

**Enhancing Benefits from Natural Resources Exploitation:
An Appraisal of the Natural Resources (Classes of
Transaction Subject to Ratification by Parliament) Act, 2016**

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Abstract

This paper critically discusses the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016. It offers some recommendations on how this legislation can be used in enhancing the benefits that accrue to communities from exploitation of natural resources in their regions. The paper also discusses some of the loopholes that must be addressed by the policy makers and other stakeholders in order to realise the full benefits of the Act.

1. Introduction

The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*¹ was enacted in 2016 to give effect to Article 71 of the Constitution of Kenya and for connected purposes.² Article 71 of the Constitution provides that a transaction is subject to ratification by Parliament if it—involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation³ of any natural resource of Kenya; and is entered into on or after the effective date.⁴ This Act was thus enacted in 2016 in line with the constitutional requirement that Parliament should enact legislation providing for the classes of transactions subject to ratification under clause (1).⁵ This provision is similar to the one found in the Constitution of Ghana⁶ which was hailed as a step forward in safeguarding the country's resources against arbitrary grant of concessions to foreign companies by the country's

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¹ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, No. 41 of 2016, Laws of Kenya.

² Preamble.

³ Notably, section 2 of the Act interprets "**exploitation**" to mean an activity that confers or is aimed at conferring a benefit on the beneficiary of the grant of the concession or right but does not include an activity that is exploratory in nature.

⁴ Article 71(1), Constitution of Kenya 2010.

⁵ Article 71(2), Constitution of Kenya 2010.

⁶ Article 268.

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leadership including chiefs especially during the colonial period.⁷ This may not be very far from the reality in Kenya especially in such cases as the Lake Magadi soda ash mining concessions and the infamous Maasai community land disinheritance by the colonial masters.⁸ Kenya has also suffered other instances of skewed contracts whose resultant activities have been characterised by past reported and unreported cases of non-disclosure and non-declaration of income by the mining companies in the country.⁹ Hence, the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016* was a welcome move by the Parliament of Kenya.

This paper offers a critical appraisal of the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act* with a view to proposing some recommendations on how the Act can be used in ensuring that the natural resources are exploited and used in a way that benefits communities and the country at large. "Transaction" is used in the Act to mean an arrangement or other dealing between a grantor and a beneficiary under which the beneficiary lawfully acquires a concession or a right to exploit a natural resource of Kenya.¹⁰ While this term may be used to refer to transactions involving *any person* as envisaged in the objective of the Act and Article 71 of the Constitution, this paper will mainly concentrate on transactions involving government or its representatives and investors, both foreign and local. This is due to the fact that the Constitution of Kenya vests all minerals and mineral oils as defined by law in the government of Kenya.¹¹

2. Overview of the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016

This applies to any transaction entered into on or after the effective date which, under Article 71 of the Constitution, is subject to ratification by Parliament on account of the fact that the transaction- involves the grant of a right or concession by or on behalf of any person to another

⁷ Wouters, J., Ninio, A., Doherty, T., & Cisse', H. (Eds.), *The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*, The World Bank, 2015, p. 158.

⁸ Kamau, J., "Magadi saga exposes the ugly side of capitalism," *Daily Nation*, Sunday April 21 2019. Available at <https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html> [29/8/2019].

⁹ Sanga, B., "Auditor General reveals how mining companies under-declare tax dues," 25th Aug 2016. Available at <https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues> [Accessed on 9/7/2019].

¹⁰ Sec. 2, *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*.

¹¹ Constitution of Kenya 2010, Article 62 (1) (f) (3).

