

**REFLECTIONS ON MANAGING NATURAL
RESOURCES AND EQUITABLE BENEFIT SHARING IN
KENYA**

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Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya
**REFLECTIONS ON MANAGING NATURAL RESOURCES AND
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Abstract

This paper explores the concept of benefit sharing in natural resources exploitation in Kenya. The author argues that benefit sharing should be interpreted in its various forms, namely monetary and non-monetary since a narrower conception is likely to create confusion, potential conflict between investors and local communities as well as diminished hopes of improving the livelihoods of communities. The paper highlights the international best practices in the area of benefits sharing in natural resources exploitation and briefly looks at Nigeria and Ghana to draw lessons on the likely effects of mismanagement of natural resources. The author gives tangible suggestions on some of the ways that Kenya can ensure that communities reap maximum benefits from exploitation of natural resources, including the recently discovered oil in the Northern part of the country.

1. INTRODUCTION

The role of government in establishing a framework to manage and invest revenues derived from oil, gas, and mining projects is crucial to ensure that the sector contributes positively to sustainable development.¹ It has also been observed that most private-sector investors realize that

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¹ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 11. Available at

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projects that are good for the host country and communities, and whose benefits are perceived to be shared reasonably, are less likely to face disruption, renegotiation, or even expropriation.²

Effective Natural Resources Management (NRM) contemplates the use, access of resources to preserve and conserve for the good of all generations.³ The NRM role is primarily bestowed upon the state but there is a duty to cooperate that lies with everyone to ensure that there is sound use of the natural resource.⁴ It is also noteworthy that whereas some natural resources are renewable, others are not. Thus, it is necessary to take care of the natural resources to ensure that the benefits that accrue undoubtedly serve the present and the generations to come.⁵ The issue of benefit sharing has been a great challenge as far as natural resource exploitation is concerned as many factors hinder communities from achieving an equitable share of the benefits that accrue from natural resource exploitation. This has largely been attributed to improper and ineffective management.⁶

This paper reflects on equitable benefit sharing in the context of the emerging extractives industry in Kenya. The author briefly discusses ways in which communities can benefit while drawing lessons from other countries on how best to avoid the ‘resource curse’ phenomenon. The discourse thus goes beyond reliance on extractive industries to educate communities on how best they can overcome the perennial problems of economic underdevelopment and the

http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 26 April 2016].

² *Ibid.*

³ Child, B., *et al*, *Zimbabwe’s CAMPFIRE Programme: Natural Resource Management by the People*. (1997) IUCN-ROSA Environmental Issues Series No. 2

⁴ See Article 69, Constitution of Kenya 2010.

⁵ See United Nations, *World Economic and Social Survey 2013: Sustainable Development Challenges*, E/2013/50/Rev. 1, ST/ESA/344. Available at

<https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [Accessed on 22/05/2016]; See also Kibert, C.J., ‘The Ethics of Sustainability,’ available at <http://rio20.net/wp-content/uploads/2012/01/Ethics-of-Sustainability-Textbook.pdf> [Accessed on 22 May 2016].

⁶ Ochola, O.W., *et al* (eds), *Managing Natural Resources for Development in Africa: A resource Book*. IDRC, 2010. Available at <http://www.gbv.de/dms/zbw/646005146.pdf> [Accessed on 30 May/2016].

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consequent poverty. The paper also highlights some of the principles that may need to be entrenched within the legal and institutional framework to promote inclusive and participatory decision-making in the benefit sharing framework.

2. EXTRACTIVE INDUSTRIES RESOURCES: THE NEW CANAAN FOR KENYA?

In the year 2012, the then Kenyan President, Hon. Mwai Kibaki announced the discovery of oil in Turkana County.⁷ Tullow Oil (London) and African Oil (Vancouver) evidenced the presence of enough crude oil viable for both the local and the international markets.⁸ The three wells discovered were estimated to hold at least 250 million barrels.⁹ This announcement has led to a change in perception of Turkana County which may have previously been considered as insignificant in its contribution towards national growth.

Expanding extractive industries, particularly in sub-Saharan Africa, is characterized by increasing levels of political, social, technical and environmental risk.¹⁰ Changes brought about by extractive investment can have negative social impacts, such as rapid urban growth, physical and economic displacement of communities, weakening of traditional social structures, new conflicts, and even impoverishment.¹¹ Sudan, the Democratic Republic of Congo (DRC) and Nigeria are just but few examples of African states that have experienced internal armed conflict

⁷ The Turkana County is geographically located in the North Western Kenya area which is predominantly a pastoralist populated area. Turkana County borders West Pokot County, Marsabit County, Baringo County in the South, South East and East respectively. The county also borders South Sudan and Uganda.

⁸ Michira, M., 'Kenya would be among cheapest world oil producers, Tullow says' *The Standard*, Published Fri, February 12th 2016 at 00:00. Available at <https://www.standardmedia.co.ke/business/article/2000191356/kenya-would-be-among-cheapest-world-oil-producers-tullow-says> [Accessed on 11/11/2017].

⁹ Kagwe, W., 'Kenya strikes new oil well, doubles estimates,' *The Star*, 4 July 2013. Available at <http://allafrica.com/stories/201307040991.html> [Accessed on 22/05/2016]; Liloba, H., 'Kenya: Tullow Hits another Oil Field,' *East African Business Week* (Kampala), 9 July, 2013.

Available at <http://allafrica.com/stories/201307100096.html>

¹⁰ Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

¹¹ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), *op cit.* p. 55.

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because of their rich natural resources. The natural resources in DRC's tropical rain forest covers more than 100 Million hectares. However, this has not benefited the general population of that country, and there have been recorded cases of terrible violence and immense human suffering.¹² The war has largely impacted on the environment and native wildlife. Parties to armed conflicts have resorted to occupying natural habitats thereby scaring animals away. Further, the illegal trade of minerals led to the communities not being able to benefit from its resources.¹³

There is conflicting literature on the potential of extractive industries' capacity to promote national development. Proponents of resource-led development, (i.e. how the extractive industries can contribute to poverty alleviation and sustainable development in the developing world) argue that the inflow of foreign direct investment (FDI) into the country and a model of export based growth will provide jobs, economic growth and ultimately, poverty reduction.¹⁴ This, it would be expected, would be as a result of the foreign owned companies (like Tullow Oil, London and African Oil, Vancouver) creating opportunities for the locals to benefit both in monetary and non-monetary terms from the oil exploration and extraction. However, for many resource rich developing countries pursuing this model, the reality has been low economic growth, environmental degradation, deepening poverty, and in some cases, violent conflict.¹⁵

¹² Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at <http://pubs.iied.org/pdfs/13578IIED.pdf> [Accessed on 19 May 2016].

¹³ See 'Diamonds in Sierra Leone, A Resource Curse?' available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 22/05/2016]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' *Dissent Magazine*, Spring 2014, available at <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 22 May 2016]; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' *Investigative Field Report*, June 2013. Available at <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 22 June 2016].

¹⁴ Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *op cit*, p. 48.

¹⁵ *Ibid*, p. 48.

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Kenya is no different as far as expectations are concerned. There have been renewed hopes of spurred economic growth and development in the country as a result of the recently discovered oil resources.¹⁶ The Northwestern region of the country, where the deposits were first discovered, has been seen as the new frontier in driving Kenya's economy. However, Turkana County has been documented as one of the Counties with the highest level of poverty in Kenya.¹⁷ The distrust between local communities around the region against each other¹⁸ has led to constant conflicts as well as cross border conflicts.¹⁹ The conflicts are largely sparked by livestock rustling, harsh climate and boundary disputes.²⁰ Also, due to low literacy levels,²¹ other communities have subsequently been employed because the locals had no skills for drilling and seismic work.²²

¹⁶ See Institute for Human Rights and Business, 'Human Rights Risks and Responsibilities: Oil and Gas Exploration Companies in Kenya,' *Background Paper*, 2013. Available at http://www.americanbar.org/content/dam/aba/events/international_law/2015/06/Africa%20Forum/Security1.authcheckdam.pdf [Accessed on 18 May 2016].

¹⁷ *Turkana County –United Nations Joint Programme 2015-2018*, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at <https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf> [Accessed on 26 May 2016].

¹⁸ Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. <http://www.jstor.org/stable/25842144>. [Accessed on 19 May 2016].

¹⁹ Johannes, E.M., *et al*, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

²⁰ See generally, Schilling, J., Opiyo, F.E. and Scheffran, J., "Raiding pastoral livelihoods: motives and effects of violent conflict in north-western Kenya," *Pastoralism: Research, Policy and Practice*, Vol.2, no. 1, 2012, p. 25; Schilling, J., Akuno, M., Scheffran, J. and Weinzierl, T., "On raids and relations: Climate change, pastoral conflict and adaptation in northwestern Kenya," *Conflict-sensitive adaptation to climate change in Africa*, 2014, 241.

