipment to the Nigerian military for operations to protect oil facilities during which the military committed atrocities.⁴⁷² One study has even found that "the oil companies have also

⁴⁶⁶ Ibid

⁴⁶⁷ "President Goodluck Jonathan sacks Nigeria oil bosses," BBC Online, June 27, 2012 available at <http://www.bbc.co.uk/news/world-africa-18606614>

⁴⁶⁸ Supra n. 300

⁴⁶⁹ "Blood and Oil," New York Times, February 13, 1996.

⁴⁷⁰ Esther Kiobel, individually and on behalf of her late husband, Dr. Barinem Kiobel, et al., (petitioners) v. Royal Dutch Petroleum Co., Shell Transport and Trading Co. Plc, Shell Petroleum Development Company of Nigeria Ltd (respondents), US Supreme Court, No. 10-1491.

⁴⁷¹ 28 U.S.C and 1350 ('ATS').

⁴⁷² See, among others: Human Rights Watch, "The Price of Oil," January 1999.

contributed significantly to the buildup of armed groups in the Delta.”⁴⁷³ Shell itself admitted in 2004 that its business practices had contributed –inadvertently, in its estimation –to conflict, poverty, and corruption in the Niger Delta.⁴⁷⁴

4.3.3 Measures to curb the resource curse/ Nigeria Extractive Industries Transparency Initiatives (NEITI)

At the urging of the United Kingdom, the Obasanjo administration developed the Nigerian Extractive Industries Initiative (NEITI) in 2005, and pushed oil companies active in Nigeria to join.⁴⁷⁵ The NEITI holds companies and the government to a series of rights standards and best practices, and promises to conduct regular audits on the industry. Several reports have followed, including one by the National Assembly and another commissioned by the Jonathan administration, both in 2012.⁴⁷⁶ Such information is tremendously important to provide the Nigerian public glimpses at the real revenue figures earned by the oil industry and paid to the Nigerian government. NEITI’s first audit was held in 2005 and in early 2006 the Obasanjo administration revealed that it had discovered significant discrepancies between what the oil companies paid to government and what the government had recorded as its earnings.⁴⁷⁷ The 2012 reports found similar problems, alleging that Nigeria loses \$6 billion annually to oil theft and has lost \$29 billion since 2002 in price-fixing scams that involve some of the highest levels of government, including several oil ministers, and the multinational oil companies.⁴⁷⁸

4.3.4 Conclusion

As exhibited, the example of Norway presents a country which regardless of its pre-existing institutions made significant efforts to ensure that it establishes a system of managing the petroleum resources that maximised the values for the Norwegian people and the Norwegian society. It was able to come up with a regime for the entry into the petroleum sector and

⁴⁷³ Dimieari Von Kemedi, “Fueling the violence: Non-state Armed Actors (Militias, Cults, and Gangs) in the Niger Delta,” Economies of Violence Project, Working Paper No. 10, Our Niger Delta, 2006.

⁴⁷⁴ Ibid

⁴⁷⁵ Kew, Darren and Phillips, David L. (2013) "Seeking Peace in the Niger Delta: Oil, Natural Gas, and Other Vital Resources," *New England Journal of Public Policy*: Vol. 24: Iss. 1, Article 12. Available at: <http://scholarworks.umb.edu/nejpp/vol24/iss1/12>

⁴⁷⁶ Ibid

⁴⁷⁷ Ibid

⁴⁷⁸ BBC Online, October 25, 2012

continued to embrace initiatives that would ensure transparency and accountability. Further, Norway's political stability and a stable tradition of democratic rule ensured that natural resources are more likely to lead to economic growth.

Nigeria on the other hand is an example of what went wrong. The case for Nigeria brings to the fore the resource curse phenomenon and the overwhelming nature of resource booms to a country.

5.0 CHAPTER 5

5.0 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary of findings

This chapter concludes the salient findings of the study. Additionally, the Chapter will also have highlights of the proposals for reforms, in order to align to the Constitutional paradigms of transparency and accountability in the exploration and development of oil in Kenya. This chapter is based on the analysis and discussion of the preceding chapters which identified deficiencies in the law as well concepts that ought to align to the Constitutional tone and spirit of transparency and accountability.

The study sought to critically analyse the deficiencies in law with regards to the exploration and extraction of oil and the role of access to information keeping in mind that natural resources constitute public land and thus are held in trust for the people of Kenya by the National Land Commission. Further, the study looked at the role of contract transparency and its role in averting the resource curse and what would be achieved through contract transparency.

