



Strathmore University

Law School

**TRANSPARENCY AND ACCOUNTABILITY IN THE PETROLEUM INDUSTRY;
Balancing the Right to Access Information and creating a favourable environment for
Investment**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

Ngatia Gladwinnie Wangechi

091788

Prepared under the supervision of;

Purity Wangigi Kibugi

December 2019

Word count; 11797 Words

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ACKNOWLEDGEMENT

I would first of all like to thank the Almighty God for the gift of life and for giving me strength and wisdom. I owe everything I have and all that I am to Him. I would also like to thank my family for their consistent support. They are my greatest cheerleaders and their motivation kept me going. Thank you; Mum, Dad, Carol, Sue and Brayo. I would like to thank my friends for their encouragement and support. Thank you Hope, Nicole, Mwendu, Ciiru and Martin. In addition, I would like to thank my supervisor, Purity Wangigi Kibugi. The writing of this dissertation would not have been possible without your guidance, your support and your patience.

Thank you all very much.

DECLARATION

I, NGATIA GLADWINNIE WANGECHI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

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

Signed:

PURITY WANGIGI KIBUGI

ABSTRACT

The discovery of oil in Kenya is a great blessing to the people of Kenya. However, if not managed well, it could be a dreaded curse. The country lacks the relevant expertise for oil exploration and therefore has to rely on multinational companies through foreign direct investments. The main objective of this dissertation is to analyse how to balance how between the right to access information to ensure transparency and accountability and create a favourable environment for investment in the petroleum industry. The research will look at the importance of access to information in ensuring transparency and accountability. The study will also analyse the current legal framework governing transparency and accountability in the petroleum industry. The research method used is an exploratory design which will analyse both primary and secondary sources of literature. The study will also carry out a case study on Norway and Nigeria. The study will be important in revealing that transparency and accountability is very important in the petroleum industry.

The study will analyse the research material to show the importance of transparency and accountability in the petroleum industry. It will also analyse the importance of access to information in ensuring transparency and accountability. The study will also show that limiting the right to access information to create a favourable environment for investment is a legitimate limitation. The study will then go on and use the findings to recommend reforms in the legal policy and institutional framework to ensure that there is transparency and accountability in the petroleum industry and that the government attracts investment at the same time.

LIST OF CASES

Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others [2013] eKLR.

Dagg v. Canada (Minister of Finance) (1997) Federal Court of Appeal of Canada.

Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR.

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya 2010

STATUTES

Access to Information Act, *Act No. 31 of 2016.*

Petroleum Act of Kenya, *Act No.2 of 2019.*

Natural Resources (Classes of Transactions Subject to Ratification) Act, *Act No. 41 of 2016.*

The Energy Act, *Act No. 1 of 2019*

INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights, (UDHR)

International Covenant on Civil and Political Rights (ICCPR)

African Charter on Human and Peoples Rights (ACHPR).

LIST OF ABBREVIATIONS

FDIs	Foreign Direct Investments
CS	Cabinet Secretary
NOCK	National Oil Corporation of Kenya Limited.
SEIC	Strathmore Extractives Industry Centre
EPRA	Energy and Petroleum Regulatory Authority
EPT	Energy and Petroleum Tribunal
IAs	International Investment Agreements
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ACHPR	African Charter on Human and Peoples Rights.
UNCTAD	United Nations Conference on Trade and Development
OECD	Organisation for Economic Co-operation and Development
EITI	Extractives Industry Transparency Initiative

1.0 CHAPTER ONE; INTRODUCTION

1.1 BACKGROUND

The extractives industry in any given country is promising. It holds promising prospects for boosting Kenya's economy through the large revenues that it brings in.¹ In Kenya, the discovery of petroleum in Turkana County and other parts of the country indicates feasible quantities of oil in the country.² The oil and gas sector in Kenya has been in existence since the 1950's, but the Turkana discovery was the first commercially viable discovery.³ At the moment, there are four potential sedimentary basins; Mandera, Anza, Lamu and the Tertiary Rift. The Lamu basin has significant discoveries of gas.⁴ The government of Kenya is making significant efforts towards ensuring that there is infrastructural development as well as ensuring there is a proper legal, institutional and policy framework to ensure maximum benefits from the oil and gas sector.⁵ The main stakeholders in the petroleum chain are; The petroleum mining companies, the government of Kenya and the citizens of Kenya.