²¹ Chikwanha, A.B., 'The Anatomy of Conflicts in the East African Community (EAC): Linking Security With Development,' *Keynote speech to Development Policy Review Network-African Studies Institute, Leiden University, the Netherlands, 2007*. Available at <https://www.issafrica.org/uploads/EACANNIE.PDF> [Accessed on 21 May 2016]. See also <http://opendata.go.ke/Education/Percentage-distribution-of-population-15years-by-jbxify92>

²² See Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation,' *Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya*, August 2015, p. 36. Available at https://www.cordaid.org/media/publications/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf [Accessed on 20/05/2016]. See also *Turkana is the least educated, says report*, Daily Nation November 25, 2013. Available at <http://www.nation.co.ke/news/Turkana-is-the-least-educated-says-report-/-/1056/2087018/-/vvpnq1z/-/index.html>; Kenya National Bureau of Statistics, *Exploring Kenya's Inequality: Pulling Apart or Pooling Together?*

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Nonetheless, the local communities have viewed the oil discovery as ‘heaven sent’ as they perceive that it will help ‘open’ the region to development by the national government. While there are prospects of ‘real’ development in the region, experience gained from the international arena point to the possibility that the expected development may not be realized or may not achieve the desired outcome for the country, and specifically the locals.²³ Pegging hopes of development on the extractive resources only may mean that the region could remain undeveloped or under-developed longer as the benefits of oil may not turn out as expected. If anything, it may add to other problems that have characterised the region in question. Thus, the fear of poor and low economic development despite the discovery of oil looms.²⁴ The worry is, failed economies usually end up in conflicts,²⁵ resulting from bad governance and the mismanagement of natural resources.²⁶

It is expected that the economic gains that are likely to accrue from this venture will come with both rights and responsibilities for the concerned communities.

There have Government efforts meant to enhance transparency and accountability on the sector. One such move is the decision by the Ministry of Mining to cooperate with Regional Centre for Mapping of Resources for Development (RCMRD)²⁷ on mapping of resources.²⁸ Such

²³ Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctad.xiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 22 May 2016].

²⁴ See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012.)

²⁵ Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

²⁶ Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., *et al*, ‘Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,’ (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf>

²⁷ The Regional Centre for Mapping of Resources for Development (RCMRD) was established in 1975 under the auspices of the United Nations Economic Commission for Africa (UNECA) and the African Union (AU). It is an inter-governmental organization and currently has contracting Member States in the Eastern and Southern Africa Regions. (<http://www.rcmrd.org/about-us/about-rcmrd>).

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efforts may have been informed by the fact that skewed distributions of benefits from natural resources can fuel social exclusion and conflict, threatening sustainability.²⁹ This is especially true for Kenya because, unlike the common perception that extractive industries come with a lot of wealth, this sector also requires much capital to venture into, and this may eat into the cumulative wealth accruing to the country of origin. For instance, in the case of Kenya, there have been reports that the Irish oil Firm Tullow, which was allocated the Lokichar Basin oil reserves, has so far incurred \$ 1.5 billion (Kenya Shillings 150 billion) in exploration costs, and this amount is to be recovered once production begins.³⁰ This has led to the fears that in the absence of proper audits by Kenya, explorers such as Tullow Oil may inflate recoverable costs, ultimately denying Kenyans the full benefits of their national resource.³¹

The recovery of the full costs over production cycle is one of the contractual terms in the production sharing contracts signed between Kenya and oil explorers once the commercial production from the particular development area commences.³² Indeed, Kenya has in the past been advised that, since it has a very short period within which it can maximize benefits from the oil sector before their depletion, it should continue to focus on key sectors such as agribusiness and services.³³

²⁸ Regional Centre for Mapping of Resources for Development, 'Kenya's Ministry of Mining to Cooperate with RCMRD on Mapping of Resources,' available at <http://www.rcmrd.org/archives/302-kenya-s-ministry-of-mining-to-cooperate-with-rcmrd-on-mapping-of-resources>.

²⁹ Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' *World Development*, Vol. 72, pp. 408–418, 2015, p. 408; See also a Gap Analysis outcome carried out by the Ministry of Mining with the support of United Nations Development programme (UNDP), *Ministry of Mining - Gap Analysis Kenya*, 2016. <http://www.ke.undp.org/content/kenya/en/home/library/poverty/extractives-project.html> [Accessed on 11 November 2017].

³⁰ Herbling, D., 'Tullow's Sh 150bn Exploration bill Raises Queries on Costing methods,' *Business Daily*, Monday, April 18, 2016 (Nation Media Group Publication No. 2331), pp. 1 & 4.

³¹ *Ibid*, p. 1.

³² See the Republic Of Kenya Model Production Sharing Contract, 2015. Available at http://www.erc.go.ke/images/docs/Model_Production_Sharing_Contract_2015-210115.pdf

³³ *Ibid*, p. 4.

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Resource governance, which has been defined as the hard and soft rules which shape and constrain the way hydrocarbons contribute to sustainable development and poverty alleviation within host countries,³⁴ necessitates a discourse on evidence from other jurisdictions with a view to identifying ways in which the country can ensure that maximum benefits from extractive industries accrue to the locals without relying on what may be referred to as hand-outs from the government of the day. These benefits need not necessarily direct. Thus, this article aims to suggest ways in which the country can achieve effective resource governance in the said sector and in other natural resource-reliant sectors.

3. BENEFIT SHARING: COMMUNITY RIGHTS AND RESPONSIBILITIES

Equitable benefit sharing can be defined as the access to benefits that accrue from natural resources by stakeholders including indigenous communities.³⁵ It has been noted that the notion of benefit sharing in natural resources was first formalised in international law in 1992 through the Convention on Biological Diversity (CBD), a move that was at the time expected to address problems with the governance of socio-ecological systems in developing countries.³⁶ The international recognition of the right to benefit from natural resources wealth may be predicated upon such recognised rights of communities as the right to self-determination, right to development and the right of peoples to freely dispose of their wealth and natural resources.³⁷

³⁴ Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *op cit.*, p. 49.

³⁵ Jonge, B., *What is Fair and Equitable Benefit Sharing?* *Journal on agricultural and environmental ethics*, vol. 24, issue 2, 2011.

³⁶ Pham, T.T., *et al*, 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,' Working Paper 108, 2013, CIFOR, Bogor, Indonesia, p. 1.

Available at http://www.cifor.org/publications/pdf_files/WPapers/WP108Pham.pdf [Accessed on 28 May 2016].

³⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1.

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At the regional level, article 21(1) of the *African Charter on Human and Peoples' Rights*³⁸ provides that all peoples shall freely dispose of their wealth and natural resources. This right is to be exercised in the exclusive interest of the people, and in no case should people be deprived of it. The free disposal of wealth and natural resources must however be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.³⁹ The African Charter also obligates States parties to undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies, so as to enable their peoples to fully benefit from the advantages derived from their national resources.⁴⁰ Further, Article 22(1) provides that all peoples have the 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. States also have the duty, individually and collectively, to ensure the exercise of the right to development.⁴¹

The international framework on natural resources and the environment envisages a scenario where the benefits accruing from the exploitation of the resources in a country or region will in turn benefit the lives of the concerned people through improved livelihoods and an improved national economy for overall development of the country. Indeed, one of the international principles of sustainable development is that states are under a duty to manage natural resources, including natural resources solely within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with

³⁸ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³⁹ Art. 21(3).

⁴⁰ Art. 21(5).

⁴¹ Art. 22(2).

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particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems.⁴²

The principle of equitable benefit sharing is acknowledged in several international environmental and natural resources law instruments. The Convention on Biological Diversity,⁴³ which governs the activities of countries in biodiversity protection, in its third objective emphasizes the essential need to fairly and equitably share benefits from resources⁴⁴ taking into account rights over those resources.⁴⁵ The aim of natural resource management is to ensure the sound use of the environment for the food of the present and future generations. Working towards ensuring equitable benefit sharing may guarantee conservation and protection of natural resources, coexistence among communities, promote human rights and sustainable and economic development.⁴⁶ The OECD Energy Charter Treaty 1994 for its part obligates contracting states to strive to minimize in an economically efficient manner harmful environmental impacts by acting in cost effective manners.⁴⁷

Implementation of equal benefit sharing in natural resources requires balancing with the need to achieve sustainable development. Article 162 of the Constitution of Kenya⁴⁸ establishes an environmental court to deal with environmental matters. Through their decisions, the court has attempted to promote the right of communities to benefit from natural resources while at the same

⁴² CISDL, 'The Principles of International Law Related to Sustainable Development,' available at <http://cisdl.org/tribunals/overview/principles/1.html> [Accessed on 28 May 2016].

⁴³ It was adopted in 1992 at the Earth Summit, Rio de Janeiro, Brazil; UNGA.

⁴⁴ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable and the Fair and Equitable Sharing of Benefits Arising from their utilization to the Convention of the Biological Diversity was adopted in 2010 at the 10th Conference of Parties.

⁴⁵ An Ad-Hoc Open-ended Working Group was established between 2000 and 2007 to implement this objective and was mandated to come up with Bonn Guidelines to assist parties with the implementation of the benefit sharing.

⁴⁶ See Huggins, C., *et al.*, 'Chapter 12: Environment for Peace and Regional Cooperation,' *Africa Environment Outlook 2: Our Environment, Our Wealth*. Available at http://www.unep.org/DEWA/Africa/docs/en/aeo-2/chapters/aeo-2_ch12_ENVIRONMENT_FOR_%20PEACE_AND.pdf [Accessed on 28 May 2016].