The objectives of the study was to critically discuss oil exploration and extraction and the need for transparency and accountability initiatives to avert issues of corruption, conflict and poverty especially in developing countries and in particular Kenya.

The hypothesis of the study was that, transparency and accountability in oil extraction in Kenya is lacking and may undermine efforts to ensure that the country effectively benefits from this resource.

The research methodology used in the study was mainly desktop research given that most of the materials and literature is available as secondary data in the internet, books, journal articles, reports and relevant studies in the area. The study was also based on a case study as well as comparative methods of inquiry in order to prove or disprove the hypothesis.

The study was divided into 5 chapters. Chapter One introduced natural resources under the Constitution 2010 and the whole concept of the resource curse. The chapter included the background to the study, literature review and theoretical framework in laying out the foundation for discussion in the ensuing chapters.

Chapter two analyzed the legal, policy and institutional framework as regards extraction and exploration of oil in Kenya. The chapter further analysed access to information, a key concept in ensuring that transparency and accountability can be achieved. The discussion was organized

around the thematic areas of legal framework with regard to oil and access to information, the policy and institutional framework. The chapter also looked at case law with regards to access to information.

From the discussion under chapter two, the question that this chapter sought to answer is whether the current policies, regulator regimes and laws are adequate to deal with emerging concerns in the exploitation and extraction of oil in light of constitutional dictates of transparency and accountability. This chapter further tested and confirmed the hypothesis that Kenya lacks adequate laws and regulator regimes to deal with the emerging concerns in the exploration and extraction of oil in light of constitutional dictates of transparency and accountability. This chapter further confirmed that, despite the court's determination that the state ought to publish and publicise any important information affecting the nation, this notion stops with the provision under the Constitution. Thus, there are no enabling provisions, or the requirement for such publication in enabling law especially under the Petroleum (Exploration and Production) Act,⁴⁷⁹ the Petroleum Exploration, Development and Production Bill, 2015 as well as the Access to information Act, 2016.

Chapter Three looked at contract transparency. The chapter analysed the legal framework as regards contract and whether the constitutional aspect of transparency and accountability with particular regard to exploration and extraction of oil are provided. The chapter further discussed the need for contract transparency and what it sought to achieve in light of the fact that natural resources are shrouded in secrecy and thus, the resulting conflict. From the study, it emerged that, though contract transparency is a new concept, it is one that other countries have embraced for purposes of transparency and accountability in the exploration and extraction of not only oil but other natural resources as well.

There was also discussion with regard to confidentiality clauses in exploration and extraction of oil and or natural resources contracts and whether there is need to provide for them. The chapter looked at the clauses that go into an oil contract and the effect of confidentiality clauses. The chapter further examined countries that require parliamentary vetting of contracts with regard to exploration and extraction of natural resources.

⁴⁷⁹ Chapter 308, Laws of Kenya

From the discussion under chapter three, it emerged that it is evident that there is no requirement for contract transparency in the exploration and extraction of oil in Kenya. This chapter sought to discuss and indeed affirmed the hypothesis that Kenya lacks adequate modalities for contract transparency either through laws or policies. It also sought to answer the question of what contract transparency seeks to cure with regard to transparency and accountability in oil exploration and extraction.

Chapter Four discussed two countries which have abundant natural resources and have been able to benefit from it, albeit differently. The discussion presented an example of a country that has been able to harness the benefits of its resources and the mechanisms that it has put in place. From this discussion, it emerged that even though a country may have strong pre-existing institutions, the ‘overwhelming boom’ presented by natural resources and the ensuing monetary benefits does not necessarily translate into benefits for a country. It was discussed that Norway had to entrench institutions for purposes of developing and generally management of its oil resources. Further, much as there was no crisis with regard to exploration and exploitation of oil and gas in Norway, the Norwegian Government still joined the Extractive Industries Transparency Initiative that advocates for transparency in the extraction of natural resources.

The discussion around Nigeria presented a country that has been plagued by conflict where the exploration and exploitation of oil has left a country marred by constant conflict even becoming the poster child for the term, ‘resource curse’. With such an abundant natural resource, the case for Nigeria presents high poverty levels, massive corruption, community dissatisfaction and the never ending conflict in the resource region. In a bid to further avert this conflict, Nigeria has adopted the Extractive Industries Transparency Initiative and even enacted the Nigeria Transparency Initiative Act. The case for Nigeria presents a lesson of what went wrong and what Kenya can do differently to avert the ills that come with abundant natural resources.

From the discussion under chapter four, the ill effects of the resource curse, as was the case in Nigeria clearly emerged. Further, it is evident that the country is trying to turn around the management of its fortunes in order to benefit the country and most important, avert conflicts

through initiatives such as NEITI Act. Norway on the other hand presented a learning experience on how oil resources through management by strong state institutions can benefit a country. These two countries presented important learning lessons.

5.2 Conclusions

The thesis set out to investigate the exploration and extraction of oil in light principles of transparency and accountability as set out under the Constitution. The study has shown and concluded that the law in dealing with transparency and accountability in the exploration and extraction of oil is inadequate as it does not reflect the Constitutional principles of transparency and accountability, given that mineral oils and minerals constitute public land and is to be held in trust for the people of Kenya by the National Land Commission. Further, Parliament is required to ratify all agreements involving the exploitation of natural resources. Parliament is also required to enact legislation providing for classes of transaction that are subject to ratification. However, this legislation is yet to be enacted.

In Chapter One, it emerged that, much as the Constitution requires that the principles of transparency and accountability should be embraced in all dealings of the state, with regard to exploration and extraction of oil development in Kenya, there are no enabling requirements in keeping with the spirit of the Constitution.

In Chapter Two, it emerged that the current legal framework as regards exploitation and extraction of oil in Kenya is lacking. This was exhibited from an interrogation of the Petroleum (Exploration and Production) Act,⁴⁸⁰ an act came into effect prior to the discovery of oil of economic viability. It also emerged that the current legislation has inherent weaknesses and for the purposes of this study, does not incorporate principles of transparency and accountability. Further, dealings in the oil sector and in particular transactions are not usually in the public domain. As such, they are not aligned to the Article 35 that provides for access to information.

It also emerged that the Petroleum Exploration, Development and Production Bill, 2015 as well as the Access to information Act, 2016 do not adequately address the issues of transparency and

⁴⁸⁰ Chapter 308, Laws of Kenya

accountability with regards to oil. Further, it emerged that the Petroleum Exploration, Development and Production Bill, 2015 does not adequately provide for contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations. Further, the Access to information Act, 2016 and with regard to the provision as to contracts does contracts specifically talk on agreements with regards to natural resources as envisaged by Article 71 of the Constitution that calls for ratification of such transactions by Parliament.

It further emerged that the Kenya does not have adequate policy and institutional framework to deal with the exploitation and exploration of oil.

Chapter Three aimed to show that, whereas there The Government Contract Act⁴⁸¹ and the Law of Contract⁴⁸² are for purposes contractual obligations, neither is aligned to the Constitution 2010. Further, dealings by government as regards natural resources are not captured.

This chapter also discussed the need for contract transparency and what it seeks to cure in the exploitation and extraction of oil. International practices were also looked at in bid to show what other jurisdictions have adopted.

Chapter Four aimed to show disparities between two resource rich countries and the lessons presented to Kenya of what can go wrong, as was the case of Nigeria. On the converse, it emerged that Norway has been able to benefit from its resources as a result of entrenching policy, legal as well as institutional framework to deal with its oil sector.

5.3 Recommendations

From the foregoing, it is clear that there are many reforms required to ensure that transparency and accountability, principles enshrined under the Constitution are applied in the exploration, exploitation and development of oil in Kenya. The resource curse phenomenon is real and Kenya should put in place mechanisms to avert this as has been discussed in this study. The following

⁴⁸¹ Chapter 25, Laws of Kenya

⁴⁸² Chapter 223, Laws of Kenya

recommendations emerging from the study and as discussed below should be able to inform reforms in the oil sector with in promotion of transparency and accountability.

5.3.1 The Role of Parliament

The institution of Parliament that derives its authority from the people of Kenya is key for purposes of providing oversight in the exploitation and extraction of oil. As noted by the World Bank, Parliaments are uniquely positioned to understand and monitor the effects of extractive industries on the citizens and act as a bridge between the government, private sector and civil society.⁴⁸³ The Constitution provides that agreements relating to the exploitation of natural resources are to be ratified by Parliament.⁴⁸⁴ Further, Parliament is required to enact legislation providing for classes of transactions subject to ratification.⁴⁸⁵

In this regard, apart from having an oversight role, Parliament also exercises legislative authority.⁴⁸⁶ They are therefore responsible for enacting legislation that creates the framework for the exploitation and extraction of oil. Further, Parliament, and in particular the National Assembly determines allocation of national revenue.⁴⁸⁷ As was seen in Chapter Four, the Parliament in Norway- the Storting creates the framework for Norwegian petroleum activities. The frameworks include enactment of legislation and adoption of propositions as well as discussing and responding to white papers concerning petroleum activities.⁴⁸⁸ Further, the Storting discusses and approves major development projects or matters of great public importance. On the islands of *São Tomé and Príncipe*, situated in the equatorial Atlantic and Gulf of Guinea, the legislature is required to hold an annual debate on oil and gas policy.⁴⁸⁹

Parliament also plays a key role in approving oil contracts as seen in states like Azerbaijan, Egypt, Georgia, Liberia, Sierra Leone, Kyrgyzstan and Yemen which all require contracts to be

⁴⁸³ World Bank Institute, (2008) '*Parliamentary Oversight of the Extractive Industries Sector*.'

⁴⁸⁴ Article 71 of the Constitution

⁴⁸⁵ See Article 71 (2) of the Constitution

⁴⁸⁶ Article 94 of the Constitution

⁴⁸⁷ Article 95 of the Constitution

⁴⁸⁸ Ibid, note 285

⁴⁸⁹ Svetlana Tsalik, "The Hazards of Petroleum Wealth", in Tsalik, *Caspian Oil Windfalls*, p. 11

ratified by Parliament. Suffice to say, Kenya also has a provision requiring ratification by Parliament.⁴⁹⁰

5.3.2 Policy Framework

Policies and the current legislation in the petroleum, and or oil regulating the sector must be imperatively reviewed. The oil policy objectives ought to be formulated in the context of existing economic, social, and environmental policies; the nature and linkages of the oil sector with other sectors; and international and regional linkages of the sector.⁴⁹¹ The Oil policy should seek to meet the following broad objectives: establish the availability, potential, and demand of oil and gas in the countries; increase access to modern, affordable, and reliable oil and gas services as a contribution to poverty eradication; improve oil and gas governance and administration; stimulate economic development; and effectively and efficiently manage oil- and gas-related environmental impacts.⁴⁹²

5.3.3 Need for proper institutions for purposes of oil governance

Transparency and accountability should be vested in an independent yet accountable body. The standard model for which has been adopted in Norway where there is a separation between the Ministry, National Oil Company and the Petroleum Directorate. The Norwegian Petroleum Directorate is administratively subordinate to the Ministry of Petroleum and Energy. Further, the ministry holds the responsibility for state-owned corporations. The Norwegian Petroleum Directorate exercises management authority in connection with exploration for and exploitation of oil. It also issues regulations and makes decisions according to the rules and regulations for petroleum activities.

5.3.4 Public consultation/ stakeholder consultation/engagement

Public consultation and stakeholder engagement is key in ensuring that the right decisions are made with regard to exploitation and exploration of oil. Even in long established democracies

⁴⁹⁰ See Article 71 of the Constitution

⁴⁹¹ African Development Bank and the African Union, 2009, 'Oil and Gas in Africa,' Supplement to the African Development Report, Oxford University Press.

⁴⁹² Ibid

the relationship between government, industry, and the public is problematic and often fails to serve the common public interest.⁴⁹³ Government agencies and the legislature are required to act in public interest. In the extractive industry, this may not necessarily be the case. This is because many regulatory agencies are too closely tied to the industries they regulate to provide effective oversight (“industry capture”).⁴⁹⁴ Regulation and legislation in such a symbiotic environment tends to favor industry at the expense of the environment, communities, social justice, and economic justice.⁴⁹⁵ Therefore, transparency in itself without engaging the public and the stakeholders may not be adequate, especially because the oil/ petroleum sector is laden with jargon that the public may not really be able to understand. The ideal of a well informed, participatory public, is a government always receptive to public concerns, and a cooperative industry all working to protect the public interest is in fact far from the actual practice of democracy.⁴⁹⁶

5.3.5 Have proper mechanisms for promotion of transparency and accountability through contract transparency and access to information.

The purpose of transparency is to enable citizens to make informed demands for the fair and sustainable use of income generated through the exploitation of natural resources. Accountable governments and an informed population contribute to greater political stability, increased energy security and an improved investment climate. As it has been noted, the discovery of oil and other resources creates unrealistic expectation about future income, leading to increases in current expenditure, often on large and impractical projects.⁴⁹⁷ This is the basis of conflict as citizens may expect more than what in fact is the reality. Thus, if citizens were kept in the know, expectations would be managed. As noted by the Extractive Industries Transparency Initiative (EITI), affected communities and citizens often assume that the government and companies are

⁴⁹³ Richard Steiner, ‘*Citizens’ Advisory Councils for Mining in the Pacific*’, in Mining and mining policy in the Pacific: history, challenges, and perspectives Noumea, New Caledonia Nov. 21 – Nov. 25, 2011

⁴⁹⁴ Ibid

⁴⁹⁵ Ibid

⁴⁹⁶ Ibid

⁴⁹⁷ Shari Bryan and Barrie Hoffman, ‘Transparency and Accountability in Africa’s Extractive Industries: the Role of the Executive’, National Democratic Institute, 2007.

trying to keep the resource wealth for themselves and are undermining the economic development of the country through corruption and mismanagement.⁴⁹⁸

Further, to the call for transparency and accountability initiatives is contract transparency. Contract transparency is important in realizing transparency and accountability in the exploration, extraction and development of oil. Contract transparency provides incentives to improve on the quality of contracting, government officials will be deterred from seeking their own interests over the population's and, with time, governments can begin to increase their bargaining power by surveying contracts from around the world.⁴⁹⁹ Secrecy hides incompetence, mismanagement and corruption—but only from the public, not from the industry that typically comes to know the terms of a deal or even the text of the putatively secret agreement.⁵⁰⁰ The Constitution further makes provision for access to information with regard to any important information affecting the public. The Extractive Industries Transparency Initiative (EITI) and Publish What You Pay initiatives advocate for contract transparency as well transparency initiatives in the extractive industry. Contract transparency has been adopted by countries such as Azerbaijan, Egypt, Georgia, Kyrgyzstan, Liberia, Sierra Leone and Yemen. In these jurisdictions, contract transparency is embraced whereby Parliament has to ratify contracts with regard to international investments or agreements relating to natural resources. The São Tomé and Príncipe Revenue Law mandates the public to access information on all oil payments. Further, oil companies have also advocated for contract transparency. Among those that have made statements in favor of contract disclosure are oil companies, with Tullow and Kosmos, mining companies Newmont and Rio Tinto leading the fray. This is because disclosure is a necessary precursor for the coordinated and effective management of the sector by government agencies.⁵⁰¹

The aspect of transparency can be achieved through access to information as regards dealings in the exploitation and extraction of oil. Thus, the state ought to publish, in accordance with Article

⁴⁹⁸ Extractive Industries Transparency Initiative, 'Impact of EITI in Africa: Stories from the Ground', 2010.

⁴⁹⁹ P. Rosenblum & S. Maples, (2009) 'Why Contracts confidential: Ending secret deals in the Extractive Industries', Revenue Watch Institute.

⁵⁰⁰ Ibid

⁵⁰¹ P. Rosenblum & S. Maples, (2009) 'Why Contracts confidential: Ending secret deals in the Extractive Industries', Revenue Watch Institute.

35 of the Constitution information held by it especially where public interest is concerned. Further, this will enable the citizens to keep abreast of what is happening and it would go further in managing citizen expectation. Ills such as corruption and conflict would be managed as the happenings in the industry would be in the public domain.

Further, effective policy design and analysis require that information should not only be available, but be reasonably accurate and distributed in a timely manner.⁵⁰² Lack of information leads to weak bargaining power in contract and concession negotiations, resulting in suboptimal capture of rents from oil resources.⁵⁰³

5.3.6 Review contract clauses especially with regard to confidentiality

Flowing from the need for contract transparency is the need to ensure that clauses in the contracts do not have confidentiality clauses as this would defeat the essence of contract transparency. Where there are provisions of access to information with regard to dealings that are of public importance, confidentiality clauses of whatever nature are at odds with national laws supporting freedom of information and with developing international human rights jurisprudence on the right to information.⁵⁰⁴ From a governance perspective, transparency is a central element in building public accountability and finding solutions to the long-term problem of channeling resource wealth into sustainable development.⁵⁰⁵ Confidentiality clauses are a symptom and not a cause of contract secrecy. The clauses that are found in most extractive agreements are “boilerplate,” incorporated wholesale from prior agreements.⁵⁰⁶ But though unnecessarily broad in scope and duration, they are not barriers to disclosure that is required by law or resulting from mutual consent.⁵⁰⁷

There should be an overall review of confidentiality clauses, policies, including the language by the government and the oil companies. Where companies have concerns about disclosure, they

⁵⁰² African Development Bank and the African Union, 2009, ‘Oil and Gas in Africa,’ Supplement to the African Development Report, Oxford University Press.

⁵⁰³ Ibid

⁵⁰⁴ P. Rosenblum & S. Maples, (2009) ‘Why Contracts confidential: Ending secret deals in the Extractive Industries’, Revenue Watch Institute.

⁵⁰⁵ Ibid

⁵⁰⁶ Ibid

⁵⁰⁷ Ibid

should define them narrowly and avoid recourse to blanket confidentiality.⁵⁰⁸ Complete contract transparency should be adopted in position statements.⁵⁰⁹

5.3.7 Adoption of the EITI

As discussed in chapter Two, the EITI initiative was launched by the United Kingdom government in 2002 to address the general failure to transform resource wealth into sustainable development (the “resource curse” or “paradox of plenty”) and the associated governance problems in the extractive industries sector.⁵¹⁰ The EITI aims to intervene in the middle of the value chain—collection of taxes and royalties stage—but neither upstream nor downstream. The EITI has grown into a worldwide initiative.⁵¹¹ More than 20 countries have committed to its principles and criteria, the majority of them African countries.⁵¹² Kenya should adopt the EITI initiative since it encourages greater transparency and accountability. The initiative further seeks to avert the potential negative impacts of mismanaged revenues which can be mitigated. Such mismanaged revenues that run into billions of dollars can instead become an important engine for long-term economic growth that contributes to sustainable development and poverty reduction.

Tanzania just like Nigeria has enacted the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015. The preamble to the Act states that, it is an Act of Parliament to provide for the establishment of the Extractive Industries (Transparency and Accountability) Committee for purposes of ensuring transparency and accountability in extractive industries and to provide for other related matters. The Act establishes a Committee whose function is to *inter alia* develop a framework for transparency and accountability in the reporting and disclosure by all extractive industry company on revenues due or paid to the Government; promote the effective citizen participation and awareness of extractive industry companies and its contribution to socio-economic development; promote the effective citizen participation and awareness of resources governance in extractive industry and its contribution to socio-economic

⁵⁰⁸ Ibid

⁵⁰⁹ Ibid

⁵¹⁰ African Development Bank and the African Union, 2009, ‘Oil and Gas in Africa,’ Supplement to the African Development Report, Oxford University Press.

⁵¹¹ Ibid

⁵¹² See also www.eitransparency.org

development.⁵¹³ The Act further makes it an obligation to publish information in order to ensure transparency and accountability in the extractive industries.⁵¹⁴ It states *inter alia* that, the Committee shall cause the Minister to publish in the website or through a media which is widely accessible all concessions, contracts and licenses relating to extractive industry companies.⁵¹⁵

Kenya would do well to adopt such an initiative.

5.3.8 Conclusion

The foregoing study renders it clear that, transparency and accountability in the management of natural resources is key in ensuring that governments achieve levels of sustainable development and democratic accountability. But even the best of governments don't necessarily act in support of these interests without consistent pressure.⁵¹⁶ A decade ago, there was little pressure from civil society or others for proper governance of extractive resources. Now this issue is the focal point of a strong international movement backed by governments and companies. Thus, calls for initiatives such as the EITI. Further, activists are seeking for greater transparency and contracts transparency, and regulators and international financial institutions are beginning to nudge both sides towards more disclosure.⁵¹⁷ Access to information and contract transparency act in the interest of the public. Thus, since natural resources are held in trust for the people, it follows that the government is accountable to the people of Kenya and they can do this through actualization of the constitutionally enshrined principles of transparency and accountability.

As a country, we stand on the tipping point of either using the discoveries in Turkana, Mui Basin, Lamu, Kwale and other parts of the country to join the leagues of such countries like Norway and Botswana, whose economies have benefitted hugely from the extractive industry, or follow in the footsteps on numerous countries where the extractive sector has only brought

⁵¹³ Section 10 of the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015.

⁵¹⁴ See section 16 of the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015.

⁵¹⁵ Ibid, section 16 (1) (a).

⁵¹⁶ P. Rosenblum & S. Maples, (2009) 'Why Contracts confidential: Ending secret deals in the Extractive Industries', Revenue Watch Institute.

⁵¹⁷ Ibid

misery and suffering to the citizenry, and where benefits have been enjoyed by a few elites and political leaders.⁵¹⁸ The choice is ours.⁵¹⁹

⁵¹⁸ Ibid, note 207

⁵¹⁹ Ibid

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