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person for the exploitation of a natural resource of Kenya; and falls within the class of transactions designated as subject to ratification by section 4 of this Act.¹²

The Act also applies to any transaction involving the - national government, county government, state organ and all county government entities; and grant of a right or a concession by a private person in cases in which such transaction is required by this Act to be ratified by Parliament.¹³

This clarification is important to reign in on county governments which, in an attempt to diversify their sources of income and possibly power struggles, may enter into exploitation agreements with foreigners or even worse, frustrate any investors with operations in their counties. The County governments must however be involved in the process. For instance, in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*¹⁴, the Court affirmed that an issue involving prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the County Government – even if the primary activity is assigned to the National Government in our scheme of devolution.¹⁵ The Court went on to comment that this is the logical consequence of the cooperative and collaborative two-tier governance system imposed by our Constitution. This is the future prescribed by the Constitution.¹⁶ The Court expressed hope that the National Government will involve the County Governments, as repositories of local priorities and preferences, in public decisions that would affect many of the county citizens, as the Constitutional imprimatur.¹⁷

It can therefore be said that the Parliament is to come in later on in the process after the due process as per the Constitution and other statutory requirements has been complied with.

¹² Sec. 3(1), *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*.

¹³ *Ibid*, sec. 3(2).

¹⁴ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

¹⁵ *Ibid*, para. 104.

¹⁶ *Ibid*, para. 104.

¹⁷ *Ibid*, para. 104.

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Section 4 of the Act provides that the classes of transactions set out in the schedule are subject to ratification by Parliament pursuant to Article 71 of the Constitution.¹⁸ The Act spells out the transactions relating to natural resources, which are subject to the Act.¹⁹

The Act lists the transactions requiring ratification by Parliament as those including the following resources: Crude Oil and Natural Gas-Authorization to extract crude oil or natural gas; Minerals-Mineral agreements with a threshold of US\$ 500 million; Water resources-the extraction of sea water within the territorial sea for private commercial use-Underground water resources-the extraction of underground steam within a water conservation or other water resource protected area; Wildlife-extraction of oil, gas, and minerals within a wildlife conservation area or other wildlife protected area; Wildlife-Export and re-export of endangered wildlife species; Wildlife-Excision or change of boundaries of gazetted national park or wildlife protection area; Forests-Long term concession of a gazetted forest resource; Forests-Excision or change of boundaries of gazetted public forests or nature reserves; and any other transaction subject to ratification under an Act of Parliament.²⁰

While this list does not include all the natural resources as envisaged under the Constitution of Kenya²¹ the listed resources are some of the most emotive natural resources as far as economic exploitation of resources is concerned. These resources are so important that the Indian Supreme Court in *M.C. Mehta v Kamal Nath and others*²² affirmed the need for state involvement in their management through emphasizing the essence of the doctrine of public trust in the following terms;

“The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters, and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone

¹⁸ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, sec. 4 (1).

¹⁹ Schedule [Section 4(1), 4(2)(e)].

²⁰ Schedule [Section 4(1), 4(2) (e)].

²¹ Article 260: “natural resources” means the physical non-human factors and components, whether renewable or non-renewable, including--

(a) sunlight;
(b) surface and groundwater;
(c) forests, biodiversity and genetic resources; and
(d) rocks, minerals, fossil fuels and other sources of energy.

²² *M.C.Mehta v Kamal Nath and others*, Writ Petition [c] No. 182 of 1996(Supreme Court of India)-Decided on December 13, 1996.

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irrespective of the status in life. The doctrine enjoins upon government the duty to protect the resources subject to the trust for the enjoyment of the general public rather than to permit their use for private or commercial purposes”

The need for ratification of agreements touching on exploitation of some of these resources thus becomes even more critical.

<i>Resource</i>	<i>Transaction requiring Parliament Ratification</i>
Crude Oil and Natural Gas	Authorization to extract crude oil or natural gas.
Minerals	Mineral agreements with a threshold of US\$ 500 million.
Water resources	The extraction of sea water within the territorial sea for private commercial use.
Underground water resources	The extraction of underground steam within a water conservation or other water resource protected area.
Wildlife	Extraction of oil, gas, and minerals within a wildlife conservation area or other wildlife protected area.
Wildlife	Export and re-export of endangered wildlife species.
Wildlife	Excision or change of boundaries of gazetted national park or wildlife protection area.
Forests	Long term concession of a gazetted forest resource.
Forests	Excision or change of boundaries of gazetted public forests or nature reserves
	Any other transaction subject to ratification under an Act of Parliament.

Fig. 1. Source: *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, Schedule [Section 4(1), 4(2)(e)].*

The Act however exempts some transactions from ratification by Parliament. It provides that notwithstanding subsection (1), certain classes of transactions shall not be subject to ratification by Parliament—(a) subject to paragraph (e), the grant of a concession or right to exploit a natural resource through a permit, licence or other authorization issued in accordance with the requirements of national or county government legislation; (b) the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract; (c) the grant of a concession or right to exploit a natural resource for scientific research, educational or other non-commercial purposes unless the exploitation involves taking the natural resource or an portion of it outside of the jurisdiction of Kenya; (d) the exploitation of a natural resource by a

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Kenyan national for subsistence purposes in circumstances in which the law does not require that a permit, licence or other authorization be obtained; and (e) the exploitation of a natural resource in quantities falling below a threshold prescribed by the Cabinet Secretary by notice in the Gazette or below a threshold specified in the Schedule to the Act.²³

While this exemption is well meaning, there is potential for abuse or confusion. For instance, where the Act exempts the grant of a concession or right to exploit a natural resource through a permit, licence or other authorization issued in accordance with the requirements of national or county government legislation from such ratification, what measures will be put in place to determine the seriousness of the transaction in question and the ramifications of such exemption? This, coupled with the exemption of the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract, are both likely to be used for personal gains especially in light of the rampant corruption in the country's governance structures. Would Parliament be compromised to classify a particular transaction as qualifying under these two exemptions for purposes of bypassing the Act's provisions? Again, how will grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract be qualified against the constitutional provisions that vest all minerals and mineral oils as defined by law in the government of Kenya?²⁴ How are the private persons to either benefit from the exploitation or the ones to grant the concession to be determined to prevent abuse? Is it possible for a private person to use the Parliament through insider lobbying to access or get a particular transaction for exploitation of a particular resource? These are some of the questions that may arise in light of the listed exemptions.

Regarding the process of submission, the Act requires that within fourteen days after entering into a transaction, a beneficiary should submit an agreement or other instrument evidencing the transaction, accompanied by a memorandum in the prescribed form, to the Cabinet Secretary responsible for the natural resource that is the subject of the transaction.²⁵ After receipt of the agreement but within seven days of receiving the agreement and the memorandum, the Cabinet Secretary responsible for the natural resource that is the subject of the transaction should submit

²³ Ibid, sec. 4 (2).

²⁴ Constitution of Kenya 2010, Article 62 (1) (f) (3).

²⁵ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 5.

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the agreement and memorandum to Parliament for ratification in terms of Article 71 of the Constitution.²⁶

A transaction which under this Act, is subject to ratification by Parliament shall only be effective once it is ratified, and where Parliament has declined to ratify any transaction under this Act, the transaction shall be null and void.²⁷

The Act spells out certain relevant considerations in deciding whether or not to ratify an agreement: the applicable Government policy; recommendations of the relevant regulatory agency; comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located; adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement; the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right the applicable law has been complied with.²⁸

These considerations, if fully upheld may be useful in giving the ratification process some credence. However, this is based on the assumption that Parliament is above reproach as far as following due process and putting into consideration the general public's interests is concerned.

The Act also spells out the process of approval of an agreement by the Parliament which shall commence in the National Assembly.²⁹ Notably, apart from the fact that Parliament includes both the National Assembly and the Senate, the participation of Senate in the ratification process serves another important role-securing the meaningful participation of county representatives in making the important decision of ratification.

The Cabinet Secretary is obligated to establish and maintain an accessible central register of agreements relating to natural resources and other transactions which have been ratified as provided under this Act.³⁰ This is important as it guarantees the general public's constitutional right of access to information.³¹ It may not be clear whether Parliament has ratified any

²⁶ Ibid, sec. 6.

²⁷ Ibid, sec. 7.

²⁸ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 9.

²⁹ Ibid, secs. 10 & 11.

³⁰ Ibid, sec. 12(1).