⁴⁷ OECD 1994, Article 19.

⁴⁸ Government printer, Nairobi, 2010.

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time safeguarding the need for the country to achieve sustainable development. In the case of *R v Kenya Forest Services ex parte the National Alliance of Community Forest Association*, the appellant sought orders to quash the respondent's decision⁴⁹ calling on individuals and interested institutions to apply for concessions in state forest plantations for parcels of between 1000 and 12000 hectares each. The court granted their prayer to prohibit any processing of any bids that may be received by the officials, agents, servants or officers and compelled the respondent to comply with the constitutional requirement that forests and catchment areas in Kenya are protected and that a tree cover of at least 10% should be maintained in Kenya.

As a potentially major exporter of oil in future,⁵⁰ the discovery of oil is deemed as a major boost to the Kenyan economy.⁵¹ The economic value of oil is expected to be high and central to the development of the local community, even though it may have its own challenges.⁵² Indeed, it has been reported that the discovery of oil has facilitated infrastructural developments such as schools, health amenities and making the area easily accessible. Within two years of discovery, buildings were erected and human population was recorded at 500% growth in several towns within Turkana County.⁵³ This is an indication of the high hopes that have been pegged on the potential benefits that may accrue from this venture.

⁴⁹ *R v Kenya Forest Service Ex parte and Clement Kariuki & 2 others suing as the Chairman, Secretary and Treasurer of the National Alliance of Community Forest Association*, Judicial Review Case No 285 of 2012.

⁵⁰ The 2015 Economic Survey Report by Kenya National Bureau of Statistics.

⁵¹ <http://www.tradingeconomic.com/kenya/imports>

⁵² BBC (2012, March 26) Kenya oil discovery after Tullow Oil Drilling; The *paradox of plenty* is a fear that may hit the county In comparison to countries in Africa, those which are rich in minerals are the lowest in terms of development.

⁵³ Kenya County Fact Sheet, 2014; Kornet, J., 'Oil in the cradle of mankind - A glimpse of Africa's future,' available at <http://www.frontiermarketscompendium.com/index.php/news-commentary/entry/oil-in-the-cradle-of-mankind-a-glimpse-of-africa-s-future> [Accessed on 20 May 2016].

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The *Nagoya Protocol* is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way.⁵⁴ One of the key factors informing the drafting of this protocol was the recognition that that public awareness of the economic value of ecosystems and biodiversity and the fair and equitable sharing of this economic value with the custodians of biodiversity are key incentives for the conservation of biological diversity and the sustainable use of its components.⁵⁵ It was also an acknowledgement of the potential role of access and benefit-sharing to contribute to the conservation and sustainable use of biological diversity, poverty eradication and environmental sustainability and thereby contributing to achieving the Millennium Development Goals.⁵⁶

This Protocol is limited to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources, as well as to traditional knowledge associated with genetic resources within the provisions of the Convention and to the benefits arising from the utilization of such knowledge.⁵⁷ It, however, also offers important guidelines on benefit-sharing. Of particular relevance is the Annex to the *Nagoya Protocol* which provides for both monetary and non-monetary forms of benefits. It envisages monetary benefits which may include, but not be limited to: access fees/fee per sample collected or otherwise acquired; up-front payments; milestone payments; payment of royalties; licence fees in case of commercialization; special fees to be paid to trust funds supporting conservation and

⁵⁴ Convention on Biological Diversity, 'The Nagoya Protocol on Access and Benefit-sharing,' available at <https://www.cbd.int/abs/>. Art. 1 thereof is to the effect that 'the objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.'

⁵⁵ Preamble to the Protocol.

⁵⁶ *Ibid.*

⁵⁷ Art. 3.

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sustainable use of biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; and joint ownership of relevant intellectual property rights.⁵⁸

There are a number of non-monetary benefits, on the other hand. These benefits include the sharing of research and development results and collaboration, cooperation and contribution in scientific research and development programmes (particularly biotechnological research activities) where possible in the Party providing genetic resources. While this is specific to the genetic resources, it is within the type of natural resources that should be protected as envisaged under the Constitution of Kenya. The Constitution obligates the State to recognise the role of science and indigenous technologies in the development of the nation, and to promote the intellectual property rights of the people of Kenya.⁵⁹ One of the ways of implementing the constitutional provision is through ensuring that communities participate fully and meaningfully as envisaged by the Nagoya Protocol.

The other forms of non-monetary benefit are through participation in product development; collaboration, cooperation and contribution in education and training; admittance to *ex situ* facilities of genetic resources and databases; transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity; strengthening capacities for technology transfer; institutional capacity-building; human and material resources to strengthen the capacities for the administration and enforcement of access regulations; training related to genetic resources with the full participation of countries providing genetic resources, and where possible,

⁵⁸ *Annex to the Nagoya Protocol on Access and Benefit-sharing.*

⁵⁹ Art. 11(2) (b) (c), Constitution of Kenya 2010.

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in such countries; access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; contributions to the local economy; research directed towards priority needs (such as health and food security) taking into account domestic uses of genetic resources in the Party providing genetic resources; institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities; food and livelihood security benefits; social recognition; and joint ownership of relevant intellectual property rights.⁶⁰

These approaches arguably form the core of an effective benefit sharing agreement. This is because they are geared towards building capacity for the local people that may go beyond the lifespan of the resources being exploited. They are also meant to address the real needs of the people by investing in tangible projects. This is a viable means of ensuring benefits accrue to the communities in ways that are not prone to corruption and wastage of resources, as it would be the case in the monetary forms of benefits.

It is also worth pointing out that most of these benefits are applicable to the exploitation of other types of natural resources, including oil. The Nagoya protocol approach to benefits sharing can help in building benefit-sharing mechanisms applicable in the exploitation of the other forms of natural resources. These are important in ensuring that even as communities receive benefits in forms of access fees/fee per sample collected or otherwise acquired, up-front payments, milestone payments, payment of royalties and licence fees in case of commercialization, they also get to participate by engaging in activities that will ensure that they benefit from the exploitation of the resources beyond the resources' lifespan. The monetary forms

⁶⁰ *Annex to the Nagoya Protocol on Access and Benefit-sharing.*

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of benefits may be limited in the ways they benefit communities while the non-monetary benefits are likely to reach a bigger group of beneficiaries and thus more effective.

Capacity-building within the community ensures that communities become less dependent on the immediate benefits accruing from commercial exploitation of the resources but instead have enduring sources of livelihoods. Research may go a long way in helping communities realise the other forms of investments or economic activities that may be viable within their localities. Thus, communities should not only seek to receive the monetary benefits but should also take advantage by acquiring the relevant skills and investing in businesses or venture that will help them in the long term even after the oil reserves are depleted.

4. LEGAL FRAMEWORK ON BENEFIT SHARING AND NATURAL RESOURCE EXPLOITATION IN KENYA

One of the most important aspects of the Constitution of Kenya 2010 is the provisions on national values and principles of governance which include, inter alia: 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-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.⁶¹

These values and principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁶² Arguably, one of the ways of implementing these principles as far as natural resources governance and management is

⁶¹ Art. 10(2).

⁶² Art. 10(1).

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concerned is equitable benefit-sharing. A viable benefit-sharing framework should be able to reflect and promote the foregoing values and principles of governance.

The Constitution also guarantees every person's right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.⁶³ The Constitution also outlines the principles of land policy and provides that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the outlined principles that include equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas. Other principles include elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.⁶⁴ These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.⁶⁵

It is noteworthy that one of the adverse effects of mining is degradation of the environment which ultimately affects the livelihoods of the communities living within the affected areas. An acceptable benefit-sharing model with such affected communities must take

⁶³ Art. 42. Art. 70 (1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

⁶⁴ Art. 60(1).

⁶⁵ Art. 60(2).

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into account such effects when compared to the distribution of the returns from mining with the national Government.

Relevant to this discussion is the provision for community land which vest in and is held by communities identified on the basis of ethnicity, culture or similar community of interest.⁶⁶ The Constitution also provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities,⁶⁷ and as individuals.⁶⁸ Land in Kenya is also classified as public, community or private.⁶⁹ Also noteworthy is that regardless of their location, the Constitution classifies all minerals and mineral oils as defined by law and all rivers, lakes and other water bodies as defined by an Act of Parliament as public land.⁷⁰

There is a need to ensure that the public understands this concept as it is likely to generate misunderstandings especially in the face of devolution where counties have been demanding exclusivity in exploration and benefits accruing from natural resources located within their boundaries. It is important to clarify that, while the non-monetary benefits such as setting up of social amenities and other infrastructure may exclusively accrue to the local communities living within the mining localities, the monetary benefits are not to be treated in a similar way, but

⁶⁶ Art. 63(1). Art. 63(2) provides that community land consists of— (a) land lawfully registered in the name of group representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is— (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2). Clause (3) thereof further provides that any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. Clause (4) also provides that community land must not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

⁶⁷ See Community Land Act, No. 27 of 2016, Laws of Kenya (Government Printer, Nairobi, 2016). The Act was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.

⁶⁸ Art. 61(1).

⁶⁹ Art. 61(2).

⁷⁰ Art. 62(1) (f) (i).

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ought to be shared among the local communities, county government and the national government.

The Constitution also outlines the obligations of the State in respect of the environment. These may be relevant as far as benefit sharing in natural resources exploitation is concerned. The State is required to, inter alia, ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the *equitable sharing of the accruing benefits* (emphasis added); protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; and encourage public participation in the management, protection and conservation of the environment. The obligations also extend to the protection of genetic resources and biological diversity as well as establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment. Other obligations extend to elimination of processes and activities that are likely to endanger the environment and utilization of the environment and natural resources for the benefit of the people of Kenya.⁷¹ The obligations are not just on the State. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁷²

The Environment (Management and Coordination) Act (EMCA)⁷³ provides the legal and institutional framework for the management of the environment. In its preamble, it recognizes that the environment is the foundation of the economic, social, cultural and spiritual enrichment. Section 3 of the Act entitles every Kenyan to a healthy and clean environment and obligates them to safeguard and enhance the environment. The government must thus be held accountable in

⁷¹ Art. 69(1).

⁷² Art. 69(2).

⁷³ No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999).

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ensuring that the investors meet their environmental conservation and protection obligations as far as mineral exploration and extraction are concerned.

The Constitution also tasks the Parliament to enact legislation ensuring that investments in property benefit local communities and their economies.⁷⁴ This may be strengthened by the provision that a transaction is subject to ratification by Parliament if it involves the grant of a right or concession⁷⁵ by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.⁷⁶ The resources in question range from wildlife resources and habitats, resources of gazetted forests, water resources, resources on community land and biodiversity resources.

These provisions are to be implemented through the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016. The Act is meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.⁷⁷ Notably, the law outlines the relevant considerations in deciding whether or not to ratify an agreement. Under the Act the following must be considered: the applicable Government policy; recommendations of the relevant regulatory agency; and comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located. Other considerations to be borne in mind include 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

⁷⁴ Art. 66(2).

⁷⁵ "concession" is defined in the proposed legislation, *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2015*, to mean the right to exploit a natural resource pursuant to an agreement between the grantor and the beneficiary or a permit issued under national or county legislation (clause 2).

⁷⁶ Art. 71(1).

⁷⁷ See also S. 124A, *Environment (Management and Coordination) Act*, No.8 of 1999, Laws of Kenya.

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likely to enjoy from the transaction; and whether, in granting the concession or right, the applicable law has been complied with.⁷⁸

While these provisions are commendable in that they acknowledge the need for public participation and benefit sharing in natural resources exploitation arrangements, the law is quiet on the thresholds necessary for such approval. This leaves room for political manipulation by powerful groups creating the likelihood of an elite capture scenario where the exploitation is approved by a few for their own selfish interests. The effectiveness of this legislation will largely depend on the goodwill of the law enforcers as well as the level of information held by the affected communities. It is also noteworthy that the means and extent of benefits accruing to the community is to be left to community or their representatives. Thus, the communities will get a deal as good as the negotiation ability of their representatives or the leaders.

The Community Land Act, 2016⁷⁹ is meant to give effect to Article 63(5) of the Constitution. It provides for the recognition, protection and registration of community land rights and the management and administration of community land. It also makes provision for the role of county governments in relation to unregistered community land and for connected purposes.⁸⁰ The law defines "community" to mean an organized group of users of community land who are citizens of Kenya and share any of the following attributes: common ancestry, similar culture, socio-economic or other common interest, geographical space, or ecological space.⁸¹ This definition is relevant in that it helps clarify the target group in case of benefits accruing from what would fall under community land and consequently avert potential conflict. This is affirmed under section 31 thereof which provides that every member of the community has the right to

⁷⁸ Clause 9.

⁷⁹ No. 27 of 2016, Laws of Kenya.

⁸⁰ *Ibid*, Preamble.

⁸¹ *Ibid*, Clause 2.

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equal benefit from community land, where equality includes full and equal enjoyment of rights of use and access. This is a form of promoting benefit sharing as far as community land is concerned.

Section 36 provides that subject to any other law, natural resources found in community land should be used and managed sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits. This provision thus requires all those charged with administration of such jointly-owned resources to not only ensure equitable sharing of accruing benefits, but also sustainable and productive use and management of the same.

Where need for concessions arise, the proposed law provides that an agreement relating to investment in community land should be made after a free, open consultative process which contains provisions on environmental, social, cultural and economic impact assessment; stakeholder consultations and involvement of the community; and continuous monitoring and evaluation of the impact of the investment to the community. The legislation requires payment of compensation and royalties and the rehabilitation of the land upon completion or abandonment of the project. It enjoin measures to mitigate any negative effects of the investment and advocates for capacity-building of the community and transfer technology to the community.⁸²

The Environmental Management and Co-ordination (Amendment) Act, 2015⁸³ amends section 48 of EMCA by inserting subsection (3) to the effect that where a forested area is declared to be a protected area under section 54(1), the Cabinet Secretary may cause to be ascertained, any individual, community or government interests in the land and forests and shall

⁸² *Ibid*, Clause 37.

⁸³ No. 5 of 2015, Laws of Kenya.

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provide incentives to promote community conservation.⁸⁴ This is an important clause that can promote forests conservation through the use of incentives. The incentives can be in the form of benefits that accrue to the community from the forests resources.

The Mining Act 2016 defines a “mineral” as a geological substance whether in solid, liquid or gaseous form occurring naturally in or on the earth, in or under water, in mine waste or tailing and includes the minerals specified in the First Schedule but does not include petroleum, hydrocarbon gases or groundwater.⁸⁵ The Act also defines mining operations to mean an operation carried out in connection with a mine to win a mineral from where it occurs; to extract metal or precious mineral from a mineral so won, or to beneficiate a mineral so won; or to dispose of a mine waste or tailings resulting from winning, extraction or benefaction.⁸⁶ The Act provides for accruing benefits in the form of financial and other benefaction to which communities in mining areas are entitled to receive from the proceeds of mining and related activities.

This clarification on what entails accruing benefits ensures that the targeted population does not direct all their focus on the monetary benefits while paying little attention to the non-monetary forms. This may be important in averting any disputes that may arise where a community’s expectations of direct financial returns are not realized. The provisions may also be a good basis for working with the investors to get more involved in corporate social responsibility activities that directly benefit communities in terms of improved social amenities and infrastructure. Indeed, the 2009 Africa Mining Vision correctly points out that the benefits to the local community may come in various forms, including revenues which accrue to the

⁸⁴ S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015.*

⁸⁵ Act No. 12 of 2016, Laws of Kenya, s.4.

⁸⁶ *Ibid*, s.4.

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community because of its location (property rates and land rents); benefits which are the community's share of central government revenues from mining and non-income benefits such as employment for local residents; assistance to community health and educational institutions; access to the use of mine infrastructure by the general public, amongst others.⁸⁷

The repealed Petroleum (Exploration and Production) Act⁸⁸ defined petroleum as mineral oil including crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.⁸⁹ In the Act, "petroleum operations" was defined as the exploration for, development, extraction, production, separation, and treatment, storage, transportation and sale or disposal of, petroleum including natural gas processing but does not include petroleum refining operations.⁹⁰ The Petroleum (Exploration and Production) Act⁹¹ provided that the relationship between the Government and an exploration and production company is governed by a Production-Sharing Contract (PSC).⁹²

The PSC stipulated that the exploration and production company gets a share of the oil and gas produced and its share is in the form of oil barrels. Essentially, the petroleum exploration and production company does not own the oil or gas but rather the Government retains title to the oil or gas produced. Should the exploration and production company not find any oil, then the cost of exploration is borne solely by the company. The Government does not meet any exploration costs that do not result in any oil revenue. Therefore, should oil be produced, the exploration and production company can recover that cost from the oil produced.⁹³ Such

⁸⁷ African Union, *Africa Mining Vision*, 2009, p. 23.

⁸⁸ Chapter 308, Laws of Kenya (Repealed).

⁸⁹ *Ibid*, S. 2.

⁹⁰ *Ibid*.

⁹¹ Chapter 308, Laws of Kenya (Repealed).

⁹² *Ibid*.

⁹³ See Muigua, K., *et al*, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 248-251.

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contracts may be important in securing the Government income. However, other loopholes must be looked into to ensure that such companies do not bypass such contracts to maximize their returns through such means as tax exemption measures.

The proposed Natural Resources (Benefit Sharing) Bill 2018⁹⁴ seeks to establish a system of benefit-sharing in resource exploitation between resource exploiters, the national government, county governments and local communities, to establish the natural resources benefit-sharing authority and for connected purposes. The proposed legislation will apply with respect to petroleum and natural gas, among other natural resources. It seeks to provide the guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.⁹⁵ It proposes setting up a Benefit-Sharing Authority which will be mandated to coordinate the preparation of benefit-sharing agreements between local communities and affected organizations, review and, where appropriate, determine the royalties payable to affected organizations engaged in natural resource exploitation. The Authority will identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties and oversee the administration of funds sets out for county projects as identified and determined under and benefit-sharing agreement. It will monitor the implementation of any benefit-sharing agreement entered between a county and an affected organization and conduct research regarding the exploitation and development of natural resources and benefit-sharing in Kenya so as to recommend better exploitation of natural resources in Kenya. The Authority will be empowered to determine

⁹⁴ 2018 (Government Printer, Nairobi, 2018).

⁹⁵ S. 4.

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appeals arising out of conflict and advise the national government on policy/ enactment of legislation relating to natural resource benefit-sharing.⁹⁶

Setting up an institutional and legal framework on implementing the legal requirements on benefit-sharing is a laudable step meant to achieve equity and promote social justice amongst other principles of governance. The personnel should, however, work hand in hand with community representatives to avert any feelings of exclusion amongst such communities.

The Petroleum (Exploration, Development and Production) Act, 2019⁹⁷, which was developed to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations; and for connected purposes. The Petroleum (Exploration and Production) Act was repealed by this new law.⁹⁸

Notably, the Act introduces the concept of "local content" which means the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.⁹⁹ Before engaging in petroleum operations, the contractor must prepare and submit a long-term and annual local content plan which corresponds with the work program to the Authority for approval.¹⁰⁰ The local content plan is required to address employment and training; research and

⁹⁶ Clause 6, *Natural Resources (Benefit Sharing Bill)*, 2015.

⁹⁷ Petroleum (Exploration, Development and Production) Act, No. 2 of 2019, Laws of Kenya.

⁹⁸ *Ibid*, sec. 128.

⁹⁹ Sections 50-52, Petroleum (Exploration, Development and Production) Act, 2019..

¹⁰⁰ *Ibid*, Sec. 50(2).

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development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; and succession plans for positions not held by Kenyans.¹⁰¹

The Petroleum (Exploration, Development and Production) Act, 2019 requires the contractor and any sub-contractor conducting petroleum operations to comply with local content requirements in all of the contractor's or sub-contractor's operations. They are required to give priority to services provided and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by the Kenya Bureau of Standards or, in absence of a Kenyan standard, any other internationally acceptable standard that the (Upstream Petroleum Regulatory) Authority shall approve. They must also ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain provided that the cost of local content should not be higher than at any other place.¹⁰²

The requirement on local content can go a long way in enhancing benefit sharing mechanism in the extractive industry in Kenya, an aspect that was missing or inadequate in the Kenyan legal framework on extractives. The local content plan is a step in the right direction for not only addressing the plight of communities living and exposed to mining and oil exploration activities, but also guaranteeing maximum and diverse benefits which would accrue to the current and future generations, long after the resource extraction activities have stopped.

The Kenya Sovereign Wealth Fund Bill, 2019¹⁰³ proposes to establish Kenya's National Sovereign Wealth Fund to undertake diversified portfolio of medium and long term local and foreign investment to build a savings base for purposes of national development. The object and

¹⁰¹ Ibid, sec. 50(3).

¹⁰² Ibid, sec. 50(1).

¹⁰³ Kenya Sovereign Wealth Fund Bill, 2019; A BILL for an Act of Parliament to establish the Kenya Sovereign Wealth Fund, to provide institutional arrangements for effective administration and efficient management of minerals and petroleum revenues, and for connected purposes and incidentals thereto.

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purpose of the fund shall be to: insulate expenditure under the budget estimates of the national government from fluctuations in resource revenues; provide finance for infrastructure development priorities to foster strong and inclusive growth and development; and build a savings base for future generations when minerals and petroleum resources are exhausted.¹⁰⁴ This fund will also be important in promoting intergenerational and intragenerational equity in natural resource benefits sharing.

According to the draft National Energy and Petroleum Policy, 2015,¹⁰⁵ the Government shall undertake the requisite process of ensuring transparency and accountability in extractive industries taking into account best industry practices and existing legal framework as a demonstration of its commitment to good governance, increased scrutiny over revenue collection from petroleum and coal resources and improvement of the country's investment climate. The Policy seeks to substitute the National Fossil Fuels Advisory Committee (NAFFAC) with two committees: a National Upstream Petroleum Advisory Committee (NUPAC) responsible for upstream petroleum exploration and development matters; and a National Coal Advisory Committee (NCAC) responsible for coal exploration and development matters. It also seeks to develop mechanisms for sharing of benefits between the National and County Governments as well the local communities in accordance with Article 69 of the Constitution.¹⁰⁶ In the Policy, the Government also commits to establish a one stop shop for licensing of fossil fuel operations and undertakings with a view to enhancing development of the requisite infrastructure for fossil fuels.¹⁰⁷

¹⁰⁴ Kenya Sovereign Wealth Fund Bill, 2019, Clause 5.

¹⁰⁵ National Energy and Petroleum Policy-Final Draft –January 2015, Government Printer, Nairobi.

¹⁰⁶ *Ibid*, para. 7.

¹⁰⁷ National Energy and Petroleum Policy-Final Draft –January 2015, pp. 28 & 44.

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If fully implemented, the contents of these Policy provisions are likely to impact positively on the community in ways that would ensure that the community becomes self-sustaining as far as livelihood sustenance is concerned. However, it must be noted that for the community to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way. They must be made to understand that the expected benefits will not come in monetary terms only, and must be made aware of the various non-monetary benefits that may accrue to them as envisaged under the Nagoya Protocol. Some of the forms would only be made possible through concerted efforts from both the concerned community and the investor and possibly with assistance from the county and national governments.

While there are other laws that may be resorted to, some of the issues that will arise may remain unaddressed. These may include social and cultural effects of the resource exploitation. This affects the ‘social licence’ required for such activities by both local and foreigner investors.

**5. REGIONAL EFFORTS IN PROMOTING SUSTAINABLE MINING FOR
NATIONAL DEVELOPMENT IN AFRICAN STATES**

The African Union in collaboration with the United Nations Economic Commission for Africa developed the Africa Mining Vision as result of some challenges that had been identified. These challenges included, inter alia, the issue that although the benefits of mining to certain national economies could be evident, local costs (environmental impacts and social and cultural disruptions) associated with mining especially to local communities were not being adequately compensated for. It was also observed that the magnitude of special incentives offered to mining companies arguably reduced the share of rent on which African governments depended to fund their social and development programmes. Moreover, mining had not fulfilled its poverty

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reduction role as poverty reduction had not been mainstreamed into mining policies, often due to weak linkages to the local, regional and national economies.¹⁰⁸

With respect to benefit sharing, the Mining Vision highlights the changing approaches in new contractual arrangements and legal instruments to facilitate increased participation by local communities and other stakeholders, as well as new revenue (derived from royalties, income tax, land tax, lease rents etc.) distribution mechanisms for sharing, at local level, portions of centrally collected rents.¹⁰⁹

The Africa Mining Vision recommends a tentative framework for action on what needs to be done at national, sub-regional and continental levels. This is presented in three stages of implementation, namely short-term (up to 5 years from the date the vision is adopted), medium-term (5-20 years) and long-term (20- 50 years), and where possible, roles and responsibilities have been assigned to key players.¹¹⁰

The Mining Vision also highlights the fact that, although the approaches described offer hope for the improvement of the mining legacy in Africa, more needs to be done to achieve change. The suggested measures include, but are not limited to recommendations that policies, legal and regulatory frameworks to facilitate equitable participation by local businessmen, communities and other stakeholders in mining activities need to be refined, and tools improved for revenue (derived from royalties, income taxes, land taxes, lease rents etc.) distribution at local level. It also advocates for transparency and efficiency in the management of revenue paid to various governmental authorities.¹¹¹

¹⁰⁸ African Union, *Africa Mining Vision*, February 2009, p.11.

¹⁰⁹ *Ibid*, p.12.

¹¹⁰ *Ibid*, pp. 30-37.

¹¹¹ *Ibid*, p.38.

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It is worthy pointing out that with the ever increasing awareness on human rights at the international, regional and national, more people have been demanding transparency, accountability and inclusion in the natural resource extraction decisions and the accruing benefits. They are concerned about how the natural resources in their countries are being used to improve their livelihoods.

From the Africa Mining Vision, it is clear that despite many African states being well endowed with natural resources, they have little to show on how they have utilised the same to improve their people's welfare. A few States have, however, made attempts to enhance utilisation of their mineral resources for the improvement of their economies. The two countries discussed below are not meant to present a full case study on their status on mining and benefit sharing, but are merely presented as examples on pitfalls that a country like Kenya can avoid to maximize their returns from their nascent mining sector.

5.1 LESSONS FROM GHANA: CATAPULTING NATIONAL DEVELOPMENT THROUGH EXTRACTIVE INDUSTRIES

It has been observed that many African countries do not have a strong track record of managing mineral wealth well. Ghana is, however, often considered a model of best practice, based on the government's distribution of a proportion of mining rents to mining affected communities.¹¹²

In Ghana's mining sector, the system devised to distribute mining wealth to local level is, by and large, through royalty with royalty agreements being set at between 3% and 6% provided directly to the government quarterly which is the main source of revenue derived from gold mining.¹¹³ The mine revenue is paid to the Large Tax Unit of the Ghana Revenue Authority,

¹¹² Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *Resources Policy*, vol. 40, 2014, pp.74–82, p. 74.

¹¹³ *Ibid*, p. 75; See S. 25, *Minerals and Mining Act*, 2006 (Act 703), Laws of Ghana.

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which then dispenses the money into the Consolidated Fund. Of this, 80% is retained by the Government and used for general budget support. 10% is put into the Mineral Development Fund (MDF), which is ostensibly used to help fund public mining sector institutions and ad-hoc flagship projects in mining communities.¹¹⁴

Decentralization of mining revenue in Ghana is legislated as compensation for mining-affected communities. It is not a dividend or admission that citizens in mining areas have economic rights to mineral deposits.¹¹⁵ It is noteworthy, however, that even in Ghana, as is the case in many countries, the relationship between industrial mining and communities is complex and highly contested. This is because, despite macroeconomic growth fuelled by the mining boom, Ghana remains a country with high rural poverty.¹¹⁶ There have even been instances of misappropriation of mineral benefits distributed through the grassroots leaders, namely, village chiefs who are supposed to ensure that the funds are invested well for the benefit of the communities.¹¹⁷ The result has been unending poverty despite the presence of vast resources.

Nonetheless, Ghana can offer good lessons in terms of models of division, while ensuring that Kenya does not fall into the same problem of misappropriation of funds. Thus, while Ghana remains a model country for countries venturing into extractive industries, it demonstrates the important point that national development should not entirely be pegged on resources accruing from extractive industries, but local communities should be supported and encouraged to diversify their sources of livelihood in a way that ensures sustainability in income and growth for both the communities and the country.

¹¹⁴ *Ibid*, p. 75.

¹¹⁵ Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *op cit*, p. 74; See also Ayee, J., *et al*, 'Political Economy of the Mining Sector in Ghana,' *The World Bank Policy Research Working Paper 5730*, July 2011. Available at <http://www.cmi.no/publications/file/4091-political-economy-of-the-mining-sector-in-ghana.pdf> [Accessed on 29/05/2016].

¹¹⁶ *Ibid*, p. 75.

¹¹⁷ *Ibid*.

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5.2 NIGERIA: RESOURCE CURSE OR BLESSING?

There has been documented evidence from the vast majority of resource-rich countries, especially those endowed with depletable natural resources (i.e. fuels, ores, minerals and metals) to suggest that resource riches can be a “curse” rather than a “blessing”.¹¹⁸ Some of the factors that contribute to such eventualities include unpredictable commodity prices with abrupt fluctuations, booms and busts in macroeconomic and fiscal balances that follow the swings in resource rents, inter- and intra-generational misallocation of resource revenues and increasing corruption.¹¹⁹

One such country is Nigeria, which is listed as one of the largest economies of the African continent and one of the leading oil producers in the world.¹²⁰ It is estimated that oil accounts for more than 90 percent of the country’s exports, 25 percent of the Gross Domestic Product (GDP), and 80 percent of government total revenues.¹²¹ Notable, the oil boom of the 1970s led to the neglect of agriculture and other non-oil tax revenue sectors, expansion of the public sector, and deterioration in financial discipline and accountability.¹²²

In Nigeria, oil revenues are divided between the three tiers of government: federal, state and local. The federal government typically gets about half of revenues, the 36 state governments about a quarter, and the 774 local governments about a fifth. The rest flows to special funds.¹²³

Despite the oil revenue, poverty rates are generally higher and infrastructure is poorer in the oil-rich States and there is disproportionate allocation of such funds.¹²⁴ It has been observed

¹¹⁸ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,’ *Resources Policy*, 38(2013), pp.181–195, p. 181.

¹¹⁹ *Ibid.*

¹²⁰ See Agbaeze, E. K., ‘Resolving Nigeria’s dependency on oil – The derivation model,’ *Journal of African Studies and Development*, Vol. 7(1), pp. 1-14, January 2015.

¹²¹ *Ibid*, p. 3.

¹²² *Ibid*, p. 2.

¹²³ Shaxson, N., ‘Nigeria’s Extractive Industries Transparency Initiative: Just a Glorious Audit?’ (Royal Institute of International Affairs, 2009), pp. 3-4.

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that while oil exports have fuelled real GDP growth of over 5 per cent per year, the official unemployment rate in Nigeria climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates are estimated to be as high as 60 per cent.¹²⁵

The negative effects of the extractive sector which is said to be poorly regulated have not only been the limited resources accruing to the locals. There has also been huge environmental damage. It is contested that the site of Nigeria's vast oil wealth is also the source of an ecological disaster that has destroyed livelihoods of farmers and fisher folk in the delta's inlets on a huge scale.¹²⁶ This is because environmental damage not only affects health and wellbeing but also decimates livelihoods, such as fishing and agriculture that depend upon natural resources.¹²⁷

The scenario has led to legal battles. *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* were three lawsuits filed by the Centre for Constitutional Rights (CCR) and co-counsel from EarthRight International on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria.¹²⁸

Royal Dutch/Shell began using land in the Ogoni area of Nigeria for oil production in 1958. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. The Royal Dutch/Shell is also said to

¹²⁴ *Ibid*, p. 4.

¹²⁵ Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' *Africa Progress Report* 2013, p. 31. Available at http://appcdn.acwupload.co.uk/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf [Accessed on 27 May 2016].

¹²⁶ *Ibid*, p. 32.

¹²⁷ *Ibid*, p. 33.

¹²⁸ Centre for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al.*, available at <http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> [Accessed on 29 May 2016].

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have worked for decades with the Nigerian military regime to suppress all demonstrations that were carried out in opposition to the oil company's activities.¹²⁹

It has been alleged that Shell's aim for the lowest possible production cost including the practice of gas flaring, without regard for the resulting damage to the neighbouring people and surrounding land, has wreaked havoc on local communities and the environment.¹³⁰ In the early 1990s, the Ogoni, led by Ken Saro-Wiwa and the Movement for the Survival of the Ogoni People, began organized, non-violent protests against Shell's practices. Shell grew increasingly concerned with the heightened international prominence of the Ogoni movement and made payments to security forces whom they knew were engaging in human rights violations against the local communities. The military government violently repressed the demonstrations, arrested Ogoni activists, and falsely accused nine Ogoni activists of murder. It bribed witnesses to give false testimony.¹³¹

From the foregoing, it is apparent that the Nigerian people have not benefited much, if at all, from the extractive industry in their country, but have instead suffered more tragedy as a result of the mining activities. Kenya should therefore avoid a scenario where oil exploration result in human rights abuse and environmental degradation which in turn affects the livelihoods of the people. Corruption should also be shunned as it would lead to the intended beneficiaries being locked out and instead, only a few people, both in the public sector and private individuals would benefit instead.

¹²⁹ *Ibid.*

¹³⁰ Centre for Constitutional Rights, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, New York, June 8, 2009. Available at <http://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell> [Accessed on 29 May 2016].

¹³¹ *Ibid.*

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6. OPPORTUNITIES: MAKING NATURAL RESOURCES WEALTH COUNT

Arguably, benefit-sharing mechanisms involve a variety of institutional means, governance structures and instruments for distributing finance and other benefits.¹³² Further, Benefit-sharing mechanisms can be organized along two main axes: a *vertical axis* of benefit sharing across scales from national to local, and a *horizontal axis* of sharing within scales, including within and across communities, households and other local stakeholders.¹³³

It has been argued that free and prior informed consent of local communities and transparent and equitable benefit-sharing mechanisms can bring affected communities into the mainstream of a natural resource dominant development model.¹³⁴ Understanding who the key stakeholders are, what their aspirations, concerns and expectations of a project are, and what drives them is important for judging the reasonableness of a benefit-sharing settlement and its legitimacy and durability over time.¹³⁵ Key stakeholders may include the Government (national and sometimes counties), investors, affected communities and citizens at large.¹³⁶

Some Governments argue that no special transfer of revenues to producing regions is justified. They hold that the most effective approach to governance and development is for national governments to collect all tax revenues and then use them to benefit the country as a whole, including the producing areas. They feel that the producing regions will gain net benefits from projects, such as jobs, infrastructure and economic activity in their regions. So, no

¹³² Pham, T.T., *et al*, 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,' *op cit.* p. 1.

¹³³ *Ibid.*

¹³⁴ Talbott, K. & Thoumi, G., 'Common ground: balancing rights and responsibilities for natural resource investments and community development,' 3rd April 2015, available at <https://news.mongabay.com/2015/04/common-ground-balancing-rights-and-responsibilities-for-natural-resource-investments-and-community-development/> [Accessed on 28 April 2016]

¹³⁵ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), *op cit.* p. 12.

¹³⁶ *Ibid.*

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additional resources are justified. Other governments and commentators maintain that natural resource projects impose costs on the producing regions, and that communities should be compensated adequately for the ‘loss’ of a non-renewable resource.¹³⁷

The UN Declaration on the Rights of the Indigenous Peoples, adopted by the UNGA, guarantees indigenous people to fully enjoy human rights and fundamental freedom without discrimination. Article 4 of the convention obligates state to take up special measure in accordance with their free wishes in protecting the vulnerable themselves, their culture, environment and property.

Article 1 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹³⁸ recognizes the right of States to self-determination including the right to freely determine their political status, pursue their economic social and cultural goals, and manage and dispose of their resources. Equitable benefit-sharing is a prerogative of the government. From equitable benefit sharing stems economic development, co-existence and co-operation as well as sound natural resource management.

The preamble to the Constitution of Kenya 2010 acknowledges the people of Kenya as being proud of their ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation, respectful of the environment which is their heritage and determined to sustain it for the benefit of future generations, and committed to nurturing and protecting well-being of the individual, the family, communities and the nation. It recognizes the aspirations of all Kenyans for the government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In exercising their sovereign and

¹³⁷ *Ibid*, p. 37.

¹³⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

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inalienable right, the people are thus entitled to determine the form of governance of their country having participated fully in the making of the Constitution.

On the other hand, State and State organs are bound by the constitutional values and principles of governance. The national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people; human dignity, equality, social justice, inclusiveness, equity, human rights, non-discrimination and protection of marginalized; good governance, integrity, transparency and protection and accountability and sustainable development.¹³⁹

The social and economic development is essential to enable a favourable living and working environment.¹⁴⁰ Natural resource management plays a key role in the conservation of the environment. The benefit of a clean environment extends to biodiversity and wildlife ecosystems which ultimately enables the enjoyment of other rights.¹⁴¹ Human rights remain the obligation of the State to protect and may be done through inclusive decision-making processes.¹⁴²

Therefore, while it is important for the state to promote the people's right to benefit from their natural resources as envisaged in international and national legal and human rights instruments, this should be done within the framework of achieving sustainable development. All stakeholders must work towards implementing the sustainable development agenda which would mean that communities are obligated to diversify modes of development and production through adoption of more sustainable means.

¹³⁹ Article 10, Constitution of Kenya, 2010.

¹⁴⁰ Principle 8, UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

¹⁴¹ Article 24 of the ACHPR provides that every person shall have a right to a general satisfactory environment for development. This right connects to other human rights such as the right to life and the right to standard health care.

¹⁴² Aarhus Convention in Access to Information, Public participation in decision making and Access to Justice in Environmental Matters 1989 recognizes the nexus between human right and the environment as being essential in the well-being of human beings.

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It is, nonetheless, important for the Kenyan people to look beyond oil resources in the country and invest in innovation to boost production in other areas such as livestock and agriculture production as well as innovative business investment in creative technologies.

7.1 Foundations and Trusts

The approaches taken by Kenya towards resource management, for instance, have been through Foundations, Trusts and Funds (FTF) initiatives in the energy sector. FTF represent a wider range of financial and institutional framework that channel revenues to local communities. This mode of benefit sharing enable for the operation of government payment, compensation and community investment. It is suggested that they establish a systematic, professional formal approach to development. This has been successful in jurisdictions such as Senegal, Ghana, Australia and Canada.¹⁴³

7.2 Enhancing Local Accountability and Capacity-Building

Minerals are non-renewable resources.¹⁴⁴ There is emphasis on the importance of sound environmental management and effective governance as priority to ensure rapid development and poverty reduction. There is demonstrable shift from a predominantly centralized natural resource management to devolved models such as community-based natural resource management (CBNRM).¹⁴⁵ Communities with more control over access and better common property management regimes play stronger decision-making roles.¹⁴⁶ They acknowledge that land-use

¹⁴³ Muigua K., *et al*, *Natural Resources and Access to Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

¹⁴⁴ Masters, L. & Kisiangani, E., *Natural resource Governance in Southern Africa*, (Institute of Global Dialogue, South Africa, 2010).

¹⁴⁵ Roe, D., *et al*, *Community management of natural resources: impacts experiences and future directions*. IIED Publishing.

¹⁴⁶ Myrers, R., *et al*, 'Benefit sharing in context: a comparative analysis of 10 land-use change case study in Indonesia,' *Infobriefs*, No. 118, May 2015. Available at http://www.cifor.org/publications/pdf_files/infobrief/5585-infobrief.pdf [Accessed on 26 May 2016].

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decision-making is inherently a multilevel process since numerous actors are involved both directly and indirectly representing multiple sectors with different roles, interests and incentives.¹⁴⁷

It has been suggested that in terms of transparency, resource fund establishments may provide what seems to be of great importance to the resource-rich countries: transparency on resource wealth management.¹⁴⁸ Arguably, resource funds (RF) may provide, even to a limited degree, a track record of windfalls.¹⁴⁹ It has also been suggested that, through corporate social responsibility (CSR) and social investment strategies, extractive firms can provide local socio-economic development where the government is unable or unwilling to do so. They may thus help mitigate against the potentially harmful impacts of resource-led growth.¹⁵⁰ Some of the suggested types of CSR and social investment programmes include those relating to employment, such as practices of local hiring; environmental impact assessments and mitigation measures; and local community development projects, such as providing safe drinking water, building health centres and school classrooms, training peer educators for community health programmes and supplying equipment. It may also include providing microcredit schemes as well as scholarships for youth and women.¹⁵¹ Notable is the assertion that the ideal goal is for private sector development interventions to supplement government service provision, to avoid a situation of

¹⁴⁷ *Ibid*, p.1.

¹⁴⁸ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *op cit*, p. 190; cf. Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *op cit*, p. 50. There is an argument that transparency in resource governance in and of itself may not be capable of facilitating good governance. The argument, thus, is that synergies with other poverty reduction and sustainable development initiatives need to be explored. One of the suggested approaches is synergy with CSR initiatives of extractive industry firms at the regional and local levels.

¹⁴⁹ *Ibid*.

¹⁵⁰ Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *op cit*, p. 50.

¹⁵¹ *Ibid*, p. 50.

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dependency on the private sector, and not to impact the willingness or ability of the State to develop its capacity.¹⁵²

It is, however, noteworthy that CSR as a means of benefit sharing, albeit informally, may not be effective as it wholly depends on the goodwill of the company or corporation in question. It may, therefore, be necessary to have a more formalized framework under which the same benefits can accrue to the communities in a more certain and sustainable manner. This may call for a framework that is anchored in law, to shield it from the uncertainties that come with CSR arrangements. This also increases accountability, not only to the local communities but also to the government.

7.3 Achieving Right to Environmental Information

Environmental information comprises of information held by authorities of factors that affect the environment, research on the environment, and health and safety measures,¹⁵³ and reports on the implementation of environmental legislation among others.¹⁵⁴ Lack of environmental information regarding conservation and management becomes more technical in undertaking natural resource management.

Like many African countries that have natural resources, Kenya generally lacks the capacity to explore and extract them as well as the required equipment and knowledge on the same.¹⁵⁵ Illiteracy levels remain high in resource-rich counties as indeed is the case in many parts of the country.

¹⁵² *Ibid.*

¹⁵³ Convention on Environment Impact Assessment in a Transboundary Context, 1991, calls for the establishment of EIA procedures that involves public participation.

¹⁵⁴ http://www.citizensinformation.ie/en/environment/environmental_law/access_to_environmental_information.htm.

¹⁵⁵ World Bank Investments Projects, www.ggr.org

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African governments have entered into multinational contracts inviting foreign investors to their countries. The foreign investors, with the literacy, technology and advanced equipment, explore, extract and export the minerals to their countries for manufacturing. African countries import these finished products at a higher price.¹⁵⁶ As far as indigenous communities are concerned, their right to information should be upheld by ensuring that any information needed is received as soon as possible. Enabling access to environmental information forms the basis to access environmental justice.¹⁵⁷ Communities are also likely to understand the implications of extractive industries on their day to day lives as far as the environment is concerned.

7.4 Devolution and Benefit-Sharing

The 2010 Constitution requires that services be devolved and both the national and county governments to ensure reasonable access to its services so far as it is appropriate.¹⁵⁸ Ideally, local communities should be allowed to access natural resources for them to be able to uphold their responsibilities to the future generations.¹⁵⁹

Natural resources are a source of livelihood as they form part of their economic activity. If natural resources are accessed and well managed, they provide the raw materials which are then processed to get products that are sold and thereby generate income. Allowing communities to access natural resources will undoubtedly promote sustainable development.

¹⁵⁶ African Development Bank, *et al*, *African Economic Outlook 2013: Structural Transformation and Natural Resources*, 2013, available at <http://www.undp.org/content/dam/rba/docs/Reports/African%20Economic%20Outlook%202013%20En.pdf>, [Accessed on 29 May 2016].

¹⁵⁷ Muigua, K., *Natural Resources and Environmental justice in Kenya, op cit*; See also The Access to Information Bill, 2015 (Government Printer, Nairobi, 2015); See also Art. 35 of the Constitution of Kenya 2010.

¹⁵⁸ Article 6, Constitution of Kenya, 2010.

¹⁵⁹ Article 40, United Nations Declaration on the Right of the Indigenous people, 2007; In *Joseph Letuya and 21 others v AG and 5 others elc civil suit no 821 of 2012*, the court was challenged to determine whether an indigenous community (Ogiek) had rights arising from their occupation of parts of the East Mau forest and whether their eviction was an infringement to their right. The court held that the applicant were indeed recognized as indigenous people being a minority, they had been discriminated upon by the said eviction. Their rights to life, dignity, economic and social rights had been infringed from the eviction.

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However, fiscal decentralization has been criticised on account of the weak capacity of sub-national Governments (SNGs) to manage intrinsic volatility in revenue flows, and limited know-how of public financial management, planning and investments, and fragility of financial control systems. They also point to poor accountability of local authorities and corruption as a result. Moreover, complete decentralization of resource rents could deprive central government of funds necessary for providing national functions and could create geographical disparity and conflict.¹⁶⁰

In contrast, proponents argue that devolution would enhance allocative efficiency, as SNGs can more accurately determine the needs and find appropriate solutions. Importantly, supporters argue that the producing regions must be compensated for the negative impacts and for the loss of a non-renewable resource which local communities feel they own.¹⁶¹

Despite the foregoing arguments, it is important to make use of the devolved system to empower communities and build capacity through investing the accrued benefits in sustainable development projects which will go beyond the lifespan of oil exploration and at the same time uplift the livelihoods of the local people. The County governments are in a better position to identify the most viable and sustainable projects.

7.5 Public Participation

The principles that govern natural resource management have been enshrined in the 2010 Constitution of Kenya.¹⁶² Public participation allows individuals to express their views on key

¹⁶⁰ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), *op cit.* p. 33.

¹⁶¹ *Ibid*, p. 33.

¹⁶² Article 61, Constitution of Kenya, 2010; *Sustainable development* principle seeks to lessen the depletion of the non-renewable resources and pollution in the environment. The Brundtland Commission defined sustainable development as development that meets the needs of the present generation without comprising the ability of the future generations to meet their own needs. *Sustainable use* principle considers the need to reduce and eliminate unsustainable patterns of production and consumption. It is applied to determine the permissibility of the natural

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governmental policies and laws concerning conditions in their communities. Fostering public participation will mean that authorities dispense their constitutional and legislative obligation, positive deviation in terms of contribution and motivation. In *The Matter of the National Land Commission [2015] eKLR*,¹⁶³ one of the issues that the Supreme Court of Kenya had to deal with was the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ observed that public participation was a major pillar, and bedrock of democracy and good governance. It was the basis for changing the content of the State, envisioned by the Constitution, so that the citizens had a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance would make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority was derived from the people of Kenya, was the indestructible fidelity to the value and principle of public participation. The realization of the pillars of good governance would become weak and subject to the manipulation by the forces of status quo if the participation of the people was excluded.¹⁶⁴

He went further to state that public participation was the community based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision-making processes in policy, legislation, service delivery, oversight and development matters. It was a two

resource exploitation and is central to the principle of sustainable development. *Polluter pays principle* provides that where a person is responsible for causing the pollution, costs for such pollution should be borne by that person. States are held liable for internationally wrongful acts or omissions that arise out of their customary international law or treaty obligations. The concept of state responsibility protects fundamental values. In the *Corfu channel case*, it was held that states have an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states. *Precautionary principle* aims at averting danger to the environment before it actually occurs.

¹⁶³ Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

¹⁶⁴ *Ibid*, para. 45.

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way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision-making and is responsive and accountable to their needs. The definition could be applied to the management and administration of land in Kenya. In order to achieve efficient land administration and management, the national and county governments; the arms of government; and the commissions and independent offices, must conduct meaningful consultation, communication, and engagement with the people.¹⁶⁵

The Chief Justice further rightfully stated that the principle of the participation of the people did not stand in isolation but was to be realised in conjunction with other constitutional rights, especially the right of access to information (article 35); equality (article 27); and the principle of democracy (article 10(2)(a)). The right to equality related to matters concerning land, where State agencies were encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy was another national principle that was enhanced by the participation of the people.¹⁶⁶

The Supreme Court's advisory opinion is an affirmation of the important role that the principle of public participation can play in enhancing people's appreciation of the management of natural resources in the country. Apart from enhancing people's role in management, public participation may promote co-existence among indigenous communities.¹⁶⁷ All the concerned groups may get a chance to express their fears and concerns as well as needs as far as resource exploitation is concerned. Although it may slow down the decision making-process, public

¹⁶⁵ *Ibid*, para. 47.

¹⁶⁶ *Ibid*, para. 49.

¹⁶⁷ See Yagoub, A.M., 'Public Participation in Natural Resource Management in Sudan.'

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participation will prevent conflict of decisions and may also enable the investors obtain the ‘social license’ to operate in the affected regions.¹⁶⁸

If the state seeks to implement this principle, recourse must be paid to the existing traditional institutional structures which provide a structural base to public participation. In addition, promoting public participation contributes to their economic development.¹⁶⁹ It has also been observed that procedural equity, which concerns participation in decision-making and the inclusion and negotiation of competing views, is seen as critically important for any benefit-sharing mechanism.¹⁷⁰

There is need to diversify the type of expected benefits from the exploitation of the existing resources. The benefits envisaged should be in both monetary and non-monetary forms where possible. Equitable benefit-sharing may take monetary or non-monetary forms.¹⁷¹ It may also be direct or indirect. This may include participation, sharing scientific research and development results access to technology and payment of royalties and other compensation. Kenyan people and policy-makers, however, seem to be more concerned with royalties, at the expense of other forms of accruing benefits which may arguably have longer sustainability as far as improving the lives of the people is concerned.

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.¹⁷² One of the ways that this can be achieved is through maintaining active relationships built on trust with communities through appropriate and effective communication.

¹⁶⁸ Mohair, P., *Public Participation and Natural resource Decision Making: the Case of RARE II Decisions*, Utah Agricultural Experiment Station, Journal Paper No. 3282.

¹⁶⁹ *R v Kenya Forest Services ex parte the National Alliance of Community Forest Association*.

¹⁷⁰ Pham, T.T., *et al*, ‘Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,’ *op cit.* p. 31.

¹⁷¹ Nandozie, K., *et al*, *African Perspective on Genetic Resources: A Handbook of Laws Policies and Institutions*. (Environmental Law Institute, Washington DC, 2003).

¹⁷² Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), *op cit.* p. 61.

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This implies that genuine consultations and participation in decision-making will happen whenever possible and that perceptions and expectations are closely aligned with reality. They also propose carrying out comprehensive, participatory baseline studies of the community's socioeconomic, cultural heritage, and socio-environmental context before project development, agreeing to joint objectives for the project's community programs, monitoring outcomes (including community feedback), and responding as needed. This, according to IFC, helps address misconceptions, manage expectations, and assuage fears or concerns.¹⁷³

There is also the suggestion on establishing robust grievance mechanisms that are understood, accessible and linked directly to project performance measures. Where justified, third party mediation may be required. Foundations and other long-term approaches may also be good vehicles to achieve community development objectives if they ensure broader stakeholder participation and helping identify areas of focus and consistency of priorities across actors, such as company, governments, donors, and communities. Finally, integrating project development and community development plans as effectively as practicable with local and national Government planning to support development aspirations and balance the expectations and demands of different communities may be useful.

The suggestions by IFC are worth considering in the case of Kenya, to build sustainable and enduring local economies for the local people. These propositions are closely related to the non-monetary forms of benefits as envisaged in the Nagoya protocol. They ought to be integrated into the national legal framework on natural resource management and benefit sharing since they are more practical and likely to result in realistic and viable outcomes for easy implementation. This is because by their very nature, they would be based on commendations from all the relevant

¹⁷³ *Ibid*, p. 61.

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stakeholders, including the affected communities. This enhances chances of the outcome being more acceptable to the community for purposes of social licence in natural resources exploitation.

7.6 Addressing Resource Capture Phenomenon and Corruption

It has been argued that rent-seeking models assume that resource rents can be easily appropriated, hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption.¹⁷⁴ Corruption has been termed as a threat to protected human security.¹⁷⁵ Global effort is needed to combat corruption.¹⁷⁶ Resources have fostered corruption, undermined inclusive economic growth, incited armed conflict and damaged the environment.¹⁷⁷ The Governments managing significant resource may find rent appropriation preferable when compared to the promotion of wealth creation policies.¹⁷⁸ The argument is based on the preposition that rent appropriation may dominate over wealth generation as it offers immediate economic and political gains. These gains appear quite appealing as they can, arguably, be highly personal, favouring the specific members of the ruling elite.¹⁷⁹

7. CONCLUSION

It is a blessing that Kenya has natural resources that can be exploited. Effective management of these resources and equitable benefit-sharing are essential. The natural resources can assist Kenya

¹⁷⁴ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 184.

¹⁷⁵ Alao, A., *Natural Resource Management and Human Security in Africa*, in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010).

¹⁷⁶ Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact*, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 26 May 2016].

¹⁷⁷ Aled, W., *et al*, *Corruption in Natural Resource Management: An introduction* (Bergen: Michelsen Institute, 2008). Available at <http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf> [Accessed on 29 May 2016].

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

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to achieve sustainable development as envisaged in the United Nations Sustainable Development Goals.¹⁸⁰

There is, however, need for debate and consensus on how best to manage natural resources and the extractive industry so as to avoid the resource curse and alleviate poverty and promote development. A strong legal framework for benefit sharing ought to be put in place covering the expectations, rights and obligations of all parties concerned.

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¹⁸⁰ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

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