Oil and gas falls in the category of non-renewable resources. This therefore means that the resources are determinate therefore their exploitation should be done in a sustainable manner.⁶ The presence of natural resources in any country creates a huge boost for the economy, through creation of revenue and employment as well as the development of infrastructure. The presence of natural resources also poses a great opportunity for corruption, which leads to what is commonly referred to as the dreaded "resource curse".⁷ The "resource curse", also known as the paradox of plenty is the failure of many resource-rich countries to benefit fully from their

¹ Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 1.

² Ministry of Petroleum and Mining, *Transparency and Accountability Framework Action Plan for Kenya's Petroleum Sector*, July 2019, 4.

³ Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 1.

⁴ Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 1.

⁵ Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 2.

⁶ Ministry of Petroleum and Mining, *Transparency and Accountability Framework Action Plan for Kenya's Petroleum Sector*, July 2019, 4.

⁷ Ministry of Petroleum and Mining, *Transparency and Accountability Framework Action Plan for Kenya's Petroleum Sector*, July 2019, 4.

natural resource wealth, and for governments in these countries to respond effectively to public welfare needs.”⁸ This has been experienced in oil producing countries such as Nigeria.

Transparency and accountability are crucial principles in the management of oil. This is important for Kenya considering the presence of high level of corruption in the country, evidenced in its low ranking on the transparency index.⁹

Kenya lacks the expertise required for petroleum exploration and therefore has to rely on multinational companies through foreign direct investment (FDI). Foreign direct investment by nature have very comprehensive confidentiality clauses.¹⁰ The companies investing mostly prefer non-disclosure of their contracts.¹¹ In essence, this is an impediment to the right to access of information, which is a means to achieve transparency. Temporary or permanent exemption from compliance with applicable standards in a country is a major incentive for investment.¹² Limiting the right to access to information in the petroleum industry would therefore create an incentive for investment in the country. Although the Kenya has inherent power to dispose of its natural resources in a manner that it deems fit, its technical, infrastructural and financial incapacities in oil exploration necessitates reliance on foreign companies. The interests of the foreign companies therefore become important due to their financial bargaining power.

Article 62(1)(f) of the Constitution of Kenya categorises minerals and oils as public land and should therefore be held in trust for the citizens of Kenya by the government.¹³ The government therefore has a duty to ensure the sustainable exploitation of these natural resources. It has a duty to ensure that it attracts investment and at the same time ensure that management is done in a transparent accountable manner. Article 71 of the Constitution also provides that any agreement relating to the exploitation of a natural resource must be ratified by Parliament.¹⁴

⁸ National Resource Governance Institute, https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf accessed on 20th November 2019.

⁹ Transparency International, ‘Corruption Perceptions Index 2017’, <https://www.transparency.org/country/KEN>.

¹⁰ United Nations Conference on Trade and Development, *International Investment Agreements: Flexibility for Development*, UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/IIT/18, 2000, 50.

¹¹ United Nations Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series on International Investment Policies for Development, 2009, 60.

¹² United Nations Conference on Trade and Development, *International Investment Agreements: Key Issues Volume Ii*, United Nations Publication, Geneva, Switzerland, 58.

¹³ Article 62(1)(f), *Constitution of Kenya 2010*.

¹⁴ Article 71, *Constitution of Kenya 2010*.

Transparency and accountability are crucial principles in the management of petroleum in the country. Article 10(2)(c) of the Constitution contains transparency and accountability as national values and principles of governance.¹⁵ In order to ensure transparency, access to information becomes v key. The right to access information is enshrined in Article 35 of the constitution and it requires states to publish and publicize any information affecting the nation.¹⁶ Article 24 of the Constitution provides for the limitation framework of fundamental rights and freedoms and provides that a right can only be limited by law to the extent that they are reasonable and justifiable in an open and democratic society.¹⁷ Section 6 of the Access to Information Act provides that the right to access information may be limited when the disclosure is likely to substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained.¹⁸

Petroleum exploration in Kenya is governed by the Petroleum Act of 2019.¹⁹ It consolidates laws relating to petroleum activities and gives guidelines on the exploration and management of petroleum in the country. Section 119 of the Act mandates the Cabinet Secretary to develop a transparency framework to govern the management of petroleum.²⁰ Section 49 of the Act provides for confidentiality and requires parties involved in the agreements to maintain confidentiality.²¹ The Cabinet Secretary is however mandated to disclose the information under certain circumstances which will be discussed in this paper.