³¹ Constitution of Kenya, Article 35; see also Access to Information Act, No. 31 of 2016, Laws of Kenya.

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transactions yet but what is certain is that currently there have not been any published summary of the ratified agreements as required by this Act. To this end, the public is therefore not aware of the status of not only the implementation of this Act but also the number of ratified agreements, if any. The Cabinet Secretary responsible needs to take this role up and ensure timely updates of the register and publication of the annual summary reports.

Notably, the Cabinet Secretary responsible for the transaction that is subject to ratification may, pursuant to Article 35 of the Constitution, grant a request that the agreement or portions of it ought not to be publicly disclosed on account of commercial confidentiality, national security or other public interest considerations.³² While this may be a useful safeguard for purposes of commercial confidentiality, there is need for Parliament and other stakeholders to ensure that the same is not abused to hide or deny the public access to useful information.

Arguably, any such non-disclosure should also be done in line with the mining regulations as envisaged under the Mining Act 2016 including but not limited to: Regulations under the Act: *Mining (Dealings in Minerals) Regulations, 2017; Mining (Licence and Permit) Regulations, 2017; Mining (Work Programmes and Exploration Reports) Guidelines, 2017; Mining (State Participation) Regulations, 2017; Mining (Use of Local Goods and Services) Regulations, 2017; Mining (Employment and Training) Regulations, 2017; and Mining (Use Of Assets) Regulations, 2017*. It is assumed that these regulations and other relevant statutory requirements are to be complied with before the agreements reach the ratification stage in order to avoid any foul play as far as due process is concerned.

These Regulations, among others under different statutes dealing with natural resources exploitation³³, are meant to ensure that the benefits flowing from such exploitation get to benefit the communities and the economy in general. Notably, there are still complaints from communities about either lack of involvement or lack of direct benefits such as employment

³² *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 13 (1).

³³ For instance, see *Mining Act, No. 12 of 2016, Petroleum Act, No. 2 of 2019, Forests Management and Conservation Act, No. 34 of 2016, Water Act, No. 43 of 2016*.

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benefits.³⁴ They have been feeling marginalised and sometimes outrightly ignored as far as benefit sharing is concerned.³⁵

The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016* was thus meant to include the Parliament in ensuring that natural resources are exploited in a responsible manner that benefits concerned communities and the people of Kenya in general.

3. Making Natural Resources Work for the People: Challenges and Prospects

It is noteworthy that the Act outlines some of the relevant considerations in deciding whether or not to ratify an agreement as including: comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located; adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement; the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right the applicable law has been complied with.³⁶

Apart from these considerations, it is worth pointing out that the Constitution has also laid out some national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³⁷ The relevant national values and principles of governance include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-

³⁴ Cordaid, "Oil Exploration In Kenya: Success Requires Consultation," *Assessment Of Community Perceptions Of Oil Exploration In Turkana County, Kenya*, Report, August, 2019; Etyang, H., "No oil will leave Turkana without security and jobs, protesters say," *The Star*, 27 June, 2018. Available at <https://www.the-star.co.ke/news/2018-06-27-no-oil-will-leave-turkana-without-security-and-jobs-protesters-say/> [29/8/2019].

³⁵ See generally, Schilling, J., Locham, R., & Scheffran, J., "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; see also Mwakio, P., "Mvurya: Public participation in mineral resource exploitation mandatory," *Standard Digital*, 22nd May, 2019. Available at <https://www.standardmedia.co.ke/business/article/2001326660/mvurya-public-participation-in-mineral-resource-exploitation-mandatory> [Accessed on 29/8/2019].

³⁶ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 9.

³⁷ Article 10(1), Constitution of Kenya 2010.

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discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.³⁸

It is noteworthy that natural resources exploitation and all the related activities are meant to benefit the country as well as communities that live in the areas where these resources are to be found. The Constitution of Kenya 2010 makes provisions on “natural resources” which means the physical non-human factors and components, whether renewable or non-renewable, including—*rocks, minerals, fossil fuels and other sources of energy*.³⁹ While the Act may not require ratification of all the transactions involving exploitation of different resources, it is important to note that there are other legal provisions that seek to safeguard the interests of the country and the general public as far as benefit sharing is concerned and should therefore be upheld in entering these agreements.

While the Act is well meaning in its mandate, there are notably some earlier exploitation agreements that were entered into before the enactment of the Act and were not revised in line with the Act.⁴⁰ The Act specifically provides that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.⁴¹

The implication of this provision is that there may have some important transactions that greatly affect communities but do not get the chance to undergo the ratification process. As a result, the communities feel sidelined as far as decision-making is concerned and the environment also gets to suffer. While there are notably other statutory provisions in place to take care of some of these issues, there is the risk of complacency in some government organs and agencies which may mean that due process may not have been followed.

There are still some complaints from some Kenyan communities about how natural resources exploitation activities within their localities are carried out and the lack of inclusion in decision-

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

³⁹ See Article 260; and Chapter Five.

⁴⁰ For instance, the agreements on exploitation of the oil and gas in Turkana; Titanium mining in Kwale, among others.

⁴¹ Sec. 16, *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*.

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making and benefit sharing.⁴² For instance, the oil and gas mining activities in the Turkana region have been facing serious challenges from the locals who have been complaining about inadequate consultations, inadequate benefits and a general feeling of marginalization from the Government and the contractors.⁴³ There have also been complaints from other natural resources exploitation about environmental degradation which directly affects the livelihoods of the communities living with such areas.⁴⁴

There is scarce information on the existing ratifications since 2016 because, although the Act provides that the Cabinet Secretary shall establish and maintain a central register of agreements relating to natural resources and other transactions which have been ratified as per the Act as well as ensuring that on an annual basis, they publish a report on the summary of the transactions submitted under this Act and the status of ratification of transactions, there are no publicly available reports or published summary of such reports. The effect of such laxity on the part of the Ministry is violation of the right to information which is useful for public participation in decision-making processes and any potential pursuit of their other rights in case of perceived violation.

Environmental laws and regulations and other laws that govern natural resources exploitation are meant to ensure that due process and other legal requirements are met but there are still instances where exploitation agreements are still challenged in courts and other forums for

⁴² Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation*, Tuesday February 12 2013. Available at <https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html> [Accessed on 28/8/2019].

⁴³ Johannes, E. M., Zulu, L. C., & Kalipeni, E., "Oil discovery in Turkana County, Kenya: a source of conflict or development?" *African Geographical Review* 34, no. 2 (2015): 142-164; Mkutu Agade, K., "'Ungoverned Space' and the Oil Find in Turkana, Kenya," *The Round Table* 103, no. 5 (2014): 497-515; Enns, C., & Bersaglio, B., "Pastoralism in the time of oil: Youth perspectives on the oil industry and the future of pastoralism in Turkana, Kenya." *The Extractive Industries and Society* 3, no. 1 (2016): 160-170; Enns, C., "Experiments in governance and citizenship in Kenya's resource frontier," PhD diss., University of Waterloo, 2016. Available at <https://core.ac.uk/download/pdf/144149828.pdf>; See also Parliament of Kenya, the Senate, *The Hansard*, Wednesday, 27th March, 2019, *Petitions: Iron Ore Mining In Kishushe Area, Taita-Taveta County*, available at <http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2C%2027th%20March%2C%202019.pdf> [Accessed on 29/8/2019].

⁴⁴ Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County: HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti*, September, 2017 Available at <http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf> [Accessed on 28/8/2019]; See also Schilling, J., Locham, R., Weinzierl, T., Vivekananda, J., & Scheffran, J., "The nexus of oil, conflict, and climate change vulnerability of pastoral communities in northwest Kenya," *Earth System Dynamics* 6, no. 2 (2015): 703-717.

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alleged failure to abide by the law.⁴⁵ Parliament, through the ratification process can also play a big role in ensuring that in granting the concession or right the applicable law has been complied with. However, as already mentioned elsewhere in this paper, this is based on the assumption and hope that both Houses of Parliament are beyond reproach as far as any potential influence by outside forces seeking to compromise them is concerned.

In order to bring the existing contracts or agreements especially in the extractives industry in line with the law on ratification of agreements, there may be a need to consider incorporating periodic contract review mechanisms. Such reviews would also be in line with international best practices, such as the principles of Extractive Industries Transparency Initiative (EITI)⁴⁶ which set the global standard to promote the open and accountable management of oil, gas and mineral resources.⁴⁷ Through reviews, there may be demonstrated accountability and transparency which is important for the contractors, the government and the communities at large.⁴⁸ Periodic contract review mechanisms, which are provisions in contracts that formally require parties to meet at particular intervals to review the terms of the contract, are mechanisms that may facilitate the process of negotiating contractual changes to accommodate changing circumstances over the term of extractive industries contracts.⁴⁹ Some countries such as Tanzania have sought to renegotiate their extractives exploitation contracts where it was deemed necessary. The Tanzanian government enacted laws that introduced changes in the exploitation of natural resources in the country's mining sector to ensure that Tanzania's natural resources are exploited

⁴⁵ See Parliament of Kenya, the Senate, *The Hansard*, Wednesday, 27th March, 2019, *Petitions: Iron Ore Mining In Kishushe Area, Taita-Taveta County*, available at <http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2C%2027th%20March%2C%202019.pdf> [Accessed on 29/8/2019]; See also *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); *Okiya Omtatah Okioti v Kenya Power and Lighting Company & 10 others* [2018] eKLR, Petition No. 14 of 2017.

⁴⁶ See Muigua, K., "Promoting Open and Accountable Management of Extractives in Kenya: Implementing the Extractives Industries Transparency Initiative," August, 2019. Available at <http://kmco.co.ke/wp-content/uploads/2019/08/Implementing-the-Extractives-Industries-Transparency-Initiative-in-Kenya-Kariuki-Muigua-15th-August-2019.pdf> [Accessed on 30/8/2019].

⁴⁷ Extractives Industries Transparency Initiative, "Who we are," available at <https://eiti.org/who-we-are> [Accessed on 30/8/2019].

⁴⁸ Haufler, V., "Disclosure as governance: The extractive industries transparency initiative and resource management in the developing world." *Global Environmental Politics*, vol.10, no. 3 (2010): 53-73; See also African Union, "Africa mining vision," *AU, Addis Ababa* (2009).

⁴⁹ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *Journal of Sustainable Development Law and Policy (The)*, Vol.7, no. 1 (2016): 116-136, p. 116; Lax, D. A., & Sebenius, J. K., *Insecure contracts and resource development*, Division of Research, Graduate School of Business Administration, Harvard University, 1981.

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to benefit the citizens.⁵⁰ Some of the laws such as the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017⁵¹ are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.⁵² The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 is meant to give powers to parliament to direct the Government to re-negotiate and rectify any term that seem to bear questionable circumstances in the contracts.

It has been observed that various commentators have regarded renegotiation of existing mining agreements as justified particularly:-when rigid contractual terms provide for an excessive duration, secured against any legislative change; when the agreement reflects the one-sided distribution of bargaining power and ability in favor of the transnational corporations; when circumstances have changed considerably so that the agreement needs adjustment to existing usages; and, when the agreement hampers severely the host country's freedom to employ its natural resources as a lever for effective economic development.⁵³

The provision for renegotiation in Tanzania is a notable departure from Kenya's position which is that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.⁵⁴ The question that arises is whether, where such a transaction is later rendered unconscionable due to the prevailing circumstances, is there any legal framework to facilitate renegotiation as is the case in Tanzania.

⁵⁰ "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 28/8/2019].

⁵¹ Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No.6 of 2017, Laws of Tanzania. Available at <https://tanzlii.org/tz/legislation/act/2017/6-0>

⁵² "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 28/8/2019].

⁵³ Walde, T.W., "Revision of Transnational Investment Agreements in the Natural Resource Industries," *University of Miami Inter-American Law Review*, Vol.10, no. 2 (1978): 265, at p. 267; Kuruk, Paul. "Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," *Michigan Journal of International Law* 13, no. 1 (1991): 43-82.

⁵⁴ Sec. 16, *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016.

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Notably, where the transaction in question fails to adhere to the requirements under the ratification process, there is lacking in place a procedure to ensure that the same is reviewed and/or renegotiated under this Act. As the balance of risks and benefits changes, parties request modifications to the terms and conditions of the investment. Accordingly, mechanisms are needed in these agreements to smoothen the process of dealing with the inevitability of changing circumstances.⁵⁵ Contractually provided periodic reviews give the parties an opportunity to negotiate and readjust contractual arrangements.⁵⁶ While statutory annual reporting requirements under different laws may seem like a cure for this, it is worth pointing out that there is hardly any mechanism in place to ensure that such reporting is done, and where the Cabinet Secretary in question fails to follow up or raise queries on such reporting, the lack or failure of contractors to report will most likely go unreported and unnoticed.⁵⁷ It may thus be necessary to consider going the Tanzanian way; putting in place a separate law to govern such matters. It has rightly been pointed out that provided that the parties take advantage of the opportunity to renegotiate terms, the contract terms and conditions can be readjusted before the parties are so desperate and frustrated that the investor decides to stop work or the Government decides to terminate permits and concessions.⁵⁸

4. Conclusion

The Constitution of Kenya 2010 calls for concerted efforts of all persons in governance matters including in natural resources governance. This is well captured under Article 10 thereof which spells out the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁵⁹ The values and principles of governance include, inter alia: patriotism, the rule of

⁵⁵ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *op cit.*, p. 117; Moran, T.H., "Mining companies, economic nationalism, and third world development in the 1990s," *Mineral Wealth and Economic Development, Washington, DC, Resources for the Future* (1992): 19-38.

⁵⁶ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *op cit.*, p. 117; Haufler, V., "Disclosure as governance: The extractive industries transparency initiative and resource management in the developing world," *Global Environmental Politics* 10, no. 3 (2010): 53-73.

⁵⁷ Stureson, A., & Zobel, T., "The Extractive Industries Transparency Initiative (EITI) in Uganda: who will take the lead when the government falters?" *The Extractive Industries and Society*, Vol.2, no. 1 (2015): 33-45.

⁵⁸ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *op cit.*, p. 117; Smith, D. N., & Wells, L. T., "Conflict avoidance and concession agreements," *Harvard International Law Journal* 17 (1976): 51.

⁵⁹ Article 10(1), Constitution of Kenya 2010.

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law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.⁶⁰ Sound environmental governance and natural resources ought to consider these values and principles.⁶¹ The Parliament of Kenya is afforded an opportunity to determine how natural resources exploitation is carried out through ratification of agreements. It is important that the Parliament not only considers the ability of the contractor in question to deliver but must also consider the country's development policies and must also remember the affected communities in certain areas with a view to ensuring that the resources in question get to benefit them especially in light of the fact that they may bear the brunt of most of the adverse environmental degradation. A good example would be the people living in Turkana region where oil and gas exploration and exploitation activities are ongoing. The people living in Mui Basin region will also bear the brunt of the adverse effects of coal mining.⁶² Laws are meant to protect the interests of the people and the Parliament must as such ensure that any ratification of agreements that they carry out are geared towards this. Existing agreements should also be reviewed accordingly to ensure that the considerations set out under existing laws and specifically the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016 which was the subject of this paper. An effective national Parliament reflects the political will of the leadership in ensuring that the country's natural resources are not exploited at the expense of the country's national development agenda or with the communities in the affected areas bearing the brunt of the adverse effects of such exploitation.

It is important that the policy and legal framework and all the relevant actors work towards enhancing benefits from natural resources exploitation. Natural resources exploitation should contribute to the realisation of the sustainable development goals.⁶³

⁶⁰ Article 10(2), Constitution of Kenya 2010.

⁶¹ Prno, J., & Slocombe, D. S., "Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories," *Resources policy*, Vol.37, no. 3 (2012): 346-357.

⁶² Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

⁶³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

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