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SCHOOL OF LAW



**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE MASTER
OF LAWS (LL.M) COURSE (GPR 699)**

**OIL EXPLORATION IN KENYA: A CRITICAL ASSESSMENT OF THE SHARING OF
PETROLEUM RESOURCE REVENUE.**

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DECLARATION

I the undersigned, declare that this is my original work and has not been submitted to any other College, Institution or University other than the University of Nairobi for Academic credit. All sources of information have been duly acknowledged.

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DEDICATION

I would like to dedicate this research paper to my late Mum for always believing in me and continually encouraging me to pursue my dream of attaining a Post-graduate Law Degree. I'm also indebted to you for your enduring determination to see me and my fellow siblings through school in difficult circumstances. This is no mean feat and my only regret is that you will not be able to take your place at the Graduation Square as I am bestowed with the honors that you really worked hard to help me achieve. As I embark on the journey in my law career, your determination, hard work, zeal and endurance will always be my inspiration and drive.

ABSTRACT

Africa has vast minerals like copper, oil, gold and diamonds. The presence of these resources in a given country is an indication that the country's economic development will be boosted. However, this is not always the case as evidence has shown that many countries endowed with rich natural resources face several challenges leading to growth loss in the country. This is due to increased violence, human rights violation and distortion of the economy.

The reduction of growth in countries with natural resources has led to a phenomenon called the "resource curse". This phenomenon entails that countries with large deposits of resource wealth often face more economic, social and political problems than they benefit from their natural boom. The political conflicts experienced in the Democratic Republic of Congo (DRC) and the Biafra War in Nigeria are all political turbulences that have occurred as a result of the rich natural resources found in these countries.

J Osongo Ambani refutes claims that the presence of natural resources in an African country leads to the deterioration of socio-economic and political institutions. According to him, that is to miss the point¹ and that it is the failed leadership and governance institutions which are responsible for the 'resource curse'².

This paper, therefore, seeks to critically assess the legal framework put in place for the sharing of petroleum resource revenue. The paper argues that equitable sharing of natural resource benefits is integral to growth and development of the Kenyan society. In our instant case, Turkana County and its locals will be used as a study case. The paper will also discuss how to address the 'resource curse' by looking at the practices of countries which are better developed in extractives and then conclude by offering recommendations that Kenya can incorporate to do better.

¹ Ambani O J, 'Drilling past the resource curse? An introduction to the concept of 'mis-rule penalty' and the book', (2018) Strathmore University Press.

² Ibid

LIST OF ABBREVIATIONS

ABS- Access and Benefits Sharing

CBD- Convention on Biological Diversity

CRA- Commission on Revenue Allocation

CS- Cabinet Secretary

EIA- Environmental Impact Assessment

EOPS- Early Oil Pilot Scheme

EPRA- Energy & Petroleum Regulatory Authority

ERC- Energy Regulatory Commission

FNLA- The National Front for the Liberation of Angola

GPFG- Government Pension Fund Global

KRA- Kenya Revenue Authority

MOMP- Ministry of Mining and Petroleum

NEMA- National Environmental Management Authority

NOCK- National Oil Corporation of Kenya

NSWF- National Sovereign Wealth Fund

PS- Principal Secretary

UPRA - Upstream Petroleum Regulatory Authority

Table of Contents

DECLARATION	ii
ACKNOWLEDGEMENTS	iii
DEDICATION	iv
ABSTRACT.....	v
LIST OF ABBREVIATIONS.....	vi
TABLE OF CASES	ix
LIST OF STATUTES	x
CHAPTER ONE: INTRODUCTION	1
1. Background	1
1.1 Problem Statement	5
1.2 Justification of the study	6
1.3 Research Objectives.....	6
1.4 Research Questions	6
1.5 Hypothesis.....	7
1.6 Theoretical Framework	7
1.6.1 The Social Contract Theory	7
1.6.2 The Sustainability theory	9
1.7 Research Methodology	11
1.8 Literature Review.....	12
1.9 Limitation of the study.....	21
1.10 Chapter Breakdown	21
1.10.1 Chapter 1- The Proposal	21
1.10.2 Chapter 2- Contextualizing equitable benefit-sharing of revenue from exploitation of oil resources.	21
1.10.3 Chapter 3- The legal and institutional framework on oil benefits sharing in Kenya	21
1.10.4 Chapter 4- Conclusions and recommendations.....	22
CHAPTER TWO: CONTEXTUALIZING EQUITABLE BENEFIT SHARING OF REVENUE FROM THE EXPLOITATION OF OIL IN KENYA	23
2.0 Introduction.....	23
2.1 Ownership of the oil resource in Kenya.....	24
2.2 Exploitation of the oil resource in Kenya	28
2.2.1 Environmental impacts	32
2.2.2 Social impacts	34

CHAPTER THREE: THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING BENEFIT-SHARING IN KENYA.....	39
3.0 Introduction.....	39
3.1 Legal Framework	39
3.1.1 The Petroleum Act 2019	40
3.1.2 The Model Production Sharing Contract (MPSC)	42
3.1.3 The Natural Resources (Benefits Sharing) Bill.....	47
3.1.4 Draft National Sovereign Wealth Fund Bill	48
3.1.4.1 The Stabilization component	50
3.1.4.2 The Infrastructure Development Component.....	52
3.1.4.3 The Urithi Component	53
3.1.5 Local Content Bill 2018.....	54
3.2 The Institutional Framework on Oil Benefits Sharing in Kenya	56
3.2.1 Ministry of Energy and Petroleum.....	56
3.2.2 Energy & Petroleum Regulatory Authority	57
3.2.3 National Upstream Petroleum Advisory Committee	57
3.2.4 National Oil Corporation of Kenya.....	58
3.2.5 National Environmental Management Authority (NEMA)	59
3.2.6 Commission on Revenue Allocation.....	60
3.2.7 County Benefit Sharing Committees	61
3.2.8 Local Benefit Sharing Forum.....	63
3.2.9 Sovereign Wealth Fund Board.....	63
CHAPTER FOUR: KEY FINDINGS, CONCLUSIONS AND RECOMMENDATIONS	66
4 Key Findings.....	66
4.1 Recommendations.....	69
5 BIBLIOGRAPHY	72
5.1 BOOKS	72
5.2 Journal Articles	73
5.3 Reports and Articles.....	75
5.4 Internet Sources	77

TABLE OF CASES

1. Africa Oil Kenya BV v Commissioner of Domestic Taxes [2020] eKLR
2. Africa Oil Turkana Limited (Previously known as Turkana Drilling Consortium Ltd) & 3 others V Permanent Secretary, Ministry of Energy & 17 others, Civil Appeal No. 376 of 2014 [2016] eKLR.
3. CEMIRIDE (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya (Endorois Case)-Communication No. 276/2003.
4. Environment Land Court Suit No. 825 of 2012
5. Law & Social Development Trust (LASODET) & 2 others versus Attorney General & 12 others [2014] Eklr
6. Mohamed Ali Baadi & others v Attorney General & 11 others [2018] eKLR
7. Muema Nzioka & 2 others v Tiomin Kenya Limited Civil Case 97 of 2001 eKLR
8. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR
9. Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others.
10. Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 Others [2014] eKLR
11. Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) 172 (2007).
12. The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (The Ogoni Case)-Communication No. 155/1996.
13. United States v Causby, 326 U.S. 256 (1964).
14. Water Resources Management Authority v Krystalline Salt Limited [2018] eKLR
15. William Yatich Sitetalia & others versus Baringo County Council & another, High Court Miscellaneous Civil Case No. 183/2002.

LIST OF STATUTES

1. The County Governments Act, No. 17 of 2012
2. The Commission on Revenue Allocation Act
3. The Energy Act, 2017
4. The Energy Act, No. 12 of 2006
5. The Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015
6. The Environmental Management and Co-ordination Act No. 8 Of 1999.
7. The Kenya Constitution, 2010
8. The Mining Act, No. 12 of 2016
9. The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016
10. The Petroleum (Exploration and Production) Act, Cap 308 of the Laws of Kenya
11. The Petroleum Act, No. 2 of 2019

LIST OF KENYA BILLS OF PARLIAMENT, REGULATIONS AND POLICIES.

1. The Draft National Energy Policy, 2014
2. The Draft Sovereign Wealth Fund Bill, 2019
3. The Local Content Bill, 2018
4. The Natural Resources (Benefit Sharing) Bill, 2014
5. The Natural Resources (Benefit Sharing) Bill, 2018
6. The Natural Resources (Benefit Sharing) Bill, 2022
7. The Petroleum Exploration, Development and Production Local Content Regulations

CHAPTER ONE: INTRODUCTION

1. Background

The discovery and exploration of natural resources actively drive a country's economic and social growth. This wealth gained from extracting these resources propels the nation towards prosperity, creating more jobs and raising the living standards of its citizens. While this is a fortunate situation for some countries, it is not always the case for most resource-rich African nations. They often face a challenge known as the "resource curse," marked by unpredictable commodity prices, resulting in sudden economic ups and downs. They also grapple with mismanagement of resource revenue across generations and within different groups in society, leading to increased corruption³.

The recent discovery of oil in Kenya established the country as a resource-endowed country on the global map ⁴. In March 2012, the late former president Mwai Kibaki announced the discovery of oil in Turkana ⁵, a statement that was corroborated by Tullow Oil and African Oil ⁶. They assured that there is enough oil to meet both local and international demand. Experts reported that the discovered oil is of high quality and is anticipated to produce a greater amount of gasoline and diesel per barrel compared to other crude explored in Africa. This discovery marked a significant development for Kenya's energy sector and economic outlook.

Turkana County, historically marginalized in development, ranks among Kenya's poorest counties. It relies on nomadic pastoralism for livelihood, occasionally facing challenges like cattle rustling and border conflicts with neighboring communities ⁷. The recent oil discovery in the region has spurred development, but it's also sparked competition for land, water, and resources, putting the

³ Tsani, S, 'Natural resources, governance and institutional quality: The role of resource funds,' Resources Policy, 38(2013), p. 1 <

https://www.academia.edu/2772078/Natural_resources_governance_and_institutional_quality_The_role_of_resource_funds > accessed on 3rd November 2022.

⁴ Odote C and Otieno S, 'Getting it right: Towards Socially Sustainable exploitation of the extractive industry in Kenya', (2015) East African Law Journal

⁵ Johannes E, Zulu L and Kalipeni E, 'Oil discovery in Turkana County, Kenya: a source of Conflict or development?', 34(2) African Geographical Review, 146.

⁶ Muigua K, 'Reflections on managing resources and equitable benefit sharing in Kenya' 15(1), 2019, Law society of Kenya, p.1-42 < <file:///C:/Users/USER%20PC/Downloads/REFLECTIONS%20ON%20MANAGING%20NR-Kariuki%20Muigua.pdf> > accessed 3rd November 2022.

⁷ Okoth J, 'Kenya: A fair share of the oil revenue for Turkana' 31st May 2012 < <https://www.pambazuka.org/land-environment/kenya-fair-share-oil-revenue-turkana> > accessed 3rd November 2022

local community at a disadvantage⁸. The curse that is bedeviling most African countries has found its way into Kenya's budding extractive industry. Unfortunately, the familiar issues associated with extractive industries, such as community displacement, erosion of traditional structures, and environmental risks, are emerging in Turkana⁹. The residents are voicing their concerns about being left out of the decision-making processes related to land sales and oil contracts.¹⁰

Poor leadership, characterized by a disregard for the values and principles of public service, is a major factor contributing to the challenges faced by Kenya and other African countries¹¹. This self-serving approach prioritizes personal gain over the well-being of communities affected by extractive industries, exacerbating the resource curse. A striking example is the Democratic Republic of Congo, which possesses over 100 million hectares of natural resources but has failed to deliver benefits to its citizens¹². This has led to widespread armed conflicts and heightened human suffering in the country.

Poor governance and maladministration in African countries is another significant factor contributing to the resource curse. This encompasses dysfunctional institutions, unaccountable political systems, and a disregard for the rule of law¹³. Those in positions of power often manipulate resource regulations to favor themselves, neglecting the interests of the citizens¹⁴. Ordinary people are excluded from the decision-making process regarding extractives, even though they bear the brunt of environmental degradation¹⁵. The Kenyan Mining Act¹⁶ states that every mineral is the property of the Republic and is vested in the National Government in trust for

⁸ Kariuki F, 'land rights issues in Kenya's extractives sector' in Ambani O J, 'Drilling past the resource curse? An introduction to the concept of 'mis-rule penalty' and the book', (2018) Strathmore University Press, p.142

⁹ Muigua K, 'Reflections on managing resources and equitable benefit sharing in Kenya' 15(1), 2019, Law society of Kenya, p.1-42 < <file:///C:/Users/USER%20PC/Downloads/REFLECTIONS%20ON%20MANAGING%20NR-Kariuki%20Muigua.pdf> > accessed 3rd November 2022.

¹⁰ Johannes E, Zulu L and Kalipeni E, 'Oil discovery in Turkana County, Kenya: a source of Conflict or development?', 34(2) African Geographical Review, p.155

¹¹ Constitution of Kenya 2010, article 232.

¹² Muigua K, 'Reflections on managing resources and equitable benefit sharing in Kenya' 15(1), 2019, Law society of Kenya, p.1-42 < <file:///C:/Users/USER%20PC/Downloads/REFLECTIONS%20ON%20MANAGING%20NR-Kariuki%20Muigua.pdf> > accessed 3rd November 2022

¹³ Ambani O J, 'Drilling past the resource curse? An introduction to the concept of 'mis-rule penalty' and the book', (2018) Strathmore University Press.

¹⁴ Kameri-Mbote P, 'Extractive Industry in Kenya: A Blessing or a Curse?', (key Note Speech), UNDP and Civil Society, Leisure Lodge, November 2014.

¹⁵ Ambani O J, 'Drilling past the resource curse? An introduction to the concept of 'mis-rule penalty' and the book', (2018) Strathmore University Press.

¹⁶ Mining Act 2016, section 6(1)

the people of Kenya. This underscores the citizens' right to receive a fair share of the benefits from the extractive industries¹⁷.

Based on the foregoing, it is imperative for Kenya to implement measures aimed at preventing conflicts stemming from the distribution of oil benefits found in Turkana. The local indigenous communities in Turkana County, where substantial oil reserves have been discovered, have voiced concerns about not reaping the full benefits of this resource in their region. Their complaints encompass a range of issues, from a scarcity of employment opportunities provided by exploration companies to the presently contentious revenue-sharing formula¹⁸.

The international community acknowledges the importance of benefit sharing with indigenous local communities, exemplified by the *Saramaka People v Suriname*¹⁹ case. In this landmark decision, the Inter-American Court affirmed the Saramaka people's ownership of sub-surface resources within their indigenous land and their entitlement to benefits upon extraction. The Court emphasized the State's obligation to ensure that benefits from development plans within indigenous territories are shared with the respective communities. In Kenya, benefit sharing in oil exploration is provided in the Constitution under Article 66(2) where the Parliament is mandated to enact legislation ensuring that investments in property benefit local communities and their economies. In the international realm, there is also great focus and emphasis on ensuring that investments in property benefit Indigenous Local Communities and their economies²⁰.

Hence, it is crucial for the country to establish a well-defined framework for transparently distributing the benefits derived from oil resources. This aligns with the aim and vision set out in the Petroleum Act of 2019, seeking to prevent Kenya from succumbing to the infamous "oil curse". Achieving this goal hinges on Parliament enacting robust and unambiguous legislation to guarantee a fair and equitable sharing of benefits from oil and gas resources among all stakeholders

¹⁷ Katindi Sivi-N, 'Case Studies of revenue-sharing models: what Kenya can learn from other countries' in Ambani O J, 'Drilling past the resource curse? An introduction to the concept of 'mis-rule penalty' and the book', (2018) Strathmore University Press. P.75

¹⁸ Peter Kiragu 'Locals storm Tullow Oil fields in Turkana', *The Star* (Nairobi, April 28 2018) available at https://www.the-star.co.ke/news/2013/10/28/locals-storm-tullow-oil-fields-in-turkana_c849534 Last accessed at 30th January 2019

¹⁹ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) 172 (2007).

²⁰ Wright Laura & White Perry 'Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements' *The International Indigenous Policy Journal* Volume 3 Issue 2 2012

in the country. Additionally, it is imperative for the government to oversee the responsible allocation of these revenues towards the nation's development and the welfare of its citizens.

The exploration of oil has higher impacts on the indigenous community compared to local community as a whole hence the need for equitable benefit sharing among the interest groups. This may however be impeded by lack of a clear definition of indigenous local community. According to the African Commission's Working Group of Experts on Indigenous Populations/Communities²¹, 'A strict definition of indigenous peoples is neither necessary nor desirable. The group rather pointed out that indigenous local communities could be identified using four major characteristics namely: "the occupation and use of a specific territory; voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; Self-identification, as well as recognition by other groups, as a distinct collectively and an experience of subjugation, marginalization, dispossession, exclusion or discrimination.'"

Moreover, it is imperative for the government to actively involve the citizens, particularly those residing in areas with discovered oil deposits, in the oversight and utilization of this resource. Public participation is a fundamental principle in the management of natural resources, as it grants those affected by resource exploration the opportunity to voice their perspectives, aiding mining companies in making informed decisions. In Kenya, the constitution which is the supreme law provides that sovereignty lies with the people²² and is vested on the three arms of government. Article 10 of the constitution²³ further provides for the principles of good governance and public participation is listed as one of the principles. The constitution also mandates the inclusion of public participation in the safeguarding, preservation, and management of the environment.²⁴ Article 69 (1) of the Constitution also mandates the government to guarantee the sustainable use, management, and conservation of the environment and natural resources. It also calls for a fair distribution of the resulting benefits. The Petroleum Act of 2019, the Mining Act of 2016, and the Energy Act of 2019 all outline explicit sharing arrangements among the National government, County governments, and local communities.

²¹ Sigam Claudine & Garcia Leonardo Extractive Industries: Optimizing Value Retention In Host Countries UNCTAD, Geneva UNCTAD/SUC/2012/

²² Constitution of Kenya 2010, Article 1

²³ Constitution of Kenya 2010.

²⁴ Constitution of Kenya 2010, Article 69(1) (d)

Nonetheless, there remains a gap in establishing an effective method for distributing and disbursing the portion designated for natural resources such as petroleum. Consequently, this paper aims to conduct a thorough examination of the status of the framework for sharing petroleum resource revenue between the National government, County government, and local communities. It will also delve into the existing legal and institutional framework and explore best practices that could be implemented by the Kenyan government to bolster equitable benefits sharing and advance development in the country.

1.1 Problem Statement

The challenge of equitable benefit sharing from natural resources persists, impeding local communities from obtaining their fair share of the benefits derived from resource exploitation. This issue primarily stems from deficient, inefficient, and ineffective systems that should ensure the fair and equitable distribution of these benefits. Additionally, shortcomings in the legal framework designed to facilitate benefit sharing exacerbate this problem.

The research highlights the opacity surrounding agreements between the government and oil exploration companies concerning the distribution of benefits following successful oil discoveries²⁵. For instance, in the case of Tullow Oil, there is a lack of publicly available information about the specifics of the agreement between the exploration company and the government²⁶. Moreover, disagreements persist over the allocation of oil revenues from Turkana among the national government, county government, and local host communities²⁷. These differing perspectives on entitlements have led to prolonged disputes, which were only resolved through an agreement between the national government and the County government of Turkana.

These issues underscore the deficiencies in the existing framework intended to ensure equitable sharing of revenue from oil exploration in Kenya. Consequently, this research endeavors to

²⁵ Anastasia Grinberg, 'Secrecy in oil deals breeds suspicion', *Daily Nation* (Nairobi April 15 2018) accessed at <https://www.nation.co.ke/news/Secrecy-in-oil-deals-breeds-suspicion/1056-4393788-k2glm3/index.html> Last accessed on 24th January 2019

²⁶ Bert Makore, 'Make petroleum contracts disclosure key in new plan', *Business Daily* (NaiJanuary 31 2019) available at <https://www.pressreader.com/> (Last accessed on 1st February 2019)

²⁷ Star Online "Turkana residents reject 5% offer, say they weren't consulted" The Star march 21 2018 available at <http://the-starvideos.co.ke/index.php/2018/05/21/turkana-residents-reject-5-offer-say-they-werent-consulted/> (Last accessed on 22nd February 2019)

scrutinize the current legal framework and identify potential areas for improvement. The ultimate goal is to facilitate fair benefit sharing of petroleum revenue in Kenya.

1.2 Justification of the study

This study is justified on the basis that there have been protracted disputes in most developing countries that have discovered oil and gas resources arising from the inequitable and unfair sharing and distribution of benefits derived from these resources. This has been particularly the case where the local communities residing in the areas where these resources are discovered who feel that they get a raw deal from the government and contractors and they do not get to enjoy the benefits of their resources. Since Kenya is embarking on the journey of exploiting and developing its oil resources, it is crucial that the country develops a clear framework on the sharing of the benefits derived from these resources for the benefit of the country a situation which will guarantee stability in the country in the long run and ensure that the country is able to derive maximum benefit from these resources.

1.3 Research Objectives

The overall objective of this research is to assess the issue of oil exploration in Kenya with the aim of determining where the existing legislation fall short in governing and ensuring the equitable sharing of revenues derived from oil resources in Kenya. The research also aims to come up with proposals to further strengthen the framework for the benefit of the citizens and the country in general.

The specific objectives of this research include:

- a) To contextualize the legal, social and economic aspects of benefit sharing of revenue from the exploitation of oil.
- b) To analyze the legal and institutional framework governing oil exploitation in Kenya
- c) To identify the possible challenges that inhibit the full realization of equitable benefit sharing of the revenue from oil exploitation.
- d) To determine possible solutions for the identified challenges on equitable benefits sharing.

1.4 Research Questions

This research will seek to answer the following questions;

- a) What is the social, economic and legal basis for benefit sharing of oil resources?
- b) Are the current laws and legislation on oil benefits sharing sufficient to ensure the fair and equitable sharing of revenues derived from oil resources in Kenya?
- c) What drawbacks should Kenya avoid in its bid towards ensuring an equitable benefit-sharing law for its oil resources?
- d) What are the policy and legislative interventions that can be taken to strengthen the framework on the sharing of oil benefits in Kenya?

1.5 Hypothesis

This research tentatively argues that the exploitation of natural resources and in particular oil has the tendency of causing disputes in societies. Kenya has made elaborate steps towards establishing a legal framework that will guarantee equitable benefit sharing of the revenues accruing from the exploration of oil. However, despite the existence of the Petroleum Act, 2019, this research proceeds on the premise that there still exists gaps in the framework, and this is the reason why there are still unresolved issues surrounding benefit sharing of the oil resource in Kenya.

1.6 Theoretical Framework

This research is premised on the exploration of the Social Contract Theory and the Sustainability theory.

1.6.1 The Social Contract Theory

Access to natural resources is an issue that is premised on state sovereignty according to Article 15(1) of the United Nations Convention on Biological Diversity. This means that, the national government is the exclusive owner of these rights, which are then governed by domestic laws. This Article also stipulates that any access to such benefits must be contingent on previous informed permission and mutually acceptable terms. Therefore, access to benefit sharing of all types of natural resources is a crucial component of state sovereignty. As such, the concept of state sovereignty is built on the social contract theory where, there is a social contract between the citizens and the state.

In contextualizing this idea with the current research, natural resources naturally belong to the citizens of Kenya and this is spelt out under Article 61(1) of the Constitution of Kenya which acknowledges that all land belongs to the people of Kenya. The state is therefore obligated to

access and use such resources, with the citizens relinquishing their right to the state in exchange for equal share in the benefits resulting from exploration of the resources.

The idea of benefit sharing of natural resources presupposes that the revenue accrued from the exploration of the natural resources in an area should be shared out especially among the affected persons or entities. The state therefore bears the obligation to ensure that access and benefit sharing of such natural resources is equitably made across all the stakeholders and interest groups in the country. Noting that there is an express or implied social agreement between the state and its citizens, the foundation of any political system is then that of the citizens giving up their rights in exchange for protection from the state. This theory has thus been propounded by several philosophers including Thomas Hobbes, John Locke and Jean Jacques Rousseau.

Thomas Hobbes in *The Leviathan*²⁸ acknowledges that in a natural world, man is always in conflict with another man and the result is the existence of continual social conflict, further characterized by miserable human life. He therefore explains that there is a need for law and government to ensure order and this is what necessitates the social contract between the state and its people.²⁹ The people thus give up their rights to the state, and the state acquires the authority to govern over the people.³⁰ The authority of the state is however to be based on the grounds of reasoned principles for instance, accountability. Hobbes further explains that the laws put in place not only ensure a civilized society, but also aim to guarantee the rights of the citizens.³¹ Therefore, in relation to benefit sharing of resources, the law is in place to regulate and ensure the equitable sharing of resources.

John Locke furthers this theory and explains that at birth, individuals surrender rights as necessary in exchange for security and their common good as a society.³² Locke however argues that as much as individuals surrender these rights, they still have the natural rights related to the integrity of the person and property that are derived from natural law. He maintained that even with the surrender of rights, there are fundamental prerogatives that are retained by the individuals.³³ Therefore, along

²⁸ Hobbes Thomas, 1651a. *Leviathan*, C.B Macpherson (editor) London: Penguin Books (1985).

²⁹ MDA Freeman, Lloyd's Introduction to Jurisprudence (8th edition, Sweet & Maxwell 2002).

³⁰ Ibid.

³¹ BH Bix, Jurisprudence: Theory and Context (6th edition, Sweet & Maxwell 2012).

³² Daudi Mwita Nyamaka, Social Contract Theory of John Locke (1932-1704) in the Contemporary World" (June 2011) in Selected Works.

³³ Ibid.

with the sovereign's duty to ensure the citizens' security and well-being, such rights surrender is what forms the basis of the social contract theory.

Jean Jacques Rousseau on the other hand further expounds on Locke's idea explaining that man has certain inalienable rights that cannot be taken away from them.³⁴ Further, he argues that the social contract between the state and its people should be subjected to the will of the people. As such, Rousseau contends that man's freedom is tempered by the social contract agreement but the aim is not to harm the citizens but rather ensure that the people are civil and rational.

Therefore, the nexus between the Social Contract Theory and benefit sharing of oil resources in Kenya can be based on the ground that the Kenyan citizens have legitimate claims to the benefits of such resources. The government is thus obligated to ensure they put in place both social and legal mechanisms with the aim of ensuring that there is equitable benefit sharing of the oil resources. In having the mechanisms in a structured manner guarantees evasion from chaos and ensures meaningful exploitation of oil resources for the benefit of Kenyan citizens.

1.6.2 The Sustainability theory

This study also considers the sustainability theory which is a pertinent concept in the exploitation, development and management of oil resources. Sustainable development is defined as development that meets the needs of the current generations without compromising the ability of future generations to meet their needs³⁵. The sustainability theory has three main pillars; economic, environmental and social pillar. The environmental pillar arguably attracts more focus and attention due to the contemporary issues around the need for environmental conservation as a result of to the adverse effects of climate change currently being experienced in the world. However, the other two pillars; the social and economic pillars are equally important.

The economic pillar argues that to be sustainable, a project or a business venture needs to have some economic benefit. In the context of oil exploration and production, oil resources and the benefits derived thereof should have economic benefit to the owner. As aforementioned, the owner of the oil resources in Kenya is the national government who hold it in trust on behalf. The benefits to the government may accrue either in the form of a share of the oil itself or from a share of

³⁴ Jean-Jacques Rousseau Social Contract (Jonathan Bennett, 2010).

³⁵ Brundtland Commission Report, "*Our Common Future*", 1987 at Page 43.

revenues derived from the oil based on the model that the government adopts. The oil share option would be applicable where the government wishes to put up supporting infrastructure in the form of refineries and other value addition facilities. In Kenya the bias is on sharing of the oil revenue with the government unwilling to invest in additional processing facilities like refineries.

There is a lot of emphasis placed on the economic viability of a project for its long-term sustainability. Elements under the economic pillar may include compliance, proper governance and risk management. However, the pillar argues that a project should not focus on profit at all costs thereby trumping over the environmental and social pillars. In the context of oil exploration this pillar is applicable in the sense that out of exploitation of the oil resource, there should be some form of economic benefit. As aforementioned however, the exploration should not solely focus on the economic benefit arising from the exploitation of the resource but consideration needs to be given to other impacts of the exploration including environmental and social effects. The manifestation of the economic pillar in oil exploration and management is in the sharing of benefits derived from oil resources. The government also needs to get a fair return on its natural resources to be able to meet its developmental needs. The local community where the project is based also need to feel the benefit of the resources being exploited in their area. Accountability by the government and prudent use of resources is also a critical element in ensuring that also crucial in ensuring the sustainability of the resource. The resources belong to the government to hold and manage them in trust for the people. Where the government is accountable for the use of a country's revenues and resources, conflicts are greatly reduced³⁶.

The environmental pillar argues for the need of environmental consciousness in the activities that we undertake. Oil exploration for example has the potential of adverse environmental impacts if not well managed. This may be manifested through emissions of carbon gases, waste and effects of drilling oil wells and future use of land where the wells are drilled. It is therefore crucial that environmental sustainability is central in the oil exploration and production.

The social pillar which is closely related to the concept of social license argues that a sustainable project should have the buy-in of all stakeholders involved to guarantee its long-term

³⁶ United States Institute of Peace, Natural Resources, Conflict and Conflict Resolution, September 14, 2007.

sustainability³⁷. The stakeholders could include employees, contractors, government agencies and the local community where the project is being carried out. Several approaches may be employed in securing and maintaining this support but key among the strategies used is the engagement of all stakeholders involved the project.

In the context of oil exploration, it is crucial bring on board all the stakeholders especially the local community where the exploration is being carried out. It is crucial that the project gains acceptability by the local communities to avoid avert disputes that may derail the project being undertaken. This may be manifested through disruptions, non-cooperation by the locals among many other negative incidents that may bog down the project. This is especially important where the exploration activities are undertaken by contractors and not by the government agencies like the case is in Kenya. It would be easier if the government itself was undertaking the exploration it would gain more acceptability by the people compared to when the project is undertaken by contractors which may give rise to resentment especially where the locals feel they are not benefitting enough from the project. The concept of public participation which is well pronounced in our constitution relates to the concept of engagement of stakeholder engagement³⁸. The involvement of the stakeholders and especially the local community is crucial in securing goodwill for the project and guaranteeing its long-term sustainability.

The “oil curse” can therefore be averted by adopting a sustainable model in the exploitation and development of the oil resource that incorporates all the three pillars of sustainable development that ensures prudent and sustainable exploitation and development of oil resources for the benefit of the people living in the areas where these resources are found. Equitable benefit sharing of benefits derived from these resources shall also guarantee the long-term sustainability of these resources.

1.7 Research Methodology

The research was undertaken through a qualitative data collection method in order to obtain data that is relevant and appropriate to the research. The qualitative data collection method for this

³⁷ Sonja M. Hunt, ‘Evaluating a Community development Project: Issues of acceptability’, *The British Journal of Social Work* Vol. 7 No. 6 1987 < <https://www.jstor.org/stable/23709082> > accessed on 30th June 2019.

³⁸ Constitution of Kenya, 2010, Article 10 (2) a.

research was a desk review of relevant publications to discern the trends, thoughts and opinions of authors on the idea of benefit sharing of natural resources. The desk research looked at the literature by academics, various organizations, and governments in an effort to successfully achieve equitable sharing of benefits of natural resources and in particular oil. In adopting the doctrinal research methodology approach, the research has utilized several materials including published and unpublished materials including books, journal articles, research papers, reports, internet sources and newspaper reports.

After obtaining the data, the author evaluated the data for relevance and appropriateness in relation to the research topic. This was to achieve congruence between the data collected and the research questions. The author has also carried out a content and qualitative analysis which has been interpreted through the chapters. This study is inquisitive, analytical and prescriptive as relates to the sharing of oil benefits in Kenya.

1.8 Literature Review

Most of the scholarly work and writings in Kenya on benefit sharing predominantly centers on broader natural resource contexts rather than specifically on oil and gas. This trend arises from Kenya's recent discovery of oil deposits, resulting in a developing body of literature in this area. Notably, there has been an emergence of journal articles specifically addressing oil and gas, coinciding with Kenya's venture into exploration, production, and development in this sector. The existing literature on oil benefit sharing in Kenya places a primary emphasis on improving the regulatory framework to cater to the interests of all stakeholders. Furthermore, it examines the potential benefits and challenges associated with oil benefit sharing, while providing recommendations for a proficient and fair allocation of revenues.

On the international realm, there exists a wealth of literature on this subject addressing the contemporary concern on oil benefits sharing especially in developing countries. Internationally, a wealth of literature addresses the contemporary concern of equitable oil benefit sharing, particularly in developing countries. Consequently, this research paper heavily draws upon the existing literature, laws, and policy guidelines pertaining to the sharing of oil and gas benefits. The study aims to critically assess the current legal framework for oil benefit sharing in Kenya, evaluate its effectiveness, and propose enhancements for the country's benefit. Additionally, the research

will inquire into the benefit-sharing practices in other jurisdictions to identify transferable practices for Kenya's context.

Adequacy of the extractive Resources

Professor Collier Aul argues in his article titled '*Managing Resource Revenues in Developing Economies*'³⁹ that revenues from extractive resources are unique because they are finite and exhaustible. He further adds that the commodity prices are highly volatile and hence unreliable. He argues therefore for the need in prudence in managing these resources and ensuring that the revenues are used for the benefit of the country. He argues that countries should as much as possible be cautious of the boom that occurs after discovery of such resources to avoid the 'oil curse'. He adds that governments should largely save the boom in foreign financial assets to cushion the country during the period of low prices or when the resources are exhausted.

Aul's suggestion to primarily allocate a significant portion of the windfall into foreign financial assets over looks the potential to neglect immediate needs of the population, especially in developing economies. Balancing long-term savings with immediate development is crucial. The creation of the Sovereign Wealth Fund under section 26 in the Natural Resources Benefit Sharing Bill provides for sharing windfalls in promotion of sustainable development. While the resource curse is a well-documented phenomenon in some countries, it's not an inevitability. A proper policy framework such as in the case of Botswana⁴⁰ fosters proper governance, transparency, and effective institutions helps a country avoid the negative consequences associated with resource abundance.

Herbst Jeffrey in his article "*The Politics of Revenue Sharing in Resource- Dependant States*"⁴¹ argues that a significant number of developing countries have few natural resources which accounts for most of the government revenue. The author's arguments regarding revenue sharing in resource-dependent states provide valuable insights into the challenges faced by developing countries. His emphasis on the potential for fair and equitable revenue-sharing mechanisms to

³⁹ Collier Aul, *Managing Resource Revenues in Developing Economies*, Palgrave Macmillan Journals IMF Staff Papers, Vol. 57 No. 1 (2010).

⁴⁰ Dougherty ML. A Policy Framework for New Mineral Economies: Lessons from Botswana. Research Paper. 2011 Oct 9(C1-2011):2.

⁴¹ Herbst Jeffrey, "The Politics of revenue Sharing Resource-dependent States" World Institute for Development Economics (UNU-WIDER) No. 43 of 2001.

promote national cohesion and prevent conflicts is well-founded. Unfair revenue sharing mechanisms has been found to sparks conflict among the investors and local communities and government such as in the *Endorois case*⁴² where the African Commission on Human and People's Rights recognized African indigenous peoples' rights over traditionally owned land. The African Charter on Human and Peoples' Rights in Article 22 provides that 'All peoples shall have their right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind, and that states shall have the duty individually or collectively to exercise of the right to development'⁴³

Chloe Parker in her work '*Benefit Sharing Mechanisms*'⁴⁴ discusses the concept of benefit sharing and she classifies the options that are available under benefits sharing. She classified benefit sharing into two main categories: monetary benefits and non-monetary benefits sharing. She argues that monetary benefits to includes elements including revenue sharing, preferential rates, property taxes and development funds⁴⁵. On the other hand, she classifies non-monetary benefits to include livelihood restoration and enhancement, community development and catchment development.

Kariuki Maigua's article, "*Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya*,"⁴⁶ echoes Herbt's Jeffrey's and Chloe Parker's concerns. Maigua emphasizes the importance of acknowledging both monetary and non-monetary forms of equitable benefit sharing. He further underscores the necessity to recognize both direct and indirect benefits stemming from the exploitation of natural resources to promote equitable sharing. Both authors stress the significance of actively implementing revenue-sharing policies, considering contextual factors, and adopting a comprehensive approach that encompasses sustainability and economic diversification for ensuring long-term prosperity in resource-dependent states.

⁴² CEMIRIDE (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya (Endorois Case)- Communication No. 276/2003

⁴³ Kamga, Serfes Alain Djoyou. "The right to development in the African human rights system: The Endorois case." *De Jure Law Journal* 44, no. 2 (2011): 381-391.

⁴⁴ Chloe Parker, '*Benefit Sharing Mechanisms* (2012) OECD water resources and sanitation set.

⁴⁵ *Ibid* note 34

⁴⁶ Muigua, Kariuki. "Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya." *The Law Society of Kenya Journal* 15, no. 1 (2019): 1-42.

John Boye Ejobowa in “*Who owns the Oil, The Politics of Ethnicity in the Niger Delta of Nigeria*⁴⁷” seeks to address the concept of “political citizenship” and argues that an individual can have more than one membership in the modern state which is multinational and subnational citizenship. He argues that sub national citizenship should be the building block for political membership in the wider state arena. He avers that benefits from oil should almost be equally divided between the Nigerian Federal governments and the subnational ethnic states. His view is that communities living in areas where oil exploration activities are carried out have the right to a larger share of benefits from the oil resources.

Ejobowa’s sentiments on the need for local communities reaping higher benefits from oil resources are captured by Christabel Nyamwaya in her work titled ‘*Benefits Sharing on Extractive Natural Resources with Society in Kenya*⁴⁸. In this work, Nyamwaya emphasizes the importance of ensuring that Indigenous Local Communities, residing in areas rich in natural resources, receive more benefits compared to the rest of the population. This is justified by various factors, including the adverse impacts they endure due to resource extraction. The author frames benefit sharing as the MNC’s social license to continue extractive operations. Proposed benefits encompass local employment opportunities, community-driven projects, development funds, direct payments to citizens, and compensation for damages resulting from mining operations.

The author also contends that since natural resources in developing countries form the predominant source of wealth for the country, this wealth from the resources attracts interest from the country across the various interest in the country. She argues that given the importance of the resources in these economies it is important to pay keen attention to the governance of these natural resources. She sets out three broad areas of governance of natural resources that the government should place emphasis on as ownership of the natural resources, allocation of the power to manage and develop these resources and the treatment of the natural resources revenues⁴⁹. While the article primarily addresses the broader mining industry, it nonetheless provides valuable insights applicable to considerations in oil benefit sharing.⁵⁰

⁴⁷ Ejobowa John, “Who owns the Oil? The Politics of Ethnicity in the Niger Delta of Nigeria” *Africa Today* Vol. 47, No. 1(2000), Indiana University Press

⁴⁸ Christabel Nyamwaya, ‘Benefits Sharing on Extractive Natural Resources with Society in Kenya’ (2013) Kenya Human Rights Commission,

⁴⁹ Supra (note 29)

⁵⁰ Supra (note 29).

Challenges experienced in Benefit Sharing

Lack of policy implementation is one of the greatest challenges in natural resource governance⁵¹. Weak regulatory systems, along with environmental and social impacts that are challenging to quantify monetarily, give rise to several challenges in benefit sharing. The costs of mining, including environmental degradation and social disruption, often negatively impact local communities the hardest, while the distribution of benefits may not be equitable. The capital-intensive and technically demanding nature of natural resource extraction is often beyond the capacity of many developing countries⁵², necessitating the involvement of foreign investors. However, this engagement often leads to a reduction in the available revenues for equitable sharing. For instance, Kenya engaged Tullow Oil to conduct the exploration with an agreement that the exploration cost would be recovered once production begins. There is a potential gap in terms of revenue loss in absence of proper audit of Tullow reports as they may inflate the cost⁵³.

The Natural Resources (Benefit Sharing) Bill of 2022 currently lacks specificity regarding benefits allocated to local communities. It defines a local community as those residing in a ward where the natural resource is situated, as well as individuals displaced to facilitate resource exploitation. This definition, however, puts indigenous local communities at a disadvantage. Legal disciplines, being highly precise, often determine beneficiaries based solely on statutory definitions outlined in each statute. Therefore, it is crucial to adopt clear and unambiguous legislative drafting, especially in the domain of natural resource benefit sharing.

There is need therefore to establish a precise definition for indigenous local communities living in areas where natural resources are prospected and exploited who deserve to benefit more from these resources as they are the ones who bear the brunt of the exploitation of these resources as their livelihoods are disrupted and they suffer from present and future health and environmental degradation arising from the exploitation of these resources⁵⁴. A clear definition of the Indigenous Local Communities also helps in inhibiting opportunistic immigrant settler communities usurping

⁵¹ Chapman, Sophie, Rowena Maguire, Mona Doshi, Caroline Wanjiku Kago, Nelly Kamunde-Aquino, Leah Kiguatha, Elizabeth Dooley, and Gretchen Engbring. "The Elements of Benefit-Sharing for REDD+ in Kenya: A Legal Perspective."

⁵² Pereira E, Matthews C, Trischmann H, 'Local content policies in the petroleum industry: lessons learned' Oil & Gas, Nat. resources & energy J, 2019, 637

⁵³ Supra (note 39).

⁵⁴ Supra (note 48)

and disenfranchising the Indigenous Local Communities who are the intended beneficiaries under the Statute or the Constitution⁵⁵. This could occur as opportunistic immigrant settler community members, adept at articulating Indigenous Local Communities' concerns, may advance their own interests at the expense of the Indigenous Local Communities who have endured economic, social, and political marginalization⁵⁶.

The rights of Indigenous Local Communities to enjoy a higher benefit over the others does however portend a challenge especially to those countries where natural resources are the predominant source of wealth⁵⁷. As a result, these resources are often seen as a national heritage to be shared equitably among all the citizens in the country. The challenge is to balance these local interests against the overall importance of natural resources to national development⁵⁸. In Kenya, the Constitution defines indigenous communities as "that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy"⁵⁹. The Constitution further recognizes the rights of Indigenous Local Communities to benefit from development on their land and provides that Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies⁶⁰. Further Article 69 (1) places an obligation on the state to ensure sustainable exploitation of natural resources and the equitable sharing of accruing benefits.

There are different approaches in the identification of membership to an Indigenous Local Community. The first approach is the geographical approach which is premised on the physical location of the people with reference to the national resource. This approach is adopted in the Natural Resources Benefits Sharing Bill 2022⁶¹ which defines Indigenous Local Communities as 'a people living in a ward within which a natural resource is situated and are affected by the exploitation of the natural resource. This definition does not however distinguish between indigenous Local Communities and the opportunistic immigrant communities and this could be a

⁵⁵ Chelagat, Grace J. "Kenya's Legal and Institutional Framework on Benefit Sharing From Oil Exploitation: the Case Study of Turkana County." PhD diss., University of Nairobi, 2015.

⁵⁶ Haysom Nicholas & Kane Sean *Briefing paper Negotiating Natural Resources for peace: Ownership, Control and Wealth-sharing* October 2009 Centre for Humanitarian Dialogue p.5

⁵⁷ Supra (note 20)

⁵⁸ Morgera, E. The need for an international legal concept of fair and equitable benefit sharing Eur. J. Int. law 2016, 27 353-383

⁵⁹ Article 260 (c) Constitution of Kenya

⁶⁰ Article 66 (2) Constitution of Kenya

⁶¹ Senate Bills, Bill No. 6 of 2022

cause of conflict arising from a feeling of disenfranchisement by the Indigenous Local Communities.

The other approach of identification of members of an Indigenous Community is the anthropological approach. This approach argues that Indigenous Local Communities can be defined by the observation of the similar culture they uphold, observe and celebrate. The approach argues that the people who should benefit from the natural resource can be identified by their common culture and traditions. However, it is instructive to note that culture is dynamic and there is the risk that immigrant settler communities could easily adopt the culture of the Indigenous Local Community for the sole reason of accessing the benefits of the resource. In Nigeria, the minority communities living within the Niger Delta have often advocated for an anthropological definition of Indigenous Local Communities as one best suited to secure their interests in natural resource benefits sharing⁶².

The third approach of identification of members of an Indigenous Community is the political approach. This definition is premised on the established political boundaries set by the state in the identification of those who should benefit from natural resource exploitation. The Natural Resource Benefit Sharing Bill adopts this definition by providing that those who should benefit from a natural resource should live within the ward where the natural resource is exploited. A ward is a political unit where ward representatives are elected to represent the people in the local county assembly. This approach of identification of Indigenous Local Communities is also prone to abuse and manipulation where opportunistic immigrant communities who have not been marginalized or suffered from the effects of the exploitation of the natural resource as the Indigenous Local Communities.

The African Commission's Working Group of Experts on Indigenous Populations/Communities elucidated that 'A strict definition of indigenous people is neither necessary nor desirable. It is much more relevant and constructive to try and outline the major characteristics which can help us identify who the indigenous peoples and communities in Africa are'. The United Nations has approved a similar method of identification of indigenous communities. Self-identification has

⁶² Elizabeth Gelber, *Rogue Pipelines, oil and amnesty: the social life of infrastructure in the Niger Delta*, University of Columbia 2015 <https://anthropology.columbia.edu/content/pipelines-oil-infrastructure-niger-delta> Accessed on 13th October 2020

been set forth by the United Nations and the ILO Convention 169 as the best mode of definition of indigenous people. The United Nations Working Group on Indigenous Populations under the chairmanship of Erica-Irene Daes laid down four-point criteria of identifying indigenous peoples⁶³ which are;

- b. The occupation and use of a specific territory
- c. The voluntary perpetuation of cultural distinctiveness, which may include the aspect of language, social organization, religion and spiritual values, modes of production, laws and institutions
- d. Self-identification, as well as recognition by other groups, as a distinct collectively
- e. An experience of subjugation, marginalization, dispossession, exclusion or discrimination

The four points do not necessarily have to occur in concurrence for a community to be considered indigenous and it suffices that one character is met by the community. This loose definition was favoured by the United Nations Sub-commission because it does not preclude genuinely indigenous communities from such characterization to the multifarious requirements. International law has not utilized geographical, anthropological, political and dependence types of definition of Indigenous Local Communities. The definition of Indigenous Local Communities in international law is fluid and indefinite in nature. The International instruments and precedents have not set down directive method of determining Indigenous Local Community membership⁶⁴.

Fiona Mackenzie and Simon Dalby in their work *Reconceptualizing Local Community: Environment, Identity and Threat* argue for the evolution of the definition of Indigenous Local Communities from the territory or geographical area that they occupy to a more holistic and humanistic approach. These humanistic geographers focus on the ‘sense of place of local communities construct and the local cultures they celebrate’⁶⁵. They further contend that a local community can be identified using non geographical indicators such as class, gender or ethnicity

⁶³ UN Human Rights Sub-Commission on Prevention of Discrimination and protection of Minorities 1984 p. 94

⁶⁴ *ibid*

⁶⁵ Dalby, Simon and Mackenzie Fiona (1997) *Reconceptualizing Local Community: Identity and Threat*, Area Vol 29 P. 99-108

There has been argument by various scholars that whereas the exploitation affects local communities, the impact is higher for the indigenous local community as they lose their heritage. Professor Albert Mumma in ‘The Role of Local Communities in Environmental and Natural Resources Management: The Case of Kenya’⁶⁶ argues that there is a state hegemony based on the state legal system over the community based legal system and the effect of this has been to alienate local communities from their environment and natural resources. He further argues that they have struggled to assert their rights of ownership and access of these natural resources as well as management rights. He gives an example of the Endorois community and their struggle over Lake Bogoria. Though the author’s main argument is advocating for the need to adopt customary systems of natural resource management, he addresses a main issue of whether local indigenous communities where mineral resources are located have a claim in their clamor for sharing of revenues derived from these resources.

The discovery of natural resources is expected to improve the livelihood of the communities in which the resource is discovered. However, this is not always the case. Communities continue to languish in poverty as in the case of Kwale and Turkana counties. Kariuki Muigua in his article ‘Utilizing Africa Natural Resource to Fight Poverty’⁶⁷ adopts a human rights approach to resource sharing and argues that proper management of natural resources and their benefits could help in breaking the cycle of poverty. He adds that by breaking the cycle of poverty the indigenous local communities will be able to enjoy greater fundamental freedoms and their innate human dignity will be upheld. His argument is based on international law specifically the role of the state to indigenous local communities who rely on land for their livelihoods and argues that they should be able to enjoy natural resource benefits to sustain themselves. His argument is that where people are displaced in the pursuit of the exploitation of a natural resource, they should be compensated for the disruption on their lives and are entitled to the incidental benefits of any project carried out in their area.

⁶⁶ Albert Mumma, ‘The role of local communities in environmental and natural resources management; The case of Kenya’ in Leroy & others (Ed) Compliance and Enforcement in Environmental Law (2001) <<https://www.elgaronline.com/view/9781848448315.00041.xml>> accessed on 24th January 2019.

⁶⁷ Kariuki Muigua, ‘Utilizing Africa’s Natural Resources to Fight Poverty’ (2014) at Page 2 <<http://kmco.co.ke/publications/121-utilizing-africa-s-natural-resources-to-fight-poverty/>> accessed 20th February 2019.

1.9 Limitation of the study

This study will be limited to the sharing of oil benefits in Kenya with specific reference to oil discovered in Turkana County and therefore does not address benefit sharing for other natural resources in other parts of the country. Further, the circumstances prevalent in Turkana County may not be necessarily applicable to other parts of the country.

1.10. Chapter Breakdown

1.10.1 Chapter 1- The Proposal

This chapter contains the proposal which gives an overview of what the study will be based on. The proposal is broken down into various sections. The background introduces the topic of sharing of oil benefits and the disputes that have arisen from the sharing of these benefits. Thereafter, there is the problem statement which aims at identifying the underlying problem of this research. Additionally, there is the literature review which reviews what authors have written on the topic under study.

The proposal also contains the justification of the study which seeks to illustrate the need of this research due to gaps identified in the in this area. There is also the conceptual framework which defines the key terms used in this proposal. The research objectives set out the aims of the research while the research questions indicate the question upon which this research is hinged on.

1.10.2 Chapter 2- Contextualizing equitable benefit-sharing of revenue from exploitation of oil resources.

This chapter will discuss the foundational basis and give context to the equitable sharing of oil benefits in Kenya in light of the legal provisions on the ownership of the oil resource in the country and the impacts that oil exploration and production have in the areas where the exploitation is carried out. The chapter will also review the existing legal and statutory provisions on the ownership of the oil resources and the existing framework on benefits sharing in the country.

1.10.3 Chapter 3- The legal and institutional framework on oil benefits sharing in Kenya

This chapter will critically enquire into the existing and proposed legal framework on oil benefits sharing in Kenya and seek to establish the efficacy of this framework in ensuring equitable sharing of oil benefits in Kenya. It will also seek to identify possible gaps in the existing legal framework.

1.10.4 Chapter 4- Conclusions and recommendations

This is the concluding chapter. It will summarize the findings and conclusions and make recommendations in relation to various issues considered, particularly on the formulation of legal and policy guidelines on sharing of oil and gas revenues and how these guidelines should be applied for the benefit of the country.

CHAPTER TWO: CONTEXTUALIZING EQUITABLE BENEFIT SHARING OF REVENUE FROM THE EXPLOITATION OF OIL IN KENYA

This chapter seeks to contextualize and evaluate the basis for the sharing of oil benefits in Kenya. It will examine both constitutional and statutory provisions governing the ownership of oil resources in the country, addressing the critical question of who rightfully benefits from these resources. Additionally, this chapter will delve into the effects of oil exploration in the country, with a particular focus on its effects on the affected communities and regions. It will also elucidate why these local populations are entitled to a portion of the benefits. The objective is to underscore that comprehending benefit-sharing necessitates a holistic approach that considers various facets influencing the equitable distribution of revenue from oil exploitation.

2.0 Introduction

Benefit sharing concept is entrenched in International Law since 1992 through the Convention on Biological Diversity (CBD)⁶⁸. The creation of this convention was deemed pivotal in tackling governance issues within socio-ecological systems, especially in developing nations⁶⁹. Initially, the focus of benefit sharing was on the distribution of benefits derived from natural resources among local communities. However, it has since evolved to encompass a wider scope, now including various forms of social accountability and responsibility beyond just financial gains.⁷⁰

The CBD defines Access and Benefits Sharing (ABS) as the way in which genetic resources may be accessed and how the benefits that result from their use are shared between the resource users and providers⁷¹. ABS is considered important because it ensures that benefits which accrue from exploitation of natural resources are shared equitably between the users and providers⁷². The CBD contemplates benefits as encompassing both monetary benefits and non-monetary benefits

⁶⁸ Pham Thu Thuy 'A Working Paper on Approaches to benefits-sharing: A preliminary comparative analysis of 13 REDD +Countries, Centre for International Forestry Research, 2013. <http://www.cifor.org/publications/pdf_files/WPapers/WP108Pham.pdf> accessed on 25th June 2022.

⁶⁹ Nkhata BA, Breen C and Mosimane A, "Engaging Common Property Theory: Implications for Benefit Sharing Research in Developing Countries" (International Journal of the Commons) (2012).

⁷⁰ Supra note 49.

⁷¹ Secretariat of the Convention on Biological Diversity, Introduction to Access and Benefits-sharing (2010) <<http://www.cbd.int/abs/infokit/all-files-en.pdf>> accessed on 13th September 2022.

⁷² Ibid.

including the development of research skills, knowledge and capacity building⁷³. The concept of benefits sharing is therefore acknowledged in the international legal framework.

Benefit sharing is further underpinned by two principal principles: derivation and need. The principle of derivation dictates that the communities where such natural resources exist tend to be affected by activities of exploitation of such natural resources and thus, ought to receive higher revenue from the exploitation over other persons.⁷⁴ Similarly, the principle of need implies that the affected communities are entitled to a share of the benefits dependent on the needs of the community.⁷⁵ It is therefore on the background of these principles that there is a need for the set-up of mechanisms that are aimed at ensuring equitable sharing of the revenue from exploitation of natural resources.

The Access and Benefit Sharing (ABS) framework in Kenya is anchored in the Environmental Management and Coordination Act of 1999⁷⁶, specifically through Part VIIA (Sections 34A to 34M). This section was established to enforce the provisions of the Convention on Biological Diversity (CBD) pertaining to ABS. This legal framework delineates the steps and conditions for obtaining and distributing benefits from genetic resources and associated traditional knowledge. Furthermore, the National Environment Management Authority (NEMA) issues ABS regulations and guidelines that offer precise information and direction on ABS application within the country. Furthermore, the Natural Resources (Benefit Sharing) Act of 2022⁷⁷ provides for sharing of revenues from natural resources exploitation between the national government, county government and local communities.

2.1 Ownership of the oil resource in Kenya

The question of benefit-sharing is fundamentally tied to the ownership of these resources. Central to this discussion is the concept of land, as mineral resources like petroleum are inherently tied to land. Article 61 of the Constitution provides that all land in Kenya is collectively owned by the

⁷³ Ibid.

⁷⁴SR Akinola and A Adesopo, 'Derivation Principle Dilemma and National (Dis)Unity in Nigeria: A Polycentric Planning Perspective on the Niger Delta' (October 2011) 4(5) Journal of Sustainable Development. See also C Ashwe, (1986) Fiscal Federalism in Nigeria Research Monograph No 46, Centre for Research on Federal Financial Relations at The Australian National University, Canberra.

⁷⁵ Angelani Ange Kayumba, Challenges and Prospects of Benefit-sharing in Mining Sector in Kenya.

⁷⁶ Environmental Management And Co-Ordination Act No. 8 of 1999.

⁷⁷ Parliament of Kenya. The Natural Resources (Benefit Sharing) Bill, 2022

people, whether as a nation, communities, or individuals. Article 61(2) of the Constitution further classifies land in Kenya into three categories: public land, community land, and private land⁷⁸. This classification implies that individuals have the potential to own land either collectively as part of the public, as members of a community, or in their individual capacity. Public land, as outlined in Article 62, encompasses specific categories of land. According to Article 62(1)(f), in conjunction with sub-article (3), the Constitution designates land containing minerals and mineral oils, as defined by an Act of Parliament, as part of the public land. In the context of this discussion, the pertinent Act of Parliament that defines oil resources is the Petroleum (Exploration and Production) Act of 2019⁷⁹.

The Petroleum (Exploration and Production) Act⁸⁰ which was the law governing oil exploration and production in Kenya prior to 2019 also provided a definition of oil resource. It adopted two definitions of oil resources by providing a definition of both crude oil and petroleum. The Act defined crude oil as “all hydrocarbons... which are produced at the wellhead in a liquid state at atmospheric conditions of temperature and pressure”. It also added that asphalt and ozokerites, liquid hydrocarbons or natural gas liquids obtained from natural gas by condensation or extraction also comprised of crude oil. The Act further defined petroleum to mean “mineral oil and includes crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.” The Petroleum Act 2019⁸¹, which is the current law governing oil exploration and production in the country, defines crude oil as “all hydrocarbons regardless of gravity which are produced at the wellhead in liquid state at atmospheric conditions of temperatures and pressure”.⁸² The Act further adds that crude oil also includes “the liquid hydrocarbons known as distillate or condensate or natural gas liquids obtained from natural gas by condensation or extraction”.

Article 62 (3) of the Constitution designates minerals and mineral oil as part of the public land that 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. The Constitution thus provides that the oil resource is a national resource that vests in the national government. In the case of

⁷⁸ Article 61 (2) of the Constitution of Kenya

⁷⁹ CAP 308 of the Laws of Kenya (Repealed by the Petroleum Act No. of 2019).

⁸¹ Ibid

⁸² Ibid.

*Water Resources Management Authority v Krystalline Salt Limited*⁸³ the court addressed the issue of natural resources and how they vest in the people and emphasized that natural resources in the country belong to the people of Kenya and the state is a mere trustee of these resources on behalf of the people. Section 3 of the repealed Petroleum (Exploration and Production) Act⁸⁴ vested property in petroleum in the government. The reference to the government in the Act was to the national government since at this time the country had not adopted the devolved system of government that we currently have that has two levels of government’ the national government and the county government. Section 3 further provided that “all petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the Government subject to any rights...that may be granted or vested in another person”.

Despite being categorized as public land, such areas are held in trust by the National Government for the people of Kenya. The National Land Commission is responsible for administrating all public land on behalf of both levels of government. However, Article 63 introduces a complexity, as it categorizes community land based on factors like ethnicity, culture, and shared community interests. This includes land lawfully held and managed by specific communities, like grazing areas, reflecting the pastoralist practices of the Turkana community in arid regions. As a result, this provision establishes a constitutional foundation for classifying the lands in Turkana County as Community Land as well. This conclusion gives rise to a conflict in land ownership responsibilities between the two levels of government.

Section 14 of the Petroleum Act 2019⁸⁵ that is currently in force provides that “all petroleum existing in its natural condition in strata lying within Kenya and its continental shelf is vested in the national government in trust for the people of Kenya”. This Act is therefore clear that petroleum resources in the country are vested in the national government. It is therefore clear that both the Constitution and the statutes governing oil resources in Kenya are clear and explicit on the ownership of the resource. These resources are vested in the national government which manages them for the benefit of the people. This clarity is important in averting the likely disputes that are

⁸³ Environment and Land Case 47 of 2015 [2018] eKLR

⁸⁴ CAP 308 Laws of Kenya.

⁸⁵ Supra note 51.

likely to arise especially now when the country has two levels of government; the national government and the county governments established under the Constitution.

The constitutional and statutory provisions vesting ownership of minerals and mineral oils raise several pertinent issues and potential conflicts regarding the ownership of these resources. For instance, an issue would arise where oil resources were to be found on private land or land owned by a community, the constitutional and statutory provisions seem to limit private and community land ownership to only the surface land⁸⁶. This seems to be a departure from the common law position on land ownership expressed in the doctrine of *cujus est solum, eius est usque ad coelum et ad inferos*. This latin maxim postulates that whoever owns the soil it is theirs all the way to heaven and all the way to the bowels of the earth. This maxim had the implication that a land owner owned everything to the inner core of the earth below the property to the end of the atmosphere or above the property. The question however still remains how far does land ownership extend above and below one's property?

The Supreme Court in the United States sought to offer some guidance on this subject, especially on ownership of space above one's property in the case of *United States v Causby*⁸⁷. This case involved the US Military flying planes over Causby's chicken farm at very low levels of up to 83 feet. The noise from these flights scared the chicken which would make them fly into the walls which led to a total death toll of 150 chicken. In determining the case, the court considered the *ad coelum* doctrine and rejected the government's claim that it possessed the airspace to the ground level. The court held that the landowner retains complete domain over the lower altitudes above his property and that he must have exclusive control of the immediate reaches of the enveloping atmosphere. The Court ruled that the maxim of *ad coelum* had no place in modern society and rejected the notion that property ownership extended upwards indefinitely.

The ownership of the subsurface rights also seems to have been altered. The common law position expressed in the maxim seems to have been replaced with the distinction between property and mineral rights. In the United States, mineral rights can be sold or conveyed separately from property rights.

⁸⁶ Constitution of Kenya, Article 62 (1) (f).

⁸⁷ 326 U.S. 256 (1964).

2.2 Exploitation of the oil resource in Kenya

As aforementioned, minerals and mineral resources in Kenya are classified as part of public land whose management vests in the national government⁸⁸. The Petroleum Act⁸⁹ provides that the government may conduct petroleum operations either through an oil company established by the government to conduct these operations or through contractors in accordance with Petroleum agreements⁹⁰. The body set up by the government to undertake oil exploration in the country is the National Oil Corporation of Kenya⁹¹ which is engaged in both upstream and downstream petroleum operations in the country. However, NOCK lacks both the technical and financial capacity to carry out oil exploration activities and hence most of the exploration activities in the country are carried out by private contractors who obtain exploration permits for the various exploration blocks from the government⁹². NOCK does however carry out exploration activities in the country albeit on a small scale and holds rights over several blocks in the country⁹³. Section 9 of the Act adds that the government shall create an enabling environment for investment in petroleum operations. The section further adds that the government shall ensure that petroleum operations and development are carried out for the benefit of the people of Kenya. The government is also required in its efforts to promote petroleum operations and investments to facilitate access to land for exploration activities in accordance with the constitution and other laws⁹⁴.

The Act further provides that no person shall engage in any petroleum operations in Kenya without having obtained the approval of the Cabinet Secretary or the Energy Regulatory Commission⁹⁵. Section 8 (2) further adds that the exploration should be carried out in accordance with the provisions of the Act and the terms and conditions of a petroleum agreement entered into between the oil exploration company and the government⁹⁶. This, therefore, means that the contractor is

⁸⁸ Supra note 54.

⁸⁹ No. 2 of 2019.

⁹⁰ Petroleum Act No. 2 of 2019, Section 8 (3).

⁹¹ Established in 1981 as a state corporation with the mandate of engaging in all aspects of petroleum operations in Kenya

⁹² Macharia Kamau, "National oil to lose powers as new regulatory unit is mooted" available at <<https://www.standardmedia.co.ke/article/2001288394/state-oil-firm-to-lose-powers-as-new-regulatory-unit-is-mooted>> accessed on 23rd August 2019

⁹³ Available at <<https://nationaloil.co.ke/upstream/>> accessed 13th September 2019.

⁹⁴ Section 9 (3) Petroleum Act 2019

⁹⁵ Petroleum Act 2019, Section 8 (1)

⁹⁶ A Petroleum Agreement is defined as any agreement, licence, contract or other arrangement between the Government and a contractor to conduct petroleum upstream operations

required to enter into an agreement with the government before commencing petroleum operations in the country.

Section 16 of the Act further buttresses the point of the contractor entering into an agreement with the government by providing that no person shall engage in petroleum operations in the country without executing a petroleum agreement and before obtaining a non-exclusive exploration permit in respect of an exploration block. A person or entity who wishes to undertake upstream petroleum operations is required to apply to the Cabinet Secretary for a grant of a petroleum agreement and to the Authority⁹⁷ for the grant of a non-exclusive exploration permit⁹⁸. The Act proscribes the carrying out of exploration activities without executing a petroleum agreement or obtaining a non-exclusive exploration permit and sets a penalty of imprisonment for a term not exceeding ten years or a fine not exceeding twenty million shillings or both on conviction⁹⁹

The Act also places financial and technical obligations on contractors who enter into a petroleum agreement with the government. Section 17 of the Act provides that the government shall only enter into a petroleum agreement with a contractor who shall have the financial, technical and professional capacity necessary to fulfil the contractor's obligation under the petroleum agreement. The Contractor is required to maintain the financial, technical and professional capacity throughout the length of the contract. In addition, the contractor is required to ensure that any sub-contractor or agent acting on its behalf possesses the necessary skills and qualifications to meet the contractor's obligations under the petroleum agreement entered into with the government¹⁰⁰. The Act further sets out express rights and obligations that should be contained in petroleum agreements entered into between the government and the contractor.

Section 19 of the Act provides that every petroleum agreement shall require the contractor to; perform certain minimum works and incur certain minimum expenditure in the course of exploration, present to the Cabinet Secretary a field development plan in respect to any commercial field and promptly take all reasonable steps to develop that field, present to the Cabinet Secretary a work program and budget for each year of operation, keep accurate books of accounts and records

⁹⁷ The Energy Regulatory Commission (Now renamed the Energy & Petroleum Regulatory Authority pursuant to the new Energy Act 2019).

⁹⁸ Petroleum Act No. 2 of 2019, Section 16 (2).

⁹⁹ Ibid, Section 16 (4).

¹⁰⁰ Ibid, Section 17 (3).

of upstream petroleum operations and submit quarterly expenditure reports and annual audited financial statements to the Cabinet Secretary, conduct upstream petroleum operations in accordance with requisite professional and technical skills, adopt necessary measures for the conservation of petroleum as well as protection of the environment, give preference to the use of locally available raw materials, products, equipment and services and ensure the continuous transfer of technology and local capacity building, indemnify the government against all claims made by third parties in respect of any injury damage or loss resulting from conduct of any operations carried out by the contractor, provide information, data, reports and samples concerning upstream operations and conduct upstream operations in accordance with the best petroleum industry practice.

Prior to the commencement of exploration activities, the contractor is required to provide a security guaranteeing the contractor's minimum works and expenditure obligations¹⁰¹. Where a contractor is in default of the minimum work and expenditure obligations, the Cabinet Secretary is empowered by law to suspend or terminate the petroleum agreement and recall the security tendered by the contractor upon serving reasonable written notice to the contractor¹⁰².

The Act further requires a person desirous of carrying out non-exclusive exploration survey to apply to the Authority for a non-exclusive exploration permit. On application, the Authority may issue a non-exclusive exploration permit for a geographically defined area. The Authority may also issue non-exclusive exploration permits to different persons in respect of different non-exclusive exploration activities in the same geographically delineated area. Section 22 (4) of the Act provides that a non-exclusive exploration permit shall state details including; the date of the issue of the permit, the area to which the permit relates, the type of non-exclusive exploration activity for which the permit is issued, the conditions under which the permit is issued and confidentiality requirements. The Authority may grant a non-exclusive exploration permit and may impose such conditions as it may deem fit¹⁰³.

A contractor who intends to conduct upstream petroleum operations is additionally required to apply to the Authority for an operational permit¹⁰⁴. An operational permit is required for activities

¹⁰¹ Ibid, Section 25 (1).

¹⁰² Ibid, Section 25 (2).

¹⁰³ Ibid, Section 23 (1).

¹⁰⁴ Ibid, Section 24 (1).

including; drilling a well, developing and production of petroleum, construction of petroleum gathering systems, building of a crude oil facility, plugging or abandoning of an individual well, operational of an underground injection control well, conversion of an individual well to an underground injection well, decommissioning or abandonment of an upstream petroleum facility, development, construction and operation of a gas processing facility and reclaiming of a well or a facility¹⁰⁵. An application for an operational permit shall include a drilling permit for exploration, appraisal, development and production well, the global positioning system of each well, a commitment by the contractor of the contractor's ability to construct a well site and facilitate mobility of equipment and materials to the well during drilling, monitoring, appraisal and evaluation activities, a development and production permit specifying the system of production facilities deemed necessary to conduct production activities, a plugging and abandonment permit indicating the proper methodology approved by the Authority¹⁰⁶. Section 24 (7) of the Act further provides that a contractor shall identify each well by a unique designation indicating the block name and the basin in which it is located.

The Act, unfortunately, lacks a comprehensive framework for addressing the environmental repercussions of oil exploration. This has led to disputes among investors, local communities, and the government. These gaps in legislation pose a threat to the long-term sustainability of the project. In the context of extractive industries, prioritizing inclusive development entails focusing on both the social and economic advantages for the local host communities, while also proactively tackling environmental challenges¹⁰⁷. In Kenya's case, it is imperative to consider both the national and local socioecological aspects to mitigate potential local conflicts. However, the necessary conditions for achieving inclusive development have yet to be firmly established.

The enforcement of current legislation on compensation for local communities affected by exploration has been slow and inefficient. Research highlights parallels between the exploitation of oil and wind resources, particularly in terms of unfulfilled promises of compensation for land use and community expectations for employment. This has resulted in tensions and conflicts

¹⁰⁵ Ibid, Section 24 (3).

¹⁰⁶ Ibid, Section 24 (6).

¹⁰⁷ Kyra Bos & Joyeeta Gupta (2016) Inclusive development, oil extraction and climate change: a multilevel analysis of Kenya, *International Journal of Sustainable Development & World Ecology*, 23:6, 482-492, DOI: 10.1080/13504509.2016.1162217

between operating companies and local communities¹⁰⁸. Moreover, the benefits received by local communities lack a sustainability component. For instance, employees hired by Tullow Oil were often on short-term contracts with low wages¹⁰⁹.

Impacts of oil exploration in Kenya

The exploitation of oil resources brings forth various impacts particularly those of environmental and social nature. The environmental impacts arise from the activities related to exploration of the oil which brings forth environmental challenges

2.2.1 Environmental impacts

The exploration of oil has the potential of giving rise to a range of environmental impact in the areas where these activities are carried out with some of these impacts having long term effects. The environmental concerns range from air pollution arising from gas flaring to environmental pollution arising from oil spillages and leakages. Most of the natural resources are located on or upon land and the exploitation of the resource will invariably lead to effect on the land and land use. In the world there have been several incidents of environmental pollution arising from extraction of natural resources. For instance, the oil and gas extraction in the Amazon Basin in South America has caused immense ecological degradation and social troubles that continue to afflict the region¹¹⁰.

The Constitution of Kenya contains provisions on the protection and conservation of the environment. Article 42 states that “every person has the right to a clean environment. It is instructive to note that the pre-2010 constitution did not make any provisions on environmental rights and these issues of environmental protection were contained in subsidiary legislation and statutes. The main legislation governing addressing environmental matters and concerns in the country is the Environmental Management and Coordination Act¹¹¹. The Act is enacted for among others the establishment of an appropriate legal and institutional framework for the management

¹⁰⁸ Schilling, Janpeter, Raphael Locham, and Jürgen Scheffran. "A local to global perspective on oil and wind exploitation, resource governance and conflict in Northern Kenya." *Conflict, Security & Development* 18, no. 6 (2018): 571-600

¹⁰⁹ Ibid

¹¹⁰ Oil and gas extraction in the Amazon, Available at http://wwf.panda.org/knowledge_hub/where_we_work/amazon/amazon_threats/other_threats/oil_and_gas_extraction_amazon/ >accessed on 14th March 2019.

¹¹¹ CAP 387 Laws of Kenya.

of the environment. The Act further creates several institutions charged with the management and enforcement of environmental standards in the country. One of the key bodies established under the Act is the National Environment Management Authority (NEMA)¹¹². NEMA is charged with among other functions the integration of environmental considerations in development plans and policies, the rational and sustainable utilization of environmental resources, initiation of procedures and safeguards for the protection accidents which may cause environmental degradation and identification of projects for which environmental audit or monitoring need to be carried out¹¹³.

One of the key tools utilized by NEMA in the management and protection of the environment is the Environmental Impact Assessment¹¹⁴. An EIA is a critical examination of the effects of a project on the environment. It also identifies measures to mitigate the negative environmental impacts. It adopts a preventive approach in environment protection by seeking to prevent environmental degradation before it actually happens. The main aims of an EIA are to identify impacts of a project on the environment, predict likely changes on the environment as a result of the development, evaluate the impacts of the various alternatives on the project and propose mitigation for the significant negative of the project on the environment among other aims¹¹⁵. The significance of an Environmental Impact Assessment before commencement of a project was highlighted in the case *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited*¹¹⁶ where Justice Hayanga was categorical that the failure to conduct an Environmental Impact Assessment before the commencement of any activity related to a proposed project offends section 58 of the Environmental Management and Coordination Act. Further, in *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others*¹¹⁷ the court underscored the need of an Environmental Impact Assessment as a matter of public interest and disallowed the withdrawal of the instant petition as sought by some of the parties involved in the suit.

¹¹² The Environmental Management and Coordination Act, Section 7.

¹¹³ Ibid, Section 9.

¹¹⁴ Ibid, Part VI.

¹¹⁵ Kariuki Muigua, “Environmental Impact Assessment (EIA) in Kenya” <<http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf>> Accessed on 13th September 2019).

¹¹⁶ Civil Case 97 of 2001 (eKLR)

¹¹⁷ Constitutional Petition No. 305 of 2012 [2014] eKLR

The Petroleum Act 2019 also places a lot of emphasis on environmental consciousness in the exploration and production of oil. Part VIII of the Act addresses Environmental Health and Safety in the activities related to the exploration and production of oil. Section 59 provides that a contractor shall carry out upstream petroleum operations in accordance with all the applicable environment, health, safety and maritime laws and best petroleum practices. A contractor is also required in its operations to among others take all reasonable steps necessary to secure the safety health and welfare of persons engaged in its operations, deploy the best available technology to assure quality, environment, health and safety requirements are met, prevent pollution of soil, water, air, marine or any other waste product, treat and disperse waste in an environmentally acceptable manner among other environmental considerations¹¹⁸. The Act also seeks to protect the environment by prohibiting the flaring of natural gas in the course of the conduct of petroleum operations without the prior authorization of the Energy Regulatory Commission¹¹⁹ in consultation with the National Environment Management Authority.

A contractor wishing to vent or flare gas shall ensure that the gas venting or flaring is kept at the lowest levels possible. The contractor is also required to explain the circumstances requiring such action is required to have carried out an evaluation of reasonable alternatives to flaring that have been prior to the approval being granted¹²⁰. The contractor also has to provide information on the amount and quality of oil or natural gas involved and the duration of the requested flaring. The Act puts heavy sanctions for a contravention of these environmental concerns and provides that a contractor who contravenes or fails to comply with these requirements commits an offence and shall on conviction be liable to a fine of not less than one hundred Million Shillings or a jail term of not less than ten years or both¹²¹

2.2.2 Social impacts

The activities related to the exploitation and development of natural resources and oil exploration in particular give rise to various social impacts. The exploration activities have the potential of disrupting people's ways of life and livelihoods. The social structures of a society can be greatly altered which is manifested though among others the displacement of people from their land to

¹¹⁸ Petroleum Act No. 2 of 2019, Section 59 (2).

¹¹⁹ Now renamed Energy and Petroleum Regulatory Authority (EPRA)

¹²⁰ Petroleum Act No. 2 of 2019, Section 62 (4).

¹²¹ Petroleum Act No. 2 of 2019, Section 62 (7).

facilitate the oil exploitation activities¹²². The social lives of the people in the areas where the exploration is undertaken also suffer from the influence of the people that come into their areas most of whom are from a different cultural background from the indigenous people living in these areas¹²³. These people normally introduce a new lifestyle to the local people which has the effect of eroding and diluting the cultural practices of the local people. Most of the cultures of the newcomers are mostly contemporary and modern cultures that may lead to introduction of vices among the natives including prostitution, drug and substance use among other immoral acts.

The society where oil resources are discovered are also likely to be affected in a big way by the anticipated boon in their area. For instance, the land tenure in Turkana region has for a long time being communal in nature informed by the nature of the society which are primarily pastoralist and hence nomadic in nature¹²⁴. As such private land ownership in this area was not common but this became prominent with the discovery of the oil resources. Upon the discovery of the oil resource, most people who are not natives of this area rushed to purchase property in this region in the expectation that they would derive an economic benefit through compensation by the oil exploration companies. This phenomenon has brought great friction between these investors and the native people of Turkana who feel that these people who came and bought land in their area receive compensation from the exploration companies a benefit that they do not get.

The influx of people in the areas where exploration activities take place also exerts pressure and strain on the available resources and infrastructure. Arguably most of the oil resources are located in areas that were hitherto undeveloped or underdeveloped with very few social amenities in place¹²⁵. This situation is mostly informed by the structure of the society as a close-knit society and hence are able to survive and make do with the available resources. However, the influx of people into the areas where exploration activities take place puts a strain on the available resources

¹²² Johanes Eliza, Oil discovery in Turkana County Kenya, A source of conflict or development? Africa Geographical Review, 2014
<https://www.researchgate.net/publication/261797966_Oil_discovery_in_Turkana_County_Kenya_A_source_of_conflict_or_development/citation/download> accessed on 26th October 2019.

¹²³ Ibid.

¹²⁴ Marena Brinkhurst, Addressing Land Conflict and Governance in Kenya, Namati, December 2015, <<https://namati.org/news-stories/addressing-land-conflict-governance-in-kenya/>> accessed on 23rd September 2019.

¹²⁵ Kennedy Mkutu Agade, "Ungoverned Space and the Oil Find in Turkana, Kenya", *The Commonwealth Journal on International Affairs*, 2014
<<http://erepo.usiu.ac.ke:8080/xmlui/bitstream/handle/11732/910/agade10.pdf?sequence=7>> Accessed on 10th September 2019.

and infrastructure as most of the existing facilities are unable to satisfy the increased population¹²⁶. For instance, it has been noted that Lodwar town which is the hub of the Turkana region where oil exploration activities are undertaken in Kenya lacks critical infrastructure including sewerage systems, power supply, health centres and water supply and this situation has been exacerbated by the increased population¹²⁷. Tullow Oil which is the main company involved in oil exploration activities in this area has sought to address some of these challenges as part of their Corporate Social Responsibility and has been engaged in sinking of boreholes and setting up of medical centers¹²⁸. The efforts made by Tullow Oil to address water challenges in the community however lacks sustainability as they are short term and unreliable. Rather than drilling boreholes, Tullow Oil opted to purchase water tanks, which were periodically refilled using water trucks.

There has been critique on the model which Multinational Extractive Industry Companies (MEIC) use in undertaking Corporate Social Responsibility¹²⁹. Lisa Calvano argues that Corporate Social Responsibility has been used as a manipulation tool towards local communities. He argues that Multinational Extractive Industry Companies use a meagre percent of their profits to appease the Indigenous Local Communities choosing to invest on projects of their preference with the least cost implications to their bottom line and foreign shareholder profitability¹³⁰. Dr. Duncan Ojwang in his Article *Converging Ubuntu Principles with Corporate Social Responsibility to Extend Corporate Benefits to Communities*¹³¹ argues that ‘The basic principle of Corporate Social Responsibility as currently defined as a mere non-binding corporate “charity” is a voluntary definition of non-binding venture hence it does not address the exploitative practices as a result of today’s globalized market. ‘The MEIC are not legally bound to provide benefits to the Indigenous

¹²⁶ Prof. Kennedy Mtuku, “Women acutely feel the negative impacts of oil discovery in Turkana”, *Business and Human Resource Centre*, 2018 < <https://www.business-humanrights.org/en/kenya-women-acutely-feel-the-negative-impacts-of-oil-discovery-in-turkana-says-columnist> > Accessed on 12th October 2019.

¹²⁷ Ibid.

¹²⁸ Irisheel Shanzu, Tullow Oil on the spot over social corporate responsibility, Standard Digital 4th October 2018 Available <https://www.standardmedia.co.ke/article/2001308242/tullow-on-the-spot-over-social-corporate-responsibility> > Accessed 12th August 2019.

¹²⁹ Calvano Lisa ‘Multinational Corporations and Local Communities: A Critical Analysis of Conflict Journal of Business Ethics (2008) 82: p.795

¹³⁰ Ibid p. 796

¹³¹ Ojwang Duncan International Conference On Indigenous Knowledge Systems and Environmental Ethics: Implications for peace-Building And Sustainable Development 28-30th April 2015 University of KwaZulu South Africa p.1

Local Communities, they are persuaded to do so as to acquire and retain a social license to continue their operations in their ancestral lands¹³².

The other social impact of oil exploration activities is the “company town” syndrome¹³³. When a large mining operation begins, the area where the mining activities are carried out experiences a sharp boost in economic activity. There are heightened infrastructural activities where roads are built, to accommodate the influx of people in that area and small businesses set up shop to serve the mine and its workers. This phenomenon should typically herald prosperity for the local communities due to the enhanced economic activities. However, the economies that grow up around these mines usually suffer from the company town syndrome where there is generally little economic activity that is independent of the mine and exploration activities. The local communities usually bear the costs of mining in the form of environmental damage and pollution, loss of traditional livelihoods, long term economic problems and deteriorating public health. The benefits of exploration activities mainly benefit the investors mine usually goes to investors overseas and the central government with little of the profit passed back to the community.¹³⁴

Conclusion.

Benefits sharing is a concept that aims to guarantee the fair distribution of benefits from natural resources. Kenyans collectively own and enjoy the country's natural resources through the government. These resources are vested in the National Government pursuant to the Constitution, and it is its responsibility to hold and administer them in trust for the Kenyan people. Every Kenyan, therefore, has a rightful expectation to get some benefit from these resources as a result of collective ownership. However, there are also pertinent social and economic issues that need to be addressed if the government is to successfully execute efficient benefit-sharing programs. This chapter, therefore, holds that benefit sharing should be understood as more than just a legal issue

¹³² Ibid

¹³³ Susan Kinnear, Kate Charters and Peter Vitartas, Regional Advantage and Innovation: Achieving Australia's national Outcomes, 2016
<<https://books.google.co.ke/books?id=68bsrtc5xrIC&pg=PA323&lpg=PA323&dq=company+town+syndrome&source=bl&ots=ynmlvN-r8g&sig=ACfU3U3PoVBBH5GPGFA65np42l0GURVggg&hl=en&sa=X&ved=2ahUKEwjUktj1o7flAhXEolwKHfAhA4wQ6AEwE3oEAcQAQ#v=onepage&q=company%20town%20syndrome&f=false>>Last accessed on 22nd October 2019.

¹³⁴Ibid.

because it also involves social, economic, and environmental dimensions that require equal attention to the legal component.

CHAPTER THREE: THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING BENEFIT- SHARING IN KENYA

3.0 Introduction

This chapter will seek to look into the existing and proposed legal and institutional framework for the sharing of oil benefits in Kenya. The chapter will also enquire into the efficacy of the existing and proposed framework in facilitating equitable sharing of benefits in the country pointing out any gaps that may exist in the laws.

3.1 Legal Framework

The legal framework governing the exploration and exploitation of oil resources in Kenya has undergone a progressive evolution. For a long time, the Petroleum (Exploration and Production) Act¹³⁵ guided oil exploration and exploitation up until the enactment of the Petroleum Act 2019¹³⁶. The Petroleum Act 2019 addressed the shortcomings of the previous Act such as ambiguous guidelines in benefit sharing and concentration of power in one office. While CAP 308 duly incorporated provisions for, inter alia, the oversight of negotiations concerning petroleum exploration, production, and conveyance within the nation, it conspicuously lacked substantial guidelines concerning the equitable allocation of revenues accruing from oil and gas activities. Its purview extended solely to the provision of general guidelines and the enunciation of guiding principles governing the issuance of oil exploration licenses within the jurisdiction. The need of clarity in the legal framework on oil exploration and production was highlighted in the case *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Limited) & 3 others v Permanent Secretary Ministry of Energy & 17 others*¹³⁷ which pitted vital players in the extractive industry. At paragraph 5 of the judgement it was observed that:

‘Interstate further contended that despite having procured the necessary permits and authority from the County Council of Turkana and that of Pokot and having procured “serious and competent strategic investors with requisite financial and technical capabilities”, the Minister ignored or refused to respond to its letters and applications for explorations permit(s) in respect to Blocks

¹³⁵ CAP 308 Laws of Kenya, 1984 (Revised 2001).

¹³⁶ No. 2 of 2019.

¹³⁷ [2016] eKLR

10BA, 10BB, 11A, 11B, 12A, and 13T. According to Interstate, the Minister “fraudulently sold out secrets and transferred the benefits accruing to it to interested parties”

This excerpt, in as much as it is merely one party’s version of the dispute before court, is key in highlighting possible challenges which will arise where there is lack of a clear legal and institutional framework guiding the granting of exploration rights which leads to rise in disputes and disagreements.

The provisions of the repealed Petroleum (Exploration and Production) Act¹³⁸ were deemed inadequate to address contemporary issues on oil exploration and production with the main concern being that the Act was enacted in 1984 at a time when this sector was not developed in the country¹³⁹. Subsequently, the government sought to strengthen the framework governing the oil and gas sector in the country. This was achieved through the enactment of the Petroleum (Exploration, Development and Production) Act of 2019¹⁴⁰ and the attendant Model Production Sharing Contract¹⁴¹. These instruments serve to institute, inter alia, a more robust regulatory apparatus pertaining to the issuance of exploration permits and concessions, the equitable distribution of revenues between the contractor and the government, and the mechanism for the recuperation of costs incurred by contractors, among other salient matters¹⁴².

3.1.1 The Petroleum Act 2019¹⁴³

The enactment of the Petroleum Act in March 2019 was a critical step towards fortifying the legal framework governing oil exploration in the country, particularly in delineating the equitable distribution of revenues stemming from these resources¹⁴⁴. The antecedent Act, as elucidated by Odhiambo¹⁴⁵, was devised in an era prior to devolution and thus vested all authority within the national government. This glaring oversight necessitated the introduction of the Petroleum Act in

¹³⁸ Supra note 124

¹³⁹ Norman Magaya, ‘Why Kenya must fix oil and gas law before export’ *The Star* (May 26 2018) available at https://www.the-star.co.ke/news/2018/05/26/why-kenya-must-fix-oil-and-gas-law-before-export_c1763507 Last accessed on 31st January 2019.

¹⁴⁰ Supra note 54.

¹⁴¹ Model Production Sharing Contract developed by the Ministry of Energy & Petroleum in 2015.

¹⁴² Model Production Sharing Contract, Part VII.

¹⁴³ Petroleum Act No. 2 of 2019

¹⁴⁴ Beatrice Nyabira, ‘Highlights of the Petroleum Act 2019’, IKM Advocates, July 2019 <<http://www.ikm.co.ke/news/articles/2019/Highlights-of-the-Petroleum-Act.html> > accessed on 21st October 2019).

¹⁴⁵ Odhiambo, Felix O. "Placing the Kenyan law on benefit-sharing within its proper social, economic and political context: the case study of Turkana oil resources." PhD diss., University of Nairobi, 2015

2019, tailored to accommodate the dual tiers of governance, with specific emphasis on the imperative matter of revenue apportionment amongst the national government, county governments, and local communities, an issue that had proven contentious¹⁴⁶.

The Petroleum Act of 2019¹⁴⁷ has taken steps to facilitate the transfer of technology and skills. It includes detailed provisions on training and the establishment, contribution, and management of the Training Fund¹⁴⁸. This fund is expressly dedicated to training Kenyan nationals in upstream petroleum activities. Additionally, the provided sample Production Sharing Contract, also governed by the Petroleum Act of 2019, includes clauses on the transfer of technology to indigenous Kenyan employees and government officials¹⁴⁹. However, it is imperative to recognize the various gaps in the fund's provisions.

Among such flaws is the fund's limiting nature. This is illustrated by the financing model as it financed through contributions from contractors who are involved in petroleum operations in the country¹⁵⁰. The extent to which how much each of the contractors is to contribute to the Fund is only determinable by the respective Petroleum Agreement(s). Section 5(1) of the Act¹⁵¹ grants authority to the Cabinet Secretary to engage in negotiations, execute, and finalize petroleum agreements on behalf of the Government. This provision's permissive language implies that the obligation to make training contributions is highly discretionary, contingent upon the results of negotiations with the Cabinet Secretary.

Additionally, section 11(4) restricts the use of resources from the Fund only for training purposes. As a result, it is impossible to expend such resources into other forms of benefit-sharing such as social and economic welfare programmes for the local communities. In this regard, it therefore means that the impact of this Fund is very marginal. Whereas this study concedes that training programmes constitute opportunities for benefit-sharing, it is nonetheless argued that such opportunities are insufficient in providing effective benefit-sharing solutions within the context of Turkana Community. The industry demands a high level of technological expertise. The existing

¹⁴⁶ Model Production Sharing Contract, Section 36.

¹⁴⁷ Supra note 128.

¹⁴⁸ Section 52, The Petroleum Act, (Act No.2 of 2019)

¹⁴⁹ Clause 24, Model Production Sharing Contract.

¹⁵⁰ Supra note 130.

¹⁵¹ Petroleum Act No. 2 of 2019, Section 5(1)).

skills gap in Turkana and Kenya presents a significant challenge to the successful execution of the fund's mandate.

Furthermore, this study examines benefit-sharing mechanisms within the prism of localized benefits to members of the community from whose neighborhoods the petroleum resources are exploited. However, the benefit-sharing mechanisms envisaged through the training fund are of national outlook. There is nothing in the law to suggest that applications for training opportunities received from members of the local community would receive a higher consideration than those from the rest of the country. Such a scope of operation ignores the historical marginalization as regions such as Turkana lags in education. An equitable approach in training opportunities as opposed to equality would maximize outcome for this community.

3.1.2 The Model Production Sharing Contract (MPSC)

The Model Production Sharing Contract is a schedule to the Petroleum Act 2019 and gives a guide for contract negotiation relating to oil and gas resources. It is signed between the host state and the investor and is currently considered one of the most progressive MPSCs. The document gives general principles and guidelines that should be followed in the negotiation of petroleum agreements between the government and investors. The current oil exploration contracts between Tullow Oil and the Government were negotiated and approved under the guidelines of the former Petroleum (Exploration and Production) Act¹⁵², where the Minister of Energy and Petroleum was vested with the power to enter in agreements on the behalf of the government. Regrettably, these contracts lack transparency, as they have been withheld from public scrutiny. The government has thus far refrained from disseminating particulars regarding the stabilization clauses therein, along with the way these clauses were subject to negotiation¹⁵³. The failure to disclose the Production Sharing Contracts (PSCs) constitutes a contravention of constitutional mandates and pertinent legislative enactments that uphold transparency. Withholding this information violates Article 35 of the Constitution on the right to access information that is held by the State¹⁵⁴ and Article 71 on the requirement for ratification of any transaction involving exploitation of Kenya's natural

¹⁵² Petroleum (Exploration and Production) Act.

¹⁵³ Adongo, Stacey. "On the Interplay between Stabilization Clauses and Sustainable Development: The Case of Tullow Oil plc in Turkana." (2021).

¹⁵⁴ Article 35, Constitution of Kenya.

resources by parliament on behalf of the people¹⁵⁵. In the case of *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*¹⁵⁶ the court addressed the issue of ratification of agreements where the High Court held that even though Article 71 of the Constitution requires parliamentary approval of concessions, the same had not been operative as statute as it had not been enacted and as such it could not be visited upon the contracting parties. It is instructive to note that legislation as to parliamentary ratification of agreements and to natural resources and has now been enacted in the Mining Act¹⁵⁷ and the Petroleum Act 2019¹⁵⁸

The right to information is a crucial procedural aspect of environmental democracy¹⁵⁹. According to Article 22(1) of the Constitution¹⁶⁰, local communities have the authority to demand the government to disclose the contents of concession agreements. In the case of *Friends of Lake Turkana Trust v Attorney General & 2 other*¹⁶¹, the court emphasized that access to environmental information is essential for meaningful public participation in decision-making processes. Though the State may attempt to invoke The Official Secrets Act¹⁶² to argue against disclosure, it is important to note that an Act of Parliament cannot override an express constitutional provision on the basis of the principle of constitutional supremacy.

Part VII of the Model Contract scrutinizes pivotal elements, including cost recovery, production sharing, and taxation. Within Clause 36, the Model Contract¹⁶³ delineates a structured framework for recuperating expenses accrued by contractors actively engaged in oil prospecting. This provision expressly confers upon the contractor the prerogative to seek reimbursement for costs linked to the acquisition and subsequent disposition of petroleum, subject to a cap of sixty percent of the total petroleum yield from the designated contract area within a given fiscal year. This entitlement is expressly contingent upon the contractor's proper documentation the books of account¹⁶⁴.

¹⁵⁵ Article 71, Constitution of Kenya

¹⁵⁶ In the Matter of the Mui Basin Local Community [2015] eKLR

¹⁵⁷ Petroleum Act, 2019, Section 58

¹⁵⁸ Mining Act, No. 2 of 2016, Section 115 (5)

¹⁵⁹ Chelagat, Grace J. "Kenya's Legal and Institutional Framework on Benefit Sharing From Oil Exploitation: the Case Study of Turkana County." PhD diss., University of Nairobi, 2015.

¹⁶⁰ Article 22(1), Constitution of Kenya

¹⁶¹ Environment Land Court Suit no. 825 of 2012

¹⁶² The Official Secrets Act Cap.187 Laws of Kenya

¹⁶³ Model Production Sharing Contract, Clause 36 (1).

¹⁶⁴ Ibid

The coined term for this recoverable expenditure is "cost petroleum," a composite term encompassing both Cost Oil and Cost Gas, as may be applicable. Moreover, the Clause articulates a hierarchical precedence in the retrieval of costs borne by the contractor, with production costs taking precedence, followed sequentially by exploration costs, development costs, uplift costs, and ultimately, decommissioning costs. Oil exploration is a costly venture that requires high levels of expertise. Kenya as a developing country lacks the financial muscle to choose joint venture contract hence has opted for concessions. This disadvantages the country through reduced revenue as the contractor takes over ownership of the oil resource within the concession area for a period. The contracted firms may sometime transfer part of their stake to other investors through joint venture agreements to other several companies thereby transferring petroleum rights. Such transfers have created tax havens for subsidiary companies robbing the country of its tax revenue from oil exploration companies.

The description of Clauses 37¹⁶⁵ and 38¹⁶⁶ of the Model Production Sharing Contract provides a clear and comprehensive overview of their respective functions. The explanation of Profit Petroleum Sharing and the R-factor in Clause 37 is particularly effective in detailing how revenues from petroleum are allocated between the government and the exploration company. The definitions of "Petroleum Profit" and the *R-Factor*¹⁶⁷ are aptly clarified. Similarly, Clause 38 is well-presented, offering a concise breakdown of how crude oil and natural gas production is categorized into Cost Oil and Profit Oil, and emphasizing the importance of timely assessments. The mention of Clause 38(4) adds an important detail regarding the obligation of contractors to handle the lifting and marketing of the Government's share of Profit Petroleum under the Cabinet.

The current discourse regarding the costs borne by contractors during exploration endeavors and their entitlement to cost recovery has engendered substantive apprehensions. In accordance with the stipulations of the Act, contractors are expressly mandated to provide an exhaustive report delineating the exploration work program, along with a detailed budget, within a stringent thirty-day timeframe after the effective commencement of the inaugural contract year¹⁶⁸. It is noteworthy, however, that the Act confers discretionary authority upon the Cabinet Secretary to proffer

¹⁶⁵ Model Production Sharing Contract, Clause 37

¹⁶⁶ Model Production Sharing Contract, Clause 38

¹⁶⁷ Profit petroleum refers to difference between cost of commercial production and the cost of petroleum produced while R-Factor is a factor of the cash inflows and outflows of an oil exploration company between one quarter.

¹⁶⁸ Model Production Sharing Contract, Section 27.

recommendations for potential revisions and adjustments to the work program and budget. These recommendations ostensibly adhere to the tenets of purported "best petroleum industry practice"¹⁶⁹. This discretionary latitude introduces an element of potential ambiguity and subjectivity into the assessment process, thereby affording room for diverse interpretations and potential disputes concerning the precise parameters governing industry best practices.

The Model Production Sharing Contract also provides for taxation of oil revenues. Section 39 (1) provides that contractors shall be subject to and shall comply with the requirements of the tax law in Kenya¹⁷⁰. Section 39 (3) further adds that each category of the profit petroleum which the government is entitled to receive for a given fiscal year shall be exclusive of all taxes payable by the contractor. The contractor is also expected to pay taxes due on its share of the profit oil and is required to prepare and file tax returns as provided for in the tax laws. Enforcement of this law has been constrained by the enormous transfer of petroleum rights from parent companies to subsidiaries. An example of this is Africa Oil Kenya BV, which previously held a 25 percent stake in Blocks 10BB, 13T, and 10BA within the South Lokichar Basin. However, they have since exited, leaving the financially strained Tullow Oil to carry on with the project independently due to historical tax disputes with the Kenya Revenue Authority (KRA)¹⁷¹. In the High court case of *Africa Oil Kenya BV v Commissioner of Domestic Taxes*¹⁷², the ruling granted the Kenya Revenue Authority (KRA) the authority to recover \$18.7 million in unpaid Value-Added Tax (VAT) for the years 2011, 2012, and 2015.

The work field development plan and the budget are mandated to undergo periodic government audits throughout the entire exploration cycle¹⁷³. However, recent developments suggest a deviation from this protocol, as the government has been cited acknowledging its inability to definitively ascertain the expenditures incurred by Tullow Oil during its exploration endeavors¹⁷⁴.

¹⁶⁹ Ibid, Section 27 (3).

¹⁷⁰ Model Production Sharing Contract, Clause 39(1).

¹⁷¹ Daily Nation, "Africa Oil Exits Kenya After Settling Sh2bn Tax Arrears," Business Daily, <https://www.businessdailyafrica.com/bd/corporate/companies/africa-oil-exits-kenya-after-settling-sh2bn-tax-arrears-4397706>. accessed on 11th October 2022

¹⁷² Africa Oil Kenya Bv V Commissioner of Domestic Taxes [2020] eKLR

¹⁷³ Petroleum Act 2019, Section 30 (2).

¹⁷⁴ David Herbling "Kenya in fresh search for consultants to audit Tullow Operations", *Business Daily*, April 25, 2016 < <https://www.businessdailyafrica.com/economy/kenya-audit-Tullow-operations/3946234-3176586-rtk1su/index.html>> accessed on 26th September 2019.

To rectify this, the government has enlisted the services of an auditor to conduct an in-depth assessment of these costs.

Similar disputes over incurred costs and the pursuit of various incentives from the government have manifested in other jurisdictions. In Uganda for instance, the government has disputed some of the figures provided by the contractor and refused to yield to the demands of the contractors particularly relating to the tax concessions. Regrettably, this impasse has resulted in a deadlock in the progress of both oil field development and the associated pipeline project. Such impasses demonstrate the complexity and significance of financial negotiations in the realm of petroleum exploration and development¹⁷⁵. The second limb of the sharing of oil revenues in the country is the sharing of the revenues that accrue to the government from the Production Sharing Contract among the various stakeholders in the country. There have been protracted disputes between the national government, county government and local communities on the share due to each of these sector groups. Parliament had proposed through the Petroleum (Exploration, Development and Production) Bill 2019 for revenue share in the proportion of 70% to the national government, 20% to the county government and 10% to the local communities which had gained considerable support from various quarters including the Turkana leadership and the local community¹⁷⁶.

However, subsequently the national government engaged the Turkana County leadership, and they struck an agreement for a revenue share in the proportion of 75% to the national government, 20% to the county government and 5% to the local community¹⁷⁷. This revenue share was adopted and is reflected in the recently assented Petroleum Act 2019¹⁷⁸. The Act further provides that Parliament shall review these percentages within ten years¹⁷⁹. Reduction of the local community's percentage share from 10% to 5% elicited resentment from the locals in Turkana a situation that has exacerbated the dispute on the sharing of these revenues¹⁸⁰. The local community in Turkana

¹⁷⁵ Andrew Mizner, "Tullow ends Ugandan oil deal over tax dispute", *Africa Law & Business* 5th September 2019 <<https://www.africanlawbusiness.com/news/10067-tullow-ends-ugandan-oil-deal-over-tax-dispute>> accessed on 30th September 2019.

¹⁷⁶ Bernard Matumbai, "Turkana Oil Wealth... Curse of violent conflict and grand corruption that could spoil the party", *Nairobi Business Monthly*, (August 3, 2018) < <http://www.nairobibusinessmonthly.com/turkana-oil-wealth/>> accessed on 1st February 2019.

¹⁷⁷ Petroleum Act No. 2 of 2019, Section 58.

¹⁷⁸ Ibid, Section 14.

¹⁷⁹ Ibid, Section 58 (5).

¹⁸⁰ Reuters, "Row Over Kenya Oil revenue threatens to delay production" , *The East African*, (February 23 2018) < <https://www.theeastafrican.co.ke/business/Row-over-Kenyan-oil-revenues-threatens/2560-4317104-format-x>> accessed on 8th January 2018.

asserts that they should receive a greater share, underscoring the proximity of the resources to their region as a compelling justification.

3.1.3 The Natural Resources (Benefits Sharing) Bill¹⁸¹

The proposed Natural Resources (Benefits Sharing Bill) 2022 Bill aims to institute a benefit-sharing system for resource exploitation, involving the exploiters, national and county governments, and local communities. This legislation covers a range of natural resources, with a particular focus on petroleum and natural gas. Its core goal is to set forth fundamental guiding principles, including transparency, inclusivity, revenue optimization, sufficiency, effectiveness, fairness, and accountability. The 2022 Bill addresses the previous deficiency in community collaboration for revenue sharing concerning oil resources, a matter already addressed in the Petroleum Act of 2019¹⁸² and its accompanying Model Production Sharing Contract.

This new Bill seeks to rectify and strengthen the existing framework for equitable benefit distribution. One significant change it proposes is a revised benefit sharing ratio. Under this new bill, 60% of the benefits will go to the National Government, while 40% will be allocated to the County Government¹⁸³. Out of this 40%, 24% will be designated for the affected community, and 16% will be for the entire County. This is an improvement from the 2018 bill¹⁸⁴ that incorporated several amendments had 20% going towards the Sovereign Wealth Fund, 48% to National Government, and 32% to County Government (19.2% to entire county and 12.5% to affected community).

Furthermore, the bill aims to modify Section 183 of the Mining Act¹⁸⁵ to ensure that royalties obtained from oil exploration are directed into a Consolidated Fund, and then distributed in accordance with Section 26 of the Natural Resources (Benefits Sharing) Bill.¹⁸⁶ Similarly, profits from upstream petroleum at the National level will also be apportioned in line with Section 26 of the Natural Resources (Benefits Sharing) Bill.

¹⁸¹ Senate Bills 2022, November 8 2022.

¹⁸² Petroleum Act, No. 2 of 2019, Section 57.

¹⁸³ Supra Note 176

¹⁸⁴ The Natural Resources (Benefit Sharing) Bill, 2022

¹⁸⁵ Mining Act No. 2 of 2016

¹⁸⁶ Senate Bills No. 6 of 2022, Section 26

3.1.4 Draft National Sovereign Wealth Fund Bill¹⁸⁷

This proposed National Sovereign Wealth Fund Bill aimed to establish the Kenya Sovereign Wealth Fund to provide for institutional arrangements for effective administration and efficient management of minerals and petroleum revenues. The Bill also captures sustainable use and management of revenues derived from minerals and petroleum resources for the benefit of future generations. The Sovereign Wealth Fund's purpose is to promote fund sustainability from our finite oil resources to ensure that future generations reap the benefits of oil revenue long after the wells have ceased production. The legislative proposals draw heavily from the Norwegian sovereign wealth fund model, with Norway recognized for possessing the world's largest sovereign wealth fund, exceeding USD 1 Trillion.¹⁸⁸ This substantial fund has led to Norway being ranked as the wealthiest country in the world, with its wealth earmarked not only for present citizens but also for future generations. Fiscal regulations in Norway permit the government to withdraw up to 4 percent from the sovereign wealth fund annually, aligning with established best practices in resource management¹⁸⁹.

Under the Norwegian model, the Government established the Government Pension Fund Global (GPF) which is the country's Sovereign Wealth Fund¹⁹⁰ into which all surplus revenue from oil resources is collected and retained¹⁹¹. The Norwegian Sovereign Wealth Fund is the largest SWF in the world with the value of the Fund established to be in excess of USD 850 billion as at 2014¹⁹². The Fund has a strong institutional arrangement in its management system and this has instilled

¹⁸⁷ Draft Kenya Sovereign Wealth Fund Bill, 2019.

¹⁸⁸ Marcus Ashworth "Norway's \$1 Trillion Wealth Fund has a First-World Problem" *Bloomberg*, (November 8, 2018) <<https://www.bloomberg.com/opinion/articles/2018-11-08/norway-1-trillion-sovereign-wealth-fund-has-first-world-problem>> accessed on 20th February 2019.

¹⁸⁹ See <<https://datacatalog.worldbank.org/dataset/gdp-ranking>> accessed on 6th February 2019.

¹⁹⁰ AHB Monk, Sovereignty in the Era of Global Capitalism: The Rise of Sovereign Wealth Funds and the Power of Finance http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1587327 accessed on 25th September 2020

¹⁹¹ Sovereign Wealth Fund Institute, 'Norway Government pension Global' *SWFI* <http://www.swfinstitute.org/swfs/norway-government-pension-fund-global/> accessed on 17th October 2020

¹⁹² M Skancke, E Dimso, M Hoel, M Kettis, G Nystuen and L Starks, *Fossil-Fuel Investments in the Norwegian Government Pension Fund Global: Addressing Climate issues through Exclusion and Active Ownership*. A Report By the Expert Group Appointed by the Norwegian Ministry of Finance. https://www.regjeringen.no/contentassets/d1d5b995b88e4b3281b4cc027b80f64b/expertgroup_report.pdf accessed on 17th October 2020

prudent management of the oil resource revenue inflows into the economy¹⁹³. The Fund was established in 1990 when the country's oil and gas production began to rise sharply¹⁹⁴. The primary aim of the Fund was to make long term investments which would have countered the effects of possible decline in production or income from the oil revenue¹⁹⁵. Through this, the Fund was to buffer Norway's economy against the disruptive effects of fluctuations in international oil prices particularly after the 1986 oil crash. The 1986 oil crash caused a deep nosedive in international oil prices in the early 1970s¹⁹⁶.

The surplus revenues deposited into the GPFG is generated from several sources which include 28 & on income companies, 50% oil and gas levied on agreements, 67% proceeds of government share in Statoil, and from a share of the 20% stake that Norway holds in all oil companies operating in the country¹⁹⁷. The Fund has divested its investments and is now estimated hold 1% of global equity markets and 1.78% of the European stocks¹⁹⁸. To minimize its risks, all the funds investments are diversified in close to 8,000 companies globally with the Fund not permitted to hold more than 10% of any single company's share¹⁹⁹.

Under Section 4 of the Kenya Sovereign Wealth Fund Bill, the proposed Fund is established and entrusted to the National Treasury for management and investment, serving the interests of current and future generations of Kenya²⁰⁰. The Bill further provides that the monies so collected shall be shared in the ratio of twenty percent and eighty percent. The objectives and purposes of the proposed Bill include insulating expenditure under the budget estimates of the national government from fluctuations in resource revenues, providing finances for infrastructure development priorities to foster strong and inclusive growth and development and building a savings base for future generations when minerals and petroleum resources are exhausted²⁰¹.

¹⁹³ S Al Fathi, 'Norway's Petroleum Fund is a success story' in Gulf News Energy for 14th July 2013 <http://gulfnews.com/business/sectors/energy/norway-s-petroleum-fund-is-a-success-story-1.1208975> accessed on 17th October 2020

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ D Gatley, Lessons from the 1986 Oil Price Collapse in Brookings Papers on Economic Activity 2: 1986. http://www.brookings.edu/~media/Projects/BPEA/1986-2/1986b_bpea_gately_adelman_griffin.PDF accessed on 17th October 2020

¹⁹⁷ Al Fathi supra

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰ Draft Kenya Sovereign Wealth Fund Bill 2019, Section 4(2).

²⁰¹ Ibid Section 5.

The fund prioritizes environmental sustainability by adhering to rigorous standards in environmental, social, and governance aspects throughout its investment procedures. Given the country's vulnerability to climate change-related disasters like floods and droughts, the fund actively explores strategies to expedite Kenya's advancement towards achieving the UN Sustainable Development Goals. For instance, the fund's infrastructure priorities seek to invest in advanced clean-coal technologies, including carbon dioxide sequestration. This endeavor is anticipated to cultivate valuable expertise for both Kenyan citizens and those in neighboring East African nations.

Revenues feeding into the fund comprise the government's share of profits from upstream petroleum operations, petroleum and mining royalties payable to the national government, bonus payments on grants or assignment of petroleum licenses, annual license fees from upstream petroleum and mining operations, proceeds from grants or assignment of mining license rights, earnings from the government's direct or indirect participation in minerals and petroleum operations, and any other minerals and petroleum revenue or funds from designated sources as determined by the Cabinet Secretary.²⁰².

Section 7 of the Bill²⁰³ envisions the creation of a Holding Account, purportedly reserved for the reception, safekeeping, and distribution of all monetary proceeds. Additionally, it stipulates that any deposits into said holding account are to be distributed among the distinct components of the fund as expounded in the Bill. Conspicuously, no fewer than 15% is earmarked for allocation to the Stabilization component, while a commanding 60% is destined for the Infrastructural Development Component, with a meager 10% consigned to the Urithi component. This allocation raises critical questions regarding the justifiability and equitable distribution of resources across the specified components.

3.1.4.1 The Stabilization component

The stabilization component is proposed under Section 9 of the Bill with the object of insulating expenditures under budget estimates of the national government from fluctuations in resource revenues manage shocks which may affect macro-economic stability. The sources of the funds to

²⁰² Ibid Section 6.

²⁰³ Ibid Section 7

the stabilization component are from the transfers received from the holding account which provides that it shall be at least 15% and from investment income earned on the stabilization component²⁰⁴. The Bill further provides that where there is a situation that requires money to be withdrawn from the Stabilization Component, the Cabinet Secretary shall write to the Board²⁰⁵ outlining the amount required and the justification for the withdrawal²⁰⁶. The Board shall subsequently write to the Central Bank of Kenya authorizing the transfer from the Stabilization Fund to the Consolidated Fund and withdrawals from the Fund shall not exceed the limit approved by Parliament in the budget estimates or for the management of shocks which may affect macro-economic stability pursuant to Section 9 (b) of the Bill²⁰⁷.

The establishment of the stabilization fund signifies an acknowledgment of the heightened reliance on mineral and oil exploitation, which inherently entails an augmented exposure to international economic fluctuations. The articulated objective of this fund, aimed at absorbing surplus liquidity, underscores the imperative to guard against inflation stemming from substantial revenue influxes derived from mineral resources. Thus, the envisaged fund unmistakably manifests an explicit intention to shield against the adverse economic repercussions and mitigate the potential onset of the resource curse²⁰⁸, arising from an escalated dependency on mineral resources.

The Bill advances a regulatory framework concerning the Stabilization Component as delineated in Section 8(3), which posits a ceiling on allocations directed towards said Component, stipulating that disbursements shall cease upon the Component's attainment of 20% of the Gross Domestic Product (GDP). Such a provision is in practicable as the Country's GDP is currently half of the proposed percentage. Additionally, the Bill proposes that any surplus amounts earmarked for the Stabilization Component beyond the cap be allocated for the servicing of the national debt, or subject to parliamentary approval, may be apportioned by the Cabinet Secretary to either the Infrastructural Component or the Urithi Component²⁰⁹.

²⁰⁴ Ibid Section 8 (1).

²⁰⁵ Sovereign Wealth Fund Board.

²⁰⁶ Ibid Section 11 (1).

²⁰⁷ Ibid Section 11(2) & (3).

²⁰⁸ Achar, Peter O. "Sources, Governance Structure and Development Contribution Of Sovereign Wealth Funds: Application Of International Experiences To Kenya." PhD diss., University of Nairobi, 2016.

²⁰⁹ Ibid Section 8 (3) (a).

Furthermore, the Bill contemplates a protocol for windfall gains stemming from resource revenues. It prescribes a hierarchical order of priority, commencing with expedited debt servicing to ameliorate the national debt burden. Subsequently, surplus funds are to be allocated, in accordance with the limitations articulated in the Bill, to the Stabilization Fund. Alternatively, they may be directed towards the Infrastructure Development Component to facilitate the provision of essential services, encompassing education and healthcare, or alternatively disbursed directly to the populace through tax reduction measures²¹⁰. The efficacy of implementing a Sovereign Wealth Fund (SWF) in a context characterized by substantial external debt and infrequent surpluses has become a subject of contentious debate.

This proposed allocation framework necessitates meticulous scrutiny due to its potential legal, fiscal, and socio-economic ramifications. Particular attention should be given to the conformity of this framework with existing legal mandates, its efficacy in achieving stated fiscal objectives, and its anticipated socio-economic impact on both the public and private sectors. Moreover, an evaluation of the practical operability of this framework in diverse economic scenarios is imperative to ensure its effectiveness and suitability in managing windfall gains derived from resource revenues.

3.1.4.2 The Infrastructure Development Component

This component is proposed under Section 12 of the Bill²¹¹ with the object of funding the public sector infrastructural development priorities that are aligned to the national or county development plan to foster stronger and more inclusive growth. The ambit of infrastructure covered by this fund encompasses crucial sectors such as agriculture, transportation, housing, energy, water, education, and healthcare. The sources of funding for this Infrastructural Component encompass transfers originating from the Holding Account and accrued investment income associated with said component²¹². The funding sources for this Infrastructural Component, originating from transfers from the Holding Account and accrued investment income, merit rigorous scrutiny.

The proposed fund introduces a notable discrepancy in relation to the provisions delineated in the Public Finance Management Act. The heart of the matter lies in the conceivable clash between the

²¹⁰ Ibid Section 8 (3) (b).

²¹¹ Ibid Section 12

²¹² Ibid Section 13.

establishment of the Sovereign Wealth Fund and the established institutional framework governing public finance management as prescribed by the Act. This disjuncture is particularly notable regarding the establishment of the Infrastructure and Development Fund, designed for the sustained financial backing of developmental endeavors. However, this initiative potentially departs from the Act's explicit requirement that such allocations must adhere to the parameters set forth in the Medium-Term Expenditure Framework (MTEF). This deviation from established protocol warrants critical scrutiny and raises pertinent questions about the coherence and efficacy of the proposed fund.

Section 14 of the Bill proposes that withdrawal from the Infrastructure Development Component shall only be used to finance infrastructure development priorities as provided for in the appropriation Act²¹³. The proposed procedure further mandates that following the National Assembly's budgetary approval, the Cabinet Secretary must communicate the amount slated for withdrawal and the timeline for such action to the Board. This step introduces an additional layer of bureaucratic procedure, potentially leading to delays in the allocation of funds for critical infrastructural projects²¹⁴.

3.1.4.3 The Urithi Component

The Urithi Component, as outlined in Section 15 of the Bill²¹⁵, is purportedly established with the fundamental aim of creating a reservoir of savings for forthcoming generations hence promoting sustainability of the wealth generated. This is to be achieved by endowing resources to facilitate development for future generations when revenues derived from mineral and petroleum resources inevitably diminish. Additionally, it seeks to establish an alternative revenue stream to underwrite capital projects, particularly in instances of revenue decline resulting from the depletion of mineral and petroleum resources. Moreover, this component purports to serve the objective of wealth distribution across successive generations.

The underlying foundation of this component rests upon the intergenerational principle, contending that resources should be managed sustainably, ensuring benefits accrue to the present generation while safeguarding the interests and prosperity of future generations. This principle

²¹³ Ibid Section 14 (1) (b).

²¹⁴ Ibid Sections 14 (2) & 3.

²¹⁵ Ibid Section 15

seeks to strike a balance between present consumption and the preservation of resources for the well-being of posterity. However, the operationalization and effectiveness of this principle within the framework of the proposed Urithi Component necessitate meticulous scrutiny, particularly in ensuring materialization of the intended benefits.

3.1.5 Local Content Bill 2018

The Local Content Bill 2018, which is based on Part VI of the Petroleum Act of 2019²¹⁶, outlines the requirements for local content in petroleum operations. This section of the Act establishes the essential elements of the local content plan and designates the responsibility for monitoring and enforcement to the national government. The content of this bill is also mirrored in the Mining Act 2016²¹⁷ which emphasizes the need for local communities to benefit from the investment in natural resources. Section 47 of the Act²¹⁸ sets a distinct course from other legislations by placing a strong emphasis on community-centric local content. It specifically states that employment opportunities in the mining area should first benefit the local community before extending to the wider population. Additionally, the Act highlights the significance of using locally manufactured goods and services, with priority given to offerings from the local communities, followed by the broader Kenyan populace. The Act further mandates that the community must be consulted and informed about the anticipated benefits of a project, and their approval must be obtained through a formal written agreement before the project begins.

Subsequently, the Bill²¹⁹ intends to establish a robust legal framework for the substantial advancement of local content. This Bill aims to realize this objective by prioritizing value addition, enabling a competitive, skilled, and enduring labor force within the extractive sector, and promoting increased local ownership and utilization of assets and services in the industry²²⁰. Local content entails channeling benefits to stakeholders such as local businesses, entrepreneurs, and communities. This is achieved by providing them with enhanced access to business opportunities and a wider range of markets, as well as facilitating access to capital, technology, and improved productivity.

²¹⁶ Petroleum Act No. 2 of 2019.

²¹⁷ Mining Act no. 2 of 2016

²¹⁸ Ibid, Section 47

²¹⁹ The Local Content Bill, 2018

²²⁰ Local Content Bill 2018, Section 4.

The Bill proposes to impose obligations on both the national government and county governments to put in place measures to ensure the maximum development and adoption of local content. Among the proposed functions of the national government include; identification of sectors in which value addition opportunities exist along the extractive value chain industry with respect to various goods and services, facilitate the realization of local content through among others the development and implementation of strategies for the development of local skills, business know-how technology, financing and wealth distribution ensuring delivery of maximum local value-addition by measuring and reporting on the performance amongst operators and identifying opportunities for improvement and pursuing supportive policy objectives across all policy frameworks²²¹.

Further, the Bill proposes the duties of the county government include; assist local contractors and companies within their counties to develop their capacities of developing local content in the extractive industry, implement strategies that enable local participation in the various activities along the extractive value chain in their respective counties, monitor and put in place measures to facilitate the implementation of local content performance by operators in their countries, conduct regular audits for the purposes of monitoring and set targets for the achievement of local content²²². The Bill also proposes the establishment²²² of the Local Development Content Committee charged with the role of overseeing, coordinating and managing development of local content in the country.

In contrast to other laws, this bill recognizes the importance of transferring authority from the central government to the county governments, signifying a significant step towards addressing local communities' interests. It outlines the specific responsibilities of both levels of government concerning local content. Notably, the bill introduces a local content committee and a secretariat within its institutional framework, marking a substantial improvement from current legislation on local content. These entities are tasked with formulating local content policies and ensuring that International Oil Companies (IOCs) comply with them. IOCs are mandated to present their local content plans to the committee, detailing the benefits for the community during their operations.

²²¹ Ibid Section 7.

²²² Ibid Section 8.

Additionally, the committee includes two members appointed by the council of governors among its membership.

There have however been concerns raised on the possible duplicity that this proposed Bill may occasion. This is because the Petroleum Act 2019 in Part VI contains provisions on local content requirements, and it is argued that these provisions in the proposed Bill may create duplicity in the law²²³. Further, it is undeniable that there is a need for a robust framework to address the issue on local content in Kenya. As it is, the value that the oil exploitation project bring to the Turkana community has not been fully demonstrated.

3.2 The Institutional Framework on Oil Benefits Sharing in Kenya

The various existing and proposed legislation in the country governing the exploration, production and management of oil resources create institutions that are tasked with the management of the oil resources in the country. Some of these institutions in the administration of oil exploration include:

3.2.1 Ministry of Energy and Petroleum

The Ministry of Energy and Petroleum holds a pivotal role in the oversight of the petroleum sector within the country. This ministry is organized into two distinct departments: the State Department of Petroleum and the State Department of Energy, each presided over by a Principal Secretary operating under the guidance of the Cabinet Secretary. The State Department of Petroleum is in charge of all petroleum operations in the country covering the upstream, midstream and downstream petroleum operations.

The authority and obligations of the Cabinet Secretary are embedded in the Petroleum Act. This legislation confers upon the Cabinet Secretary the power to engage in negotiations, allocate resources, and execute petroleum agreements on behalf of the national government.²²⁴ Furthermore, the Act mandates the formulation and dissemination of a national policy governing petroleum operations, subject to periodic review, no less than once every five years²²⁵. It is also incumbent upon the Cabinet Secretary to ensure the engagement of all pertinent stakeholders in

²²³ George Wachira, Proposed local content law will only create regulatory confusion, Business Daily, July 10, 2018 < <https://www.businessdailyafrica.com/analysis/ideas/local-content-law-will-only-create-regulatory-confusion/4259414-4656344-38pj58z/index.htm> > accessed on 20th October 2019.

²²⁴ Petroleum Act 2019, Section 18 (1).

²²⁵ Ibid , Section 5

the formulation of policies²²⁶. Additionally, the Act entrusts the Cabinet Secretary with the responsibility of crafting, publicizing, and periodically revising a national petroleum strategic plan²²⁷.

3.2.2 Energy & Petroleum Regulatory Authority

This body was formerly known as the Energy Regulatory Commission and was established under Section 5 of the Energy Act²²⁸. Operating under the purview of the Energy Act, this entity, now referred to as the Authority, is entrusted with a range of functions. These responsibilities encompass the regulation and oversight of upstream petroleum operations in strict adherence to legal provisions and relevant petroleum agreements. Additionally, the Authority is tasked with the provision of vital information and statistical data to the Cabinet Secretary on matters pertaining to petroleum.²²⁹

Among its crucial roles, the Authority is also responsible for receiving, assessing, and granting applications for non-exclusive exploration permits. Moreover, it is charged with the coordination and advancement of infrastructure in upstream petroleum activities, as well as the facilitation of capacity development in this sector. The Authority undertakes the assessment of field development plans, presenting recommendations to the Cabinet Secretary responsible for petroleum. It also verifies the recoverable costs of oil and gas owed to parties in petroleum agreements and conducts audits on contractors for cost recovery.

3.2.3 National Upstream Petroleum Advisory Committee

The Committee, established under Section 12 of the Petroleum Act 2019²³⁰, serves a critical advisory role in matters pertaining to upstream petroleum operations. Its responsibilities encompass a range of functions, including advising the Cabinet Secretary on these operations, providing guidance during negotiations of petroleum agreements, and offering recommendations, based on advice from the Upstream Petroleum Regulatory Authority, on the suspension, revocation, or termination of a petroleum agreement. Furthermore, the Committee assists the

²²⁶ Ibid, Section 5 (2).

²²⁷ Ibid, Section 7.

²²⁸ Energy Act No. 1 of 2019, Section 5

²²⁹ Energy Act No. 1 of 2019, Section 10 (a).

²³⁰Supra Note 231

Cabinet Secretary in formulating criteria for negotiations of petroleum agreements between the Cabinet Secretary and a contractor²³¹.

Membership of the Committee is comprised of representatives from pertinent government ministries and departments, including the Principal Secretary overseeing Petroleum, the Principal Secretary of the National Treasury, the Attorney General, and Director General of NEMA, the Chief Executive Officer of NOCK, and the Commissioner General of KRA, the Director General of UPRA, and a representative from the Council of Governors²³².

It is crucial to note that the Committee's role is strictly advisory, with the ultimate decision-making authority resting with the Cabinet Secretary. The Cabinet Secretary is empowered to either accept or reject the advice provided by the Committee. In the event of advice rejection, the Cabinet Secretary is mandated to furnish written communication detailing the reasons for such rejection within a period of fourteen days²³³.

This delineation of roles and responsibilities highlights the Committee's consultative nature, while affirming the Cabinet Secretary's ultimate authority in making decisions pertaining to upstream petroleum operations. The requirement for transparent communication in cases of advice rejection serves as an accountability mechanism within the decision-making process.

3.2.4 National Oil Corporation of Kenya

Established in 1984, this government parastatal plays a pivotal role in both upstream and downstream petroleum operations within the country. Specifically mandated by Section 3 of the Petroleum Act 2019, it is entrusted with the task of conducting oil exploration activities on behalf of the national government. As outlined in Section 3 (a)²³⁴, the national government has the prerogative to engage in upstream operations either independently or through its national oil company, which in this context, is envisaged as NOCK.

However, there have been expressed concerns regarding NOCK's potential limitations in terms of both technical expertise and financial resources required for the comprehensive execution of oil exploration activities as outlined in the Act. Consequently, a significant portion of exploration

²³¹ Petroleum Act No. 2 of 2019, Section 13.

²³² Ibid, Section 12.

²³³ Energy Act No. 1 of 2019, Section 13 (2).

²³⁴ Supra note 234, Section 3(a).

endeavors in the country are facilitated by private contractors, who secure exploration permits for specific blocks from the government. As such, most of the exploration activities in the country are carried out by private contractors who obtain exploration permits for the various exploration blocks from the government²³⁵. It is worth noting that while NOCK does engage in exploration activities within the country, its involvement is relatively modest in scale. Nevertheless, NOCK maintains rights over several exploration blocks and actively participates in activities related to them²³⁶.

This depiction of NOCK's role and capabilities raises pertinent questions about the optimal allocation of responsibilities within the petroleum sector. The concerns regarding NOCK's capacity highlight the need for a thorough evaluation of the entity's capabilities and, if necessary, the implementation of measures to enhance its technical and financial prowess. Furthermore, the prevalence of private contractors in the exploration process underscores the dynamic nature of public-private partnerships in the sector. These considerations are crucial in ensuring effective and efficient utilization of the country's petroleum resources.

3.2.5 National Environmental Management Authority (NEMA)

NEMA is established under Section 7 of the Environmental Management and Coordination Act²³⁷. Its primary mandate is to exercise broad oversight and coordination over all matters pertaining to the environment, making it the principal instrument of the government for implementing environmental policies.²³⁸ The Authority's primary focus lies in environmental regulation of oil exploration activities.

Originally enacted in 1999, the Principal Act did not contain specific provisions addressing the regulation of oil exploration and developments. Instead, it outlined general considerations for environmental aspects across various projects. However, significant amendments were introduced in 2012²³⁹. These amendments specifically addressed the regulation of oil exploration and development activities, notably through modifications to the second Schedule of the Act. This

²³⁵ Macharia Kamau, "National oil to lose powers as new regulatory unit is mooted" <<https://www.standardmedia.co.ke/article/2001288394/state-oil-firm-to-lose-powers-as-new-regulatory-unit-is-mooted>> accessed on 23rd August 2019.

²³⁶ Available at <<https://nationaloil.co.ke/upstream/>> accessed 13th September 2019.

²³⁷ CAP 387 Laws of Kenya, 1999 (Rev. 2012)

²³⁸ Environmental Management and Co-ordination Act, Section 7.

²³⁹ Ibid, Section 9.

adjustment mandated the requirement for an Environmental Impact Assessment in the context of exploration for petroleum production²⁴⁰.

Section 25 of the Act captures an element of benefit sharing through the establishes the National Environment Restoration Fund. The object of the Fund is to act as a supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require NEMA to intervene towards the control or mitigation of environmental degradation²⁴¹.

This regulatory framework emphasizes the evolving nature of environmental governance, particularly in the context of oil exploration. The amendments in 2012 represent a significant milestone in the legal framework, addressing specific considerations for petroleum activities. The establishment of the National Environment Restoration Fund further emphasizes the importance of proactive measures in mitigating environmental impacts and underscores the need for accountability in cases of environmental degradation for sustainable development.

3.2.6 Commission on Revenue Allocation

The Commission on Revenue Allocation, established under Article 215 of the Constitution, holds a pivotal role in recommending the equitable distribution of revenue generated by the national government among both national and county governments, as well as among the various county governments²⁴². In addition to this primary function, the Commission is also vested with the authority to provide recommendations on various aspects related to the financing and financial management of county governments. Under the provisions of Article 202, the Commission operates pursuant to a set of criteria for equitable revenue allocation. These include ensuring that county governments have the capacity to effectively carry out their designated functions, evaluating the fiscal efficiency of county governments, considering the developmental needs of individual counties, addressing affirmative action for disadvantaged areas and groups, striving for economic optimization within each county, and providing incentives for counties to enhance their revenue-raising capabilities²⁴³.

²⁴⁰ Environmental Management and Co-ordination (Amendment) Act. No. 5 of 2015, Second Schedule, 6 (i).

²⁴¹ Ibid, Section 25 (4).

²⁴² Constitution of Kenya, Article 216 (1).

²⁴³ Ibid, Article 203 (1).

The Natural Resources (Benefits Sharing) Bill of 2018 designates the Commission on Revenue Allocation as the responsible body for implementing the Act's provisions, particularly concerning the coordination of benefits sharing agreements between affected counties and entities. Additionally, the Commission's roles extend to identifying counties required to enter into such agreements, overseeing and administering funds allocated for community projects, and enhancing the negotiating capacity of local communities in benefit sharing agreements, among other proposed functions.

It is instructive to note that the proposed Natural Resources (Benefits Sharing) Bill 2018 made several changes from the earlier Bill that was formulated in 2014. First, the Bill in Section 3 removes several resources from its application including petroleum, natural gas and minerals. This was informed by the fact that there was a sector specific legislation in the form of the Petroleum Act 2019 that provided a formula of sharing of revenues derived from oil resources²⁴⁴. This revision of the 2014 Bill was important in addressing concerns of investors who felt that they were burdened with additional obligations of entering into separate benefit sharing agreements with counties and local communities while they had already entered into another agreement with the national government on the sharing of revenues through the Production Sharing Contract. The 2014 Bill had also proposed the establishment of a Benefits Sharing Authority whose roles were to oversee Benefits Sharing Agreements but these functions have now been bestowed on the Commission on Revenue Allocation under the 2022 Bill²⁴⁵.

3.2.7 County Benefit Sharing Committees

The Natural Resources (Benefits Sharing) Bill of 2018, outlined in Section 10, introduces the establishment of a County Benefit Sharing Committee in each county possessing a natural resource. This proposed committee is entrusted with a range of critical functions, including negotiating with affected organizations on behalf of the County Government, overseeing the execution of projects mandated by benefit sharing agreements within the county, determining the allocation of funds to individual local communities, organizing public forums to facilitate public participation in proposed county benefit sharing agreements, and convening public forums to engage the public in discussions concerning community projects funded by county government

²⁴⁴ Petroleum Act, No. 2 of 2019, Section 57.

²⁴⁵ Natural Resources (Benefits Sharing Bill) 2014, Senate Bills 2014, Proposed under Section 5.

revenues²⁴⁶. The composition of the Committee is slated to comprise several key figures, including the County Executive Member overseeing finance, the Chairperson of the relevant County Assembly Committee responsible for natural resource matters, and five individuals elected by the local community in which the resource is situated ²⁴⁷. These elected members are expected to adequately represent the cultural diversity of the community. While the inclusion of diverse stakeholders, such as the County Executive Member and Chairperson of the relevant County Assembly Committee, is important for representation, the reliance on elected members from the local community may introduce potential challenges. Ensuring that these elected members adequately reflect the cultural diversity of the community might prove to be a complex endeavor, potentially leading to disputes or exclusions.

Furthermore, the Bill mandates that every county and local community benefit sharing agreement be submitted to the Commission on Revenue Allocation within thirty days of its execution. Simultaneously, a copy of the agreement is to be sent to the Senate²⁴⁸. This provision aims to ensure transparency and accountability in the benefit sharing process, while also facilitating oversight by relevant authorities. The mandated submission of benefit sharing agreements to the Commission on Revenue Allocation within a strict thirty-day timeframe may inadvertently create administrative pressure. This rigid timeline may not always align with the practicalities of negotiating and finalizing comprehensive agreements, potentially compromising the quality and thoroughness of the process.

Natural Resources (Benefits Sharing) Bill of 2018 addresses critical aspects of benefit sharing, including the establishment of County Benefit Sharing Committees and mandatory submission of agreements, there are potential challenges in terms of capacity, representation, and administrative timelines that warrant careful consideration and potential adjustments in the implementation process. While the aim of ensuring transparency and accountability through these provisions is laudable, there may be a need for some flexibility in the implementation to accommodate the unique circumstances and capacities of different counties. Striking a balance between robust oversight and practical feasibility will be crucial for the success of this framework.

²⁴⁶ Natural Resources (Benefits Sharing Bill) 2018, Senate Bills 2018, Section 29.

²⁴⁷ Ibid Section 28.

²⁴⁸ Ibid, Section 13.

3.2.8 Local Benefit Sharing Forum

Section 13 of the Natural Resources (Benefits Sharing) Bill introduces the concept of a Local Benefit Sharing Forum, which is designated with a series of significant responsibilities. These include negotiating with the Benefit Sharing Committee to establish a local community Benefit Sharing agreement on behalf of the community, identifying specific local community projects to be funded with allocations from the Benefit Sharing Committee, and supervising the execution of projects undertaken by the local community. The proposed membership structure of the Forum is outlined to consist of five individuals elected by the residents of the local community ²⁴⁹. This approach aims to ensure that the Forum is representative of the community's interests and needs.

While the intention behind establishing the Local Benefit Sharing Forum is to promote community involvement and decision-making in benefit sharing, there are potential considerations that merit scrutiny. Firstly, the effectiveness of the Forum may be contingent on the capacity and expertise of the elected members to engage in negotiations and oversee project implementation. Additionally, there may be concerns about potential conflicts of interest or challenges in achieving consensus within the Forum.

Furthermore, the success of the Forum hinges on the transparency and inclusivity of the election process for its members. Ensuring that the election process is fair, accessible, and reflective of the diverse interests within the community will be crucial for the legitimacy and effectiveness of the Forum. Therefore, it is imperative to carefully consider factors such as the capacity of elected members, potential conflicts of interest, and the transparency of the election process to ensure the Forum's effectiveness in practice.

3.2.9 Sovereign Wealth Fund Board

Section 25 of the Draft Sovereign Wealth Fund Bill proposes the establishment of the Sovereign Wealth Fund Board, which is tasked with a range of pivotal functions as prescribed in the Bill. These functions encompass providing comprehensive guidance and oversight over the administration and management of the fund, making strategic investment decisions on behalf of the Fund, formulating investment policies for approval by the Cabinet Secretary, and conducting

²⁴⁹ Ibid Section 13 (1).

ongoing monitoring and evaluation of the various components of the Fund, among other responsibilities.

The proposed composition of the Board is designed to bring together key stakeholders with expertise and authority in relevant domains. It includes a Chairperson appointed by the President upon nomination by the Cabinet Secretary, the Principal Secretary to the National Treasury, the Principal Secretary responsible for Petroleum, the Governor of the Central Bank, three individuals appointed by the Cabinet Secretary from outside the government, and the Chief Executive Officer. This composition reflects a deliberate effort to assemble a diverse body of individuals with a mix of public sector, financial, and investment expertise. The inclusion of external appointees adds a valuable external perspective to the decision-making process, potentially introducing fresh insights and mitigating potential conflicts of interest.

However, it is crucial to consider that the effectiveness of the Sovereign Wealth Fund Board will ultimately hinge on the collective expertise, collaboration, and diligence of its members. Furthermore, ensuring that the Board operates with transparency, accountability, and in the best interest of the Fund and the nation will be paramount to achieving the objectives outlined in the Draft Bill.

3.2.10 Local Content Development Committee (LCDC)

The proposed establishment of the Local Content Development Committee (LCDC) in Part III of the Local Content Bill 2023 presents a comprehensive framework for the oversight and management of local content development in the country. The committee is entrusted with a diverse array of functions, ranging from the coordination and management of local content development to advising the Cabinet Secretary on policy formulation and strategy implementation. Additionally, the committee is tasked with setting minimum standard requirements for local content, evaluating and approving local content plans, and collaborating with county governments to enhance the capacity of local businesses and individuals to leverage available opportunities²⁵⁰.

The proposed composition of the committee is; a chairperson appointed by the Cabinet Secretary, the Principal Secretary in charge of Petroleum, The Principal Secretary responsible for Finance,

²⁵⁰ Local Content Bill 2018, Section 10.

two persons appointed by the Council of Governors, two persons nominated by players in the extractive industry appointed by the Cabinet Secretary and a Director of the Committee²⁵¹.

However, it is important to note that there is a potential for overlap in functions between the LCDC and the existing Energy and Petroleum Regulatory Authority (EPRA) as defined in the Petroleum Act of 2019. To avoid redundancy and ensure streamlined operations, it is imperative that, prior to enacting the Bill, a thorough assessment be conducted to consolidate the mandates of both entities into a unified body responsible for monitoring and enforcing local content compliance within the petroleum sector.

Furthermore, the Bill grants the Cabinet Secretary authority to establish minimum local content requirements for operators engaged in extractive operations. This authority is contingent upon consultation with the committee and formal notification through Gazette notices. The introduction of a local content certification mechanism, overseen by the LCDC, provides a critical means of assessing operator adherence to the local content provisions stipulated in the Bill.

Therefore, the proposed establishment of the Local Content Development Committee represents a significant step towards promoting local participation and benefit in the extractive industry. However, careful consideration and potential consolidation of functions with existing regulatory bodies will be essential to ensure efficient and effective implementation of local content policies within the petroleum sector.

²⁵¹ Ibid, Section 12.

CHAPTER FOUR: KEY FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

This chapter discusses the key findings, conclusions and recommendations from this study. The chapter starts with the conclusions of the study and then proceeds to provide the recommendations.

4 Key Findings

This study makes the finding that there needs to be good policies, proper management of resource wealth in order to ensure that resource exploitation benefits the economy, the affected local community and the society as a whole²⁵². This study has established that there is need for strengthening of the legal framework on the equitable sharing of oil benefits in Kenya.

The research has also the finding that currently as it is, the various laws governing extractive industry in Kenya such as the Mining Act 2016, the Petroleum Act 2019 and proposed Bills like the Natural Resources (Benefits Sharing) Bill of 2022 have duplicitous roles which are overlapping. For example, the Mining Act, 2016 provides for a revenue sharing formula that is different from that of the Petroleum Act and that of the Proposed Natural Resources (Benefits Sharing) Bill, 2022. The Mining Act states that National Government shall be entitled to seventy percent, the county Government shall be entitled to twenty percent while the local community gets ten percent.²⁵³

Section 58 of the Petroleum Act provides for the sharing of the petroleum resource where it provides that the petroleum resource revenue will be shared between the National government, County government and the community. The Act is silent on the per centum received by the National government but states that the County government shall receive twenty percent of the National share received and the local community shall receive five percent of the National share received²⁵⁴. These inconsistencies in the revenue sharing formula of extractive benefits contributes to inequitable benefit sharing.

Another finding of this study is the presence of multiple laws addressing benefit sharing hence lack of a singular and unified approach. This has the effect bringing confusion and unequal

²⁵² Katindi Sivi- Njonjo ‘Case Studies of Revenue- sharing Models: What Kenya can Learn from other countries.’ In *Drilling past the Resource Curse?* By Osogo Ambani < <file:///C:/Users/USER/Downloads/Drilling-Past-the-Resource-Curse-Book.pdf> > accessed 3rd November 2022

²⁵³ Mining Act, 2016, section 186 (5)

²⁵⁴ Petroleum Act, 2019, section 58.

application of the law²⁵⁵. It has been established that the sustainable exploitation and development of oil resources is crucial to a country's development and if well managed can help spur and accelerate economic growth particularly in developing countries. A key plank of the sustainable utilization of these resources is the equitable sharing of the benefits accruing from these resources.

Secondly this study has established that there are existing laws and proposals on the equitable sharing of oil benefits in Kenya. The main legislation governing the sharing of oil revenues in Kenya is the recently enacted Petroleum Act 2019 which contains provisions on the revenue sharing between the national government and contractors and the apportionment of the government's share of revenue between the county government and local communities. The research also notes the other proposals of benefits sharing including local content regulations and benefits sharing that are geared to enhancing the equitable share of oil benefits. The research however notes with concern that there is lack of capacity particularly with county governments and the local communities to prudently manage and use the share of benefits accruing to them. The research therefore argues for the need to build the capacity of the county governments and the local communities to manage and utilize the share of revenues allocated to them.

This study has also made the finding that petroleum resource is finite and the accruing wealth from it is not permanent hence the national government needs to put in place mechanisms to ensure that even future generations benefit from the present petroleum exploration in the country since the oil production will be declining in the coming years.²⁵⁶

This study made a general finding that Kenya has not adopted adequate policy and legal framework to govern benefit sharing not only of the petroleum resource but also other extractives.²⁵⁷ It established that although the laws of the country are clear that the oil resources among other natural resources in the country are owned by the national government, there is a case for the county governments and local communities where these resources are found are entitled to enjoy the benefits of these resources. The study has found that the local communities have other rights including environment and social rights that are infringed on as a result of the exploration

²⁵⁵Katindi Sivi- Njonjo 'Case Studies of Revenue- sharing Models: What Kenya can Learn from other countries.' In *Drilling past the Resource Curse?* By Osogo Ambani < <file:///C:/Users/USER/Downloads/Drilling-Past-the-Resource-Curse-Book.pdf> > accessed 3rd November 2022

²⁵⁶ Ibid.

²⁵⁷ Ibid.

activities. The local community living where these resources are situated bears the brunt of the activities manifested through environmental pollution and degradation and disruption of their lifestyles. Some of these activities have long lasting impacts that impact the people living in this area most and hence the need to have a share of the benefits accruing from these resources. The benefits could either be in monetary or non-monetary form including restoration activities.

The study has also established that accountability in the management and use of the revenues derived from oil resources is crucial in ensuring the long-term sustainability of these resources. The lack of accountability and disclosure of contents of agreements entered into between the government and contractors breeds suspicion and has the potential of giving rise to disputes and conflicts. The research has further established that there exist legal provisions on accountability through the right to information that is enshrined under Article 35 of the Constitution. This requires that government should make available information to the citizens expeditiously and at reasonable cost if any. This constitutional provision has been given effect with the enactment of the Access to Information Act²⁵⁸ whose objects are to provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles²⁵⁹. The principle of access to information was canvassed in the case of *Nairobi Law Monthly Company Limited v Kengen & 2 Others* the court held inter alia that public bodies have a constitutional obligation on the request of a citizen to provide access to information under Article 35 (1) (a) of the Constitution²⁶⁰. Further, in *Mohamed Ali Baadi & others v Attorney General & 11 others*²⁶¹, the court in adopting a pragmatic approach to the interpretation of Article 35 on the right to information held that the right to information constitutes both an “active” and a “passive” concept. A passive aspect includes the right of the public to seek from public authorities, and the obligation of public authorities to provide information to a request while an “active” aspect includes the right of the public to receive information and the obligation of authorities to collect and disseminate knowledge of public interest without the need for a specific request.

²⁵⁸ No. 31 of 2016

²⁵⁹ Section 3 (b) Access to Information Act, No. 31 of 2016

²⁶⁰ Petition No. 278 of 2011 [2013 eKLR)

²⁶¹ [2018] eKLR

The reluctance by the government is particularly intriguing considering that the contractors have maintained that they are not opposed to the disclosure of these agreements and cite the government's reluctance as the main reason that these agreements remain out of the public eye. Tullow Oil one of the major exploration companies in the country has on several occasions stated that they make public contents petroleum agreements in other jurisdictions and have no problem if such are made public in Kenya²⁶². There is also generally lack of goodwill by the government to make the details of such agreements public. Even where the government argues that such information may be accessed, the stringent requirements that must be satisfied, the bureaucracy involved and the approvals that must be sought from senior government officials make it virtually impossible to access these details.

The Ratification Act²⁶³ provides that agreements relating to concessions of oil and gas are subject to parliamentary ratification and approval. However, there have been concerns that the national government is still negotiating and entering into agreements for these resources without parliamentary approval contrary to the law. There have also been concerns that where such ratification by Parliament is sought, it is merely a formality and meant to rubberstamp the agreements that the executive has already concluded.

4.1 Recommendations

In light of the foregoing findings, this study has established that there is need for Kenya to put in place a legal framework that provides for benefit sharing, the framework should also spell out the uniform formula applied in the sharing of the accrued benefits.

The legal framework, once put in place, should contain provisions that will compel the relevant administrative bodies to provide comprehensive information on the revenue generated, how the revenue is distributed among the various stakeholders and interest groups and further that this

²⁶² Moses Michira, Kenya: Government opts to keep oil revenue sharing confidential; Tullow Oil says its open to disclosure, Standard Digital 2nd October 2017 Available at <https://www.business-humanrights.org/en/kenya-details-of-oil-revenue-sharing-agreements-with-companies-secret-tullow-oil-says-it-is-open-to-disclosure> (accessed on 1st October 2022)

²⁶³ No. 41 of 2016

information should be made available and accessible to the public. Doing this will guarantee sustainability, promote transparent management and equitable sharing of resources²⁶⁴.

Borrowing from the practice in Norway, which has a well-managed system on extractive industry, Kenya can replicate their practice and improve on its framework on benefit sharing. Through practices from countries like Norway, who are cognizant of the fact that natural resources are finite and will diminish with time hence put in place a future generations fund²⁶⁵. This Fund which was enacted by the Norwegian Parliament in 1995 in the Government Pension Fund, which reflects the net savings of the government and which is invested in non-Norwegian bonds and stocks, money markets thereby diversifying government's revenue portfolio thereby guaranteeing highest income for future use.²⁶⁶ Kenya too can borrow from this and enact the proposed National Sovereign Wealth Bill into law so that it can invest the petroleum revenue for the sake of future generations.

The various laws and the proposed bills which seek to address the criterion for revenue sharing in Kenya should be streamlined to avoid confusion and duplicity as is the case currently with the Petroleum Act 2019 and the Mining Act which have conflicting provisions on sharing of benefits derived from natural resources. This way, it will provide the needed clarity on benefit sharing, reduce conflicts which may arise from the confusion caused by the conflicting provisions and help in prevent corrupt practices and misuse of resources.

There is also need to have review the Petroleum Act 2019 and specifically the powers vested in the Cabinet Secretary in charge of Mining and Petroleum who still wields considerable powers in the negotiation of petroleum agreements. The Act in Section 5 (1) provides that the Cabinet Secretary has the power to enter into and conclude negotiations with an extractive firm where no bids are received or where the bids are non-responsive. As has been observed in this study, and in particular in the Africa Oil Turkana Limited Case²⁶⁷ such powers are prone to abuse hence the need of the regulation of these powers to avert a situation of abuse of these powers.

²⁶⁴ Katindi Sivi- Njonjo 'Case Studies of Revenue- sharing Models: What Kenya can Learn from other countries.' In *Drilling past the Resource Curse?* By Osogo Ambani < <file:///C:/Users/USER/Downloads/Drilling-Past-the-Resource-Curse-Book.pdf> > accessed 3rd November 2022.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Supra note 126

This research further postulates that the immense powers which are vested in the Cabinet Secretary and in particular the power to negotiate exploration agreements should be transferred to an independent body. This research proposes that these powers should be vested in the Energy and Petroleum regulatory Authority which has the capacity and relevant expertise on matters relating to oil and gas. Further, the Energy and Petroleum Regulatory Authority has an appellate mechanism in the Energy and Petroleum Tribunal where disputes can be lodged for determination. Lastly, there is need for the institutions governing petroleum exploration and production in Kenya to promote transparency and accountability. This will promote public confidence in the management of petroleum resource and will greatly reduce conflicts with the local community. As has been observed in the case of Norway, transparency and accountability is key in the sustainable management of revenues accruing from natural resources and the management of the National Sovereign Wealth Fund stands out. Kenya needs to ensure that all institutions governing the oil adopt transparency and accountability as key tenets as set out in the constitution.

CONCLUSION

The study findings provide evidence of achievement of the intended objectives. Through a thorough examination of the existing policy framework governing oil resource benefit sharing in Kenya, critical legislative gaps necessary for ensuring equitable revenue distribution were identified. Persisting challenges surround the benefit sharing of oil resources in Kenya. Notably, Kenya lacks a legal framework for the operationalization of benefit sharing, a continuing obstacle that has sparked increased anxiety and restlessness among the local community. Even a decade after the discovery of oil in Kenya, tangible benefits remain elusive.

There is need for National and County assemblies to take steps in amending the relevant laws governing extractive industries in Kenya. This endeavor is crucial to streamline these laws, averting redundancy, and confusion. Equally vital is the need for authorities to prioritize the enforcement of legal provisions on benefit sharing, ensuring a seamless flow from the national government to county government and, ultimately, to local communities. It is worth reiterating that the discovery of oil is commonly seen as a 'blessing' owing to its immense economic potential. Consequently, local communities, exemplified by Turkana, should be empowered to actively harness this 'blessing' for their advancement, growth and development as opposed to experiencing the opposite effect.

5 BIBLIOGRAPHY

5.1 BOOKS

1. Abate & Kronk Elizabeth (eds) *Climate Change and Indigenous People: A Search for Legal Remedies* (Edward Elgar Lmt) 2013.
2. Bix BH, *Jurisprudence: Theory and Context* (6th edn, Sweet & Maxwell 2012).
3. Bullon S (ed), *Longman Dictionary of Contemporary English* (new edition, Pearson Education Publishers 2003) 1583.
4. Dukeminier, Jesse and Krier, James E, *Property* (3rd Edition), Little Brown and Company 1993.
5. Freeman MDA Llyods' *Introduction to Jurisprudence* 8th Sweet and Maxwell 2002.
6. Garner AB (editor-in-chief), *Black's Law Dictionary*, (West Publishing Company, 2004) 578.
7. Karen, Makuch & Ricardo Pereira *Environmental and Energy Law* (Blackwell Publishing) 2012.
8. Kasomo, *Research Methods in Humanities and Education*, (Zapf Chancery Publication, Revised Edition 2007).
9. Khanani R, *The Nordic Model of Industrial Development: A study of Norway's Oil Industry**, (RSM).
10. Lambroschini S, *Technical Brief: Using cross border programming to address cross border dynamics in Karamoja (Uganda) and Pokot (Kenya)*** Agency for Technical Co-operation and Development (ACTED) February 2011.
11. Leroy, Paddock, *Compliance and Enforcement of Environmental Law Towards More Effective Implementation* (Cheletanham: Elgar Publishing) 2011.
12. Lowe John, *Oil and Gas Law* (5th ed. West Nutshell Series) 2009.
13. Mbote-Kameri Patricia et al *Ours by Right: Law, Politics and Realities of Communal Property in Kenya* (Strathmore University Press 2013).
14. Michael L. Ross, *The Oil Curse, 'How Petroleum Wealth Shapes the Development of Nations'*, Princeton University Press 2013.
15. Millennium Ecosystem Assessment (MEA) „Ecosystems and human wellbeing“ (Washington, DC, USA, Island Press 2005).

16. Monk AHB, *Sovereignty in the Era of Global Capitalism: The Rise of Sovereign Wealth Funds and the Power of Finance*.
17. Nyamaka DM, „Social Contract Theory of John Locke (1632-1704) in the Contemporary World“ (June 2011) in *Selected Works*. accessed on 2 November 2019.
18. Rousseau JJ, *Social Contract*, Jonathan Bennet, 2010.
19. Ryggvik H, „The Norwegian Oil Experience: A toolbox for managing resources“ (Centre for Technology, Innovation and Culture, 2010).
20. Sachs J and Warner A, ‘Natural Resource Abundance and Economic Growth’ in Meier G and Rauch J (eds) *Leading Issues in Economic Development* (Oxford University Press, New York 1995).
21. Salman SMA, *The Abyei territorial dispute between North and South Sudan: Why has its resolution proven difficult?* in Unruh J and Williams RC (editors), *Land and post-conflict peacebuilding* (London, Earthscan 2013).
22. Schrijver N, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997).
23. Shaxson N, “Nigeria’s Extractive Industries Transparency Initiative: Just a Glorious Audit?” (Royal Institute of International Affairs, Chatham House, November 2009).
24. Shaxson N, *Poisoned Wells: The Dirty Politics of African Oil*, Palgrave Macmillan (2007)
25. Söderholm P and Svahn N, „Mining, Regional Development and Benefit-Sharing Mining and Sustainable Development“ (Luleå University of Technology 2014).
26. Wacks Raymond, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd Ed. Oxford University Press) 2012.

5.2 Journal Articles

1. Adrian Gonzalez, *Petroleum and its Impact on Three Wars in Africa: Angola, Nigeria and Sudan* (*Journal of Peace, Conflict and Development*) Issue 16, November 2010
2. Ambani O J, ‘Drilling past the resource curse? An introduction to the concept of ‘mis-rule penalty’ and the book’, (2018) Strathmore University Press.
3. Bilder RB, *International Law and Natural Resources Policies“* (1980) 20 *Natural Resources Journal*.

4. Bos, Kyra, and Joyeeta Gupta. "Inclusive development, oil extraction and climate change: a multilevel analysis of Kenya." *International Journal of Sustainable Development & World Ecology* 23, no. 6 (2016): 482-492.
5. Calvano, Lisa. "Multinational corporations and local communities: A critical analysis of conflict." *Journal of Business Ethics* 82 (2008): 793-805.
6. Chapman, Sophie, Rowena Maguire, Mona Doshi, Caroline Wanjiku Kago, Nelly Kamunde-Aquino, Leah Kiguatha, Elizabeth Dooley, and Gretchen Engbring. "The Elements of Benefit-Sharing for REDD+ in Kenya: A Legal Perspective." *Carbon & Climate Law Review* 9, no. 4 (2015): 283–97. <http://www.jstor.org/stable/43860115>.
7. Christians A, "Sovereignty, Taxation and Social Contract" (2009) 18 *Minnesota Journal of International Law*.
8. Collier Aul, *Managing Resource Revenues in Developing Economies*, Palgrave Macmillan Journals IMF Staff Papers, Vol. 57 No. 1 (2010).
9. De Jonge B, „Towards a Fair and Equitable ABS Regime: Is Nagoya Leading us in the Right Direction? “ In *Law Environment and Development (LEAD) Journal*, Vol. 9/2.
10. Herbst Jeffrey, "The Politics of revenue Sharing Resource-dependent States" *World Institute for Development Economics (UNU-WIDER)* No. 43 of 2001.
11. Jedrzej George Frynas & George Wood, *Oil & War in Angola, Review of African Political Economy*, No. 90:587-606, Roape Publications Ltd, 2001 (Journal Article)
12. Josephat Koli Nanok & Christopher Ouma Onyango, A Socio-Economic and Environmental Analysis of the Effects of Oil Exploration on the Local Community in Lokichar, Turkana County Kenya, *International Journal of Management, Economic and Social Science* (Vol. 6 (3) 2017, pp144-156)
13. Kamba, Serges Alain Djoyou. "The right to development in the African human rights system: The Endorois case." *De Jure Law Journal* 44, no. 2 (2011): 381-391.
14. Kenneth Kirumba, "A National Sovereign Wealth Fund for Kenya" *Strathmore University*, available at <https://www.strathmore.edu/news/a-national-sovereign-wealth-fund-for-kenya/>
15. Kyra Bos & Joyeeta Gupta (2016) Inclusive development, oil extraction and climate change: a multilevel analysis of Kenya, *International Journal of Sustainable Development & World Ecology*, 23:6, 482-492, DOI: 10.1080/13504509.2016.1162217.

16. Lawrence A. Rupley, Revenue Sharing in the Nigerian Federation, *The Journal of Modern African Studies*, Volume 19, No. 2.
17. Muigua, Kariuki. "Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya." *The Law Society of Kenya Journal* 15, no. 1 (2019): 1-42.
18. Mkutu, Kennedy, Tessa Mkutu, Martin Marani, and Augustine Lokwang Ekitela. "New oil developments in a remote area: Environmental justice and participation in Turkana, Kenya." *The Journal of Environment & Development* 28, no. 3 (2019): 223-252.
19. Nkhata AB, Breen C and Mosimane AC „Engaging common property theory: implications for benefit-sharing research in developing countries“ (2012) 6 *International Journal of the Commons*.
20. Odhiambo, Felix O. "Placing the Kenyan law on benefit-sharing within its proper social, economic and political context: the case study of Turkana oil resources." PhD diss., University of Nairobi, 2015.
21. Schilling, Janpeter, Raphael Locham, and Jürgen Scheffran. "A local to global perspective on oil and wind exploitation, resource governance and conflict in Northern Kenya." *Conflict, Security & Development* 18, no. 6 (2018): 571-600.
22. Wright Laura & White Perry ‘Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements’ *The International Indigenous Policy Journal* Volume 3 Issue 2 2012

5.3 Reports and Articles

1. Achar, Peter O. "Sources, Governance Structure and Development Contribution Of Sovereign Wealth Funds: Application Of International Experiences To Kenya." PhD diss., University of Nairobi, 2016.
2. Ahmad & Raju Singh, IMF Working Paper; *Political Economy of Oil-Revenue Sharing in a developing Country: Illustrations from Nigeria*, January 2003.
3. Agwara JO, „Resource Curse in Nigeria: Perception and Challenges“, (International Policy Fellowship Program Open Society Institute, December 2007).
4. Asume IO, „Oil and Gas Revenues and Development Challenges for the Niger Delta and Nigeria“ (Expert Group Meeting on The Use of Non-Renewable Resource Revenues for Sustainable Local Development Organized by the UN Department of Economic and Social Affairs UN Headquarters, New York, 2007).

5. Chelagat, Grace J. "Kenya's Legal and Institutional Framework on Benefit Sharing From Oil Exploitation: the Case Study of Turkana County." PhD diss., University of Nairobi, 2015.
6. Chloe Parker, 'Benefit Sharing Mechanisms (2012) OECD water resources and sanitation set.
7. Christabel Nyamwaya, 'Benefits sharing on Extractive Natural Resources with Society in Kenya' (2013) Kenya National Human Rights Commission.
8. Dougherty, Michael L., A Policy Framework for New Mineral Economies: Lessons from Botswana (October 9, 2011). Research Paper Number C1-2011-2, Research Paper Series, Institute for Environmental Diplomacy and Security, University of Vermont. 1-28.
9. Ehtisham Ahmad & Eric Mottu, IMF Working Paper, *Oil Revenue Assignments; Country Experiences and issues*, November 2002.
10. Extractive Policy Group, *Revenue Sharing and Management in Kenya's Petroleum Sector*, 4th-5th April 2010.
11. Fischer C, „International Experience with Benefit-Sharing Instruments for Extractive Resources“ (Resources for the Future, 2007).
12. Hubert Don, '*Potential Petroleum Revenues for the Government of Kenya*'; Implications of the Proposed 2015 Model Production Sharing Contract.
13. IBM, „Meeting the challenges of today“s oil and gas exploration and production industry: Leveraging innovative technology to improve production and lower costs“ (IBM Global Services, 2004).
14. Institute for Human Rights and Business (IHRB) '*Human Rights in Kenya's Extractive Sector: Exploring the Terrain*' December 2016 Available at [https://www.ihrb.org/uploads/reports/IHRB%2C Human Rights in Kenyas Extractive Sector - Exploring the Terrain%2C Dec 2016.pdf](https://www.ihrb.org/uploads/reports/IHRB%2C%20Human%20Rights%20in%20Kenya's%20Extractive%20Sector%20-%20Exploring%20the%20Terrain%20Dec%202016.pdf) >
15. IPIECA, „Local Content Strategy: A guidance document for the oil and gas industry“, (IPIECA) 2011.
16. Johannes, Eliza & Zulu (2014) '*Oil discovery in Turkana County, Kenya: A source of conflict or development*, African Geographical.
17. Kariuki Muigua, 'Utilizing Africa's Natural Resources to Fight Poverty'(2014).

18. Ndirangu, Lemmy Kamau. "Benefit sharing in Kenya's extractive industry: a look into what entails fair and equitable sharing of natural resources." (2018).
19. Nyamwaya C, Benefit-sharing on Extractive Natural Resources with Society in Kenya by Kenya Human Rights Commission. A Research for and on Behalf of Friedrich Ebert Stiftung, Nairobi, Kenya. November 2013.
20. Pham Thu Thuy et al, A Working Paper on Approaches to benefit-sharing: A preliminary comparative analysis of 13 REDD+ countries (Center for International Forestry Research, 2013).
21. Report by the African Development Bank, Maximizing the Benefits from Africa's Oil and Gas Resources (African Development Bank, 29 July 2009).
22. The Early Oil Pilot Scheme; The sticking issues Institute for Law and Environmental Governance.
23. World Bank Group, Sovereign Wealth Funds and Long-Term Development Finance: Risks and Opportunities (World Bank Group, Washington, 2014).

5.4 Internet Sources

- a) Anastasia Grinberg, '*Secrecy in oil deals breeds suspicion*', Daily Nation (Nairobi April 15 2018) < <https://www.nation.co.ke/news/Secrecy-in-oil-deals-breeds-suspicion/1056-4393788-k2glm3/index.html> > accessed on 24th January 2019.
- b) Akumu W, Tullow Oils woes in Turkana expose the soft underbelly of East Africa" in The East African (Nairobi, 9 November 2013).
- c) Andrew Baur, "Kenya Proposes Transparent but Risky, New Sovereign Wealth Fund Bill (March 2019) National Resource Governance Institute, <<https://resourcegovernance.org/blog/kenya-proposes-transparent-risky-new-sovereign-wealth-fund> > accessed on 20th October 2019.
- d) Cyril Obi, Oil and Conflict in Nigeria's Niger Delta region: Between the barrel and the trigger <<https://www.sciencedirect.com/science/article/pii/S2214790X14000173> > accessed on 4th January 2019.
- e) Gachiri John, Tullow puts Turkana oil at a billion barrels after new find Business Daily, (Nairobi January 15, 2014) < <http://www.businessdailyafrica.com/Corporate->

[News/Tullow-puts-Turkana-oil-at-a-billion-barrels-after-new-find/-/539550/2147558/-/bvbu4ez/-/index.html](https://www.bbc.com/news/health-5395502147558/bvbu4ez/-/index.html) >accessed 16th May 2019.

- f) J.P Afam Ifedi, J Ndumbe Anyu “Blood oil, ethnicity and Conflict in the Niger Delta region of Nigeria < <https://muse.jhu.edu/article/430055/pdf> >accessed on 3rd January 2019.
- g) Kennedy Senelwa, “Row brewing over how oil revenue from Turkana basin will be shared” *Business Daily* (Nairobi January 3, 2018) <<https://www.theeastafrican.co.ke/business/Row-brewing-over-how-Turkana-oil-revenue-will-be-shared/2560-3505470-sqvlpd/index.html> >accessed on 22nd February 2019.
- h) Moses Wachira, ‘Kenya to wait longer for the oil trillions’ *The Standard* (Nairobi October 1 2017) < <https://www.standardmedia.co.ke/article/2001256097/kenya-to-wait-longer-for-the-oil-trillions> >accessed on 29th January 2019.
- i) Peter Kiragu ‘Locals storm Tullow Oil fields in Turkana, *The Star* (Nairobi, April 28 2018) <https://www.the-star.co.ke/news/2013/10/28/locals-storm-tullow-oil-fields-in-turkana_c849534 > accessed on 30th January 2019.
- j) Terry Hallmark, *Oil and Violence in the Niger Delta isn’t talked much, but it has a global impact* <<https://www.forbes.com/sites/uhenergy/2017/02/13/oil-and-violence-in-the-niger-delta-isnt-talked-about-much-but-it-has-a-global-impact/#5e0cd1734dc6> >

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