While ensuring that there is access to information in the petroleum industry to ensure transparency and accountability, the state must ensure that it does so in a way that ensures there is attraction on investment since it lacks the sufficient expertise and infrastructure for the exploration of petroleum.

This paper therefore seeks to investigate how to balance the right to access information to ensure transparency and still attract investment at the same time. It also seeks to interrogate the current legal framework on transparency in the petroleum industry. In addition, it seeks to examine whether attracting investment is a reasonable and justifiable reason for limiting the right to access information in the petroleum industry.

¹⁵ Article 10(2)(c), *Constitution of Kenya 2010*.

¹⁶ Article 35, *Constitution of Kenya 2010*.

¹⁷ Article 24, *Constitution of Kenya 2010*.

¹⁸ Section 6(e), Access to Information Act, *Act No. 31 of 2016*.

¹⁹ Petroleum Act of Kenya, *Act No.2 of 2019*.

²⁰ Section 119, Petroleum Act of Kenya, *Act No.2 of 2019*.

²¹Section 49, Petroleum Act of Kenya, *Act No.2 of 2019*.

1.2 STATEMENT OF THE PROBLEM

Kenya's oil and gas industry has promising potential. It is expected that the industry should generate considerable tax revenue to boost Kenya's economy. The discovery of oil in Turkana county poses a great opportunity for Kenya's economy to grow. In fact, it is a major solution to solving the current debt problem in the country.²² Kenya lacks the expertise and infrastructure for oil exploration and therefore has to rely on multinational companies to carry out the exploration through FDIs.²³

Transparency and accountability are key to ensure that Kenya averts the resource curse associated with natural resources. The right to access information is key in ensuring that there is transparency and accountability in the petroleum industry. The government also has a duty to ensure that it creates an environment that attracts investment in this sector as it lacks the expertise and infrastructure in the exploration of oil. The exemption from compliance with disclosure requirements by multinational companies carrying out exploration in Kenya would create an incentive for investment in the sector.

This creates a need to balance between the right to access information to ensure accountability and the attraction of investment. This paper therefore seeks to examine how to strike this balance.

1.3 PURPOSE OF THE STUDY

This study aims to evaluate the legal system in Kenya surrounding transparency and accountability in Kenya. The study aims to analyse the role of access to information in ensuring transparency and accountability. It will also expound on how to create a balance between the right to access information and the attraction of investment by relying on the limitation framework found in Article 24 of the Constitution of Kenya.

1.4 HYPOTHESIS

1. Kenya lacks the expertise and infrastructure required for oil exploration and therefore has to rely on multinational companies for exploration through FDIs.

²² Ministry of Petroleum and Mining, *Transparency and Accountability Framework Action Plan for Kenya's Petroleum Sector*, July 2019, 4.

²³ Cordaid Foundation, *Oil Exploration in Kenya: Success Requires Consultation; Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya*, August 2015,10.

2. The existence of a comprehensive legal and institutional transparency framework in Kenya is very important in ensuring proper management of petroleum resources.
3. Temporary or permanent exemption from compliance with applicable standards in a country is a major incentive for investment.
4. FDI agreements contain very comprehensive confidentiality agreements which is an impediment to the right to access information.
5. Limiting the right to access information would be a major incentive for investment in the petroleum industry.
6. There is need to strike a balance between the right to access information and still attract investment in the petroleum industry.

1.5 OBJECTIVES.

1. This research aims to analyse the current legal system governing transparency in the petroleum industry.
2. The study will analyse the role of access to information in ensuring that there is transparency and accountability.
3. The study will analyse how to balance the right to access to information and attract investment at the same time.
4. The study will identify the gaps in the system and propose solutions to close the gaps so as to curb the problem.
5. The study also seeks to carry out a comparative analysis so as to borrow lessons from the country of comparison.

1.6 RESEARCH QUESTIONS.

1. What is the current legal framework governing transparency and accountability in the petroleum industry in Kenya?
2. What is the role of access to information in ensuring transparency and accountability?
3. Is creating a favourable environment for investment a reasonable and justifiable limitation of the right to access information in the petroleum industry?
4. How do you balance the right to access information and attraction of investment in the petroleum industry?

1.7 IMPORTANCE OF STUDY.

This study is important as it speaks to the economy of the country and the well-being of the citizens. The petroleum industry is a major boost to the economy and could be a solution to the current debt problem in Kenya. Transparency and accountability are very key in ensuring that petroleum resources are well managed and that they benefit the citizens in Kenya. Ensuring that there is a favourable environment for investment is also very important to the country because it lacks the expertise for petroleum exploration.

1.8 RESEARCH DESIGN

The research design used in this dissertation will be an exploratory design. This is because this topic is legal in nature and it requires the analysis of existing literature on the subject as well as existing legal framework.

The study will analyze primary sources, secondary and tertiary sources of the information on transparency and accountability in the petroleum industry in Kenya. The primary sources include international legislations, domestic legislations, case law and other regulatory instruments on the topic. Secondary sources include books, journal articles research papers, institutional reports, newspaper articles among others. The paper will also carry out a comprehensive internet research. The study will also do a case study on Norway and Nigeria.

The paper will then use its findings to make conclusions and recommendations on the topic.

1.9 SCOPE AND LIMITATIONS OF THE STUDY.

The study will examine the current legal system in Kenya. It will also review literature on the area. In addition, it will carry out a comparative analysis with another jurisdiction. The research will adopt be an exploratory design. This is because this topic is legal in nature and it requires the analysis of existing literature on the subject as well as existing legal framework.

This topic will heavily rely on written literature on the subject, and therefore the scope of the study will be limited to this. Therefore, most of the information will be abstract as there will be no practical measures of obtaining data and will therefore need implementation.

The time frame for the writing of this dissertation is also not enough to comprehensively do research on the topic. The word limit does not also give me an opportunity to deeply cover the concepts expressed in this paper.

1.10 DEFINITION OF TERMS

Resource Curse refers to “the failure of many resource-rich countries to benefit fully from their natural resource wealth, and for governments in these countries to respond effectively to public welfare needs.”²⁴

Transparency is “the government’s obligation to share information with citizens that is needed to make informed decisions and hold officials accountable for the conduct of the people’s business.”²⁵

Accountability occurs when “one party must report its activities and take responsibility for them. It is done to keep them honest and responsible.”²⁶

The right to access information refers to the citizens’ rights to attain information that is held by the state or any other body that affects them.²⁷

An FDI is a “investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate).”²⁸

Cabinet Secretary refers to the Cabinet Secretary in charge of the Ministry of Petroleum in Kenya.

Ministry refers to the Ministry in charge of petroleum in Kenya, which is the Ministry of Petroleum and Mining which is The Ministry of Petroleum and Mining.

Corruption is the is the abuse of entrusted power for private gain.²⁹

Authority means the Energy Regulatory Commission.

The Constitution refers to “The Constitution of Kenya 2010.”

Information refers to contracts and any other data in the petroleum exploration process.

²⁴ National Resource Governance Institute, https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf accessed on 20th November 2019.

²⁵ <https://www.alec.org/model-policy/transparency-and-government-accountability-act/> accessed on 21st November 2019.

²⁶ Black Law’s Dictionary, 2nd Edition.

²⁷ Article 35, *Constitution of Kenya 2010*.

²⁸ United Nations Conference on Trade and Development, *Definitions and Sources*, 245, https://unctad.org/en/Docs/wir2007p4_en.pdf.

²⁹ <https://www.transparency.org/> accessed on 20th November 2019.

1.11 ASSUMPTIONS

The author assumes that the relevant laws on the topic will remain constant throughout the writing of this paper.

1.12 CHAPTER BREAKDOWN.

This study will comprise of five chapters.

The first chapter of the dissertation will outline the background, the statement of the problem, the hypothesis, the definition of terms and the objectives of the study.

Chapter two will then extensively discuss the theoretical framework and literature review on this topic.

Chapter three of this dissertation will then analyse the current legal, policy and institutional framework governing transparency and accountability in Kenya.

Chapter four will then discuss the role of access to information in ensuring transparency and accountability in the petroleum industry, and how to balance the right with creating a favourable room for environment. The chapter will also carry out a comparative study.

Chapter five will then contain conclusions drawn from the study and give recommendations to solve the problem.

1.13 CHAPTER SUMMARY.

This chapter gives the background to the study. The chapter then goes ahead and states the problem and gives its objectives. It defines the key terms used in the dissertation and gives a scope of the study as well as its limitations. The chapter then outlines the flow of arguments through the chapter breakdown.

2.0 CHAPTER 2; THEORETICAL FRAMEWORK

The principle of transparency and accountability is founded in various theories of law. Transparency and accountability are key in ensuring proper management of the petroleum industry in Kenya. This chapter will therefore discuss various theories that espouse the need for transparency and accountability in the petroleum industry.

2.1 SOCIAL CONTRACT THEORY.

The proponents of this theory include, Jean- Jacques Rousseau³⁰, Thomas Hobbes³¹, Thomas Paine³² and John Locke³³ among other philosophers. Thomas Paine espouses the idea that a government is based on a social and political contract and that it is only a political contract that can guarantee the legitimacy of a government.³⁴ According to John Locke, we retain all our rights in the state of nature apart from the right to punish.³⁵ This paper is going to focus on the social contract theory according to Jean - Jacques Rousseau and Thomas Hobbes.

2.1.1 KEY FEATURES OF THE SOCIAL CONTRACT THEORY.

Jean - Jacques Rousseau's ideas of the social contract theory are codified in his book, *The Essential Rousseau*.³⁶ According to Rousseau, the social contract is a transcendental assembly through which an individual joins a community and becomes part of the general will.³⁷ He postulates that people should ideally govern themselves, however, it is difficult for people to remain continually assembled to devote their time to public affairs.³⁸

According to Rousseau, law is a reflection of the general will of the people, therefore the government can only exercise the will of the people, the failure of which cannot be tolerated. He further champions that every law that has not been ratified by the people is null and void and is actually not law.³⁹ The participation of the citizens directly in the law is very important and is necessary in establishing a moral obligation to obey the law.

³⁰ J Rousseau, *The Social contract or principles of political rights*, 1762

³¹ Hobbes T, Tuck R (ed), *Leviathan*, Cambridge University Press, Cambridge, 1991

³² T Paine, *The Common sense*, 1776

³³ J Locke, *Second Treatise on civil government*, 1690.

³⁴ Thomas Paine, *Common Sense and Other Writings*, ed. Gordon S. Wood (New York: The Modern Library, 2003), xxi–xxii.

³⁵ Locke J, Chapter One, *Two Treatise on Government*.1821.

³⁶ Rousseau J, *The Essential Rousseau*, Plume Publishers, 1974.

³⁷ Freeman M, *Lloyd's Introduction to Jurisprudence*, 8th Edition, Sweet & Maxwell, 111.

³⁸ Cole G Translation, *Social Contract Book 3, Chapter 4*, Pg. 17.

³⁹ Cole G Translation, *Social Contract Book 3, Chapter 4*, Pg. 17

Thomas Hobbes argues that the government exists because of the initial crude society that existed without common administration.⁴⁰ Under this system, men existed without any organized system of rules and they depended on their unlimited natural instincts. This system was problematic due to the selfish nature of man. Thomas Hobbes explains that when two men desire the same thing which they cannot both enjoy at the same time, they become enemies, and they are constantly in a state of war against one another.⁴¹ In this state, the concept of right or wrong, just or unjust does not make sense because of the absence of law and a system to enforce those laws.⁴² The state of affairs therefore necessitated the need for a government. In this theory, the citizens surrender their natural rights to the government in exchange for fundamental rights and mutual security.⁴³

2.1.2 CRITIQUES OF THE THEORY

Rousseau's idea of the general will assumes that the general will is common to all persons. It fails to recognize that different people will different things and it is therefore difficult to determine what the general will is. The closest idea to the general will is the majority rule which also discriminates the minority of any given community.⁴⁴

In addition, Rousseau's idea that man should ideally govern themselves using the idea of the general will fails to recognize the selfish nature of man and is inadequate to safeguard the citizens against tyranny.⁴⁵

Moreover, Rousseau fails to recognize that a contract is a voluntary agreement. However, the contract between a state and its individuals is not a voluntary one. This is because man is born into a state and has no power to withdraw from his obligations.⁴⁶

⁴⁰ Mbondenyei KM and Ambani JO, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, 47.

⁴¹ Abizadeh A, *Hobbes on the Causes of War: A Disagreement Theory*, *The American Political Science Review* Vol. 105, No. 2, May 2011, 299.

⁴² Hobbes T, Tuck R (ed), *Leviathan*, Of the Natural condition of mankind as concerning their felicity and misery, Chapter XIII Cambridge University Press, Cambridge, 1991

⁴³ Abizadeh A, *Hobbes on the Causes of War: A Disagreement Theory*, *The American Political Science Review* Vol. 105, No. 2, May 2011, 300.

⁴⁴ <https://fee.org/articles/rousseau-social-contract-a-critical-response> accessed on 1st October 2019.

⁴⁵ <https://fee.org/articles/rousseau-social-contract-a-critical-response> accessed on 1st October 2019.

⁴⁶ Gettel R, *Political Science*, Revised Edition, 1956, 116

Hobbes theory is also limited as he only samples a specific group of human beings. His sample consisted of young men from Europe who were fighting. He fails to consider other factors such as age, cultural background and sex.⁴⁷

2.1.3 WHY THIS THEORY?

The social contract is the foundation of the consent that the government has to rule its people. From the theory above, we see that the government has a duty to ensure that it takes care of its citizens and follows the general will of its people. The government therefore executes an important function of preserving order through promulgating and enforcing laws.⁴⁸ This is to make life more pleasant as opposed to living in a state of nature without government.⁴⁹ This paper will look at the will of the people as expressed in the Constitution of Kenya 2010.

The Constitution of Kenya categorizes mineral resources and oils as public land, and therefore have to be held in trust for the people of Kenya. Therefore, the government has a duty to report the management of petroleum to its citizens, hence the role of transparency and accountability in the petroleum industry. The government also has a duty to ensure that it attracts investment in the country.⁵⁰ This is because they have a duty to serve the citizens in a way that will benefit them the most. This duty raises a need to limit some fundamental rights and freedoms so as to ensure the best interests of its citizens. In this paper, the issue discussed is the limitation of the right to access information.

The Constitution of Kenya requires government officials to carry out their duties in a transparent and accountable manner.⁵¹ It also requires the State to publicize any information affecting its citizens.⁵² Any limitation of fundamental rights and freedoms should be done according to the Constitution and must be reasonable and justifiable in a democratic society.⁵³

2.1.4 CONCLUSION

The principles of transparency and accountability in the extractives industry are founded on the social contract theory. The role of access to information in ensuring the same is also seen in the theory as discussed above. This paper therefore seeks to examine the general will of the

⁴⁷<https://medium.com/@MichaelRobertCaditz/hobbes-error-and-problems-with-social-contract-theory-%D6%98-bec8bf7ae13c> accessed on 1st October 2019.

⁴⁸ Tamanaha BZ, *On the Rule of Law; History, Politics, Theory*, Cambridge University Press, Cambridge, 2004.

⁴⁹ Tamanaha BZ, *On the Rule of Law; History, Politics, Theory*, Cambridge University Press, Cambridge, 2004.

⁵⁰ This obligation arises from the duty of the government to manage natural resources. Kenya currently lacks the expertise for oil exploration and therefore has to rely on multinational companies.

⁵¹ Article 10, *Constitution of Kenya 2010*.

⁵² Article 35, *Constitution of Kenya 2010*.

⁵³ Article 24, *Constitution of Kenya 2010*.

people as expressed in the Constitution of Kenya 2010 and postulated by the social contract theory.

2.2 LITERATURE REVIEW

2.2.1 INTRODUCTION.

There exists broad literature on transparency and accountability in the oil industry. Various authors have broadly discussed this topic. The principles are also reflected in various legislations governing the country. This section focuses on the Constitution of Kenya as it is the supreme law of the land, as well as various authors who have written on the subject.

2.2.2 THE CONSTITUTION OF KENYA 2010.

The Constitution of Kenya 2010, which is the supreme law of the land dedicates a whole chapter on land and environment.⁵⁴ Minerals and oils are categorized as public land which is to be held in trust by the government for the citizens on Kenya.⁵⁵ It requires government officials to carry out their work in a transparent and accountable manner.⁵⁶ In addition, it recognizes transparency and accountability as part of its national values.⁵⁷ The Constitution also provides for access to information by its citizens. It requires the government to publicize all the information held by the state that affects its citizens.⁵⁸

2.2.3 AUTHORS VIEWS.

Dr. Kariuki Muigua and Francis Kariuki discuss the importance of transparency and accountability in ensuring good governance. They argue that transparency and accountability are key principles of good governance and they ensure that government officials are subjected to oversight.⁵⁹ Their views are further reflected by Saladin who argues that oversight ensures that the government meets its citizens need and ensures good governance and poverty reduction. Lack of transparency and accountability breeds corruption and weakens the structures of good governance.⁶⁰

Virginia Hautler argues that promoting transparency and accountability is a solution to weak governance in developing countries that are rich in resources. She further argues that disclosing

⁵⁴ Chapter 5, *Constitution of Kenya 2010*.

⁵⁵ Article 169, *Constitution of Kenya 2010*.

⁵⁶ Article 232, *Constitution of Kenya 2010*.

⁵⁷ Article 10(2)(c), *Constitution of Kenya 2010*.

⁵⁸ Article 35, *Constitution of Kenya, 2010*.

⁵⁹ Muigua DK, Kariuki F, *Natural Resources and Environmental Justice in Kenya*, Nairobi, Glenwood Publishers Limited; 2015, 15.

⁶⁰ Saladin A, *Good Governance and Transparency; Their Impact on Development*, Bluebook 20th Edition, 1999, 193.

information in the extractive industry enables citizens to hold government accountable and this in turn reduces corruption and alleviates conflict.⁶¹ In Kenya, the culture of corruption by government officials is not a new phenomenon. Transparency in the petroleum industry therefore becomes key to ensure the proper management of the resources.

Mark Fenster on the other hand argues that transparency creates frustration for the parties involved. This is because it does not consider the tensions that come with concealing certain information. He states that the concept of transparency poses other difficult questions such as the extent of disclosure and the effects and tensions that disclosure of certain information creates.⁶² He argues that the flaws of transparency theories result from a simple model of linear communication that assumes that when information is released to the public, it will hold government officials accountable.⁶³ He therefore argues transparency does not always ensure that the government is held accountable. This argument is important when it comes to the limitation of the right to access information to ensure transparency.

To ensure transparency and accountability, the need for strong institutions is inevitable. Paul Stevens and Evelyne Ditches argue that the presence of oil in any country leads to the dreaded resource curse. In order to avert this, they argue that the presence of strong institutions is key.⁶⁴ He argues that the negative impact of natural resources is as a result of economic or political flaws in managing natural resources. He argues that institutions could serve as the tie between natural resource wealth and poor outcomes. This is because, when institutions are good and strong, politicians are not able to influence alter outcomes. On the other hand, in countries where institutions are not strong, political incentives become dominant and this has a negative impact on the outcomes. A good example is Nigeria, which will be discussed in the case study in this dissertation. They also argue that countries must improve the quality of institutions so as to avoid the negative economic and political effect that the exploitation of natural resources would have.⁶⁵ In Kenya, this is important because of the corruption culture that has been

⁶¹ Hautler V, *Disclosure as Governance, The Extractives Industries Transparency Initiative and Resource Management in the Developing World*, Massachusetts Institute of Technology, 55.

⁶² Fenster M, *The Opacity of Transparency*, IOWA Law Review, 91, 2006, 885.

⁶³ Fenster M, *The Opacity of Transparency*, IOWA Law Review, 91, 2006, 885.

⁶⁴ Stevens P, Dietsche E, *Resource curse: An analysis of causes, experiences and possible ways forward*, Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland, UK, October 2007, 1.

⁶⁵ Stevens P, Dietsche E, *Resource curse: An analysis of causes, experiences and possible ways forward*, Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland, UK, October 2007, 61

experienced.⁶⁶ Strong institutions therefore become very key to ensuring transparency and accountability in the extractives industry in Kenya.

Paivi Lujala and Levon Epremian discuss the importance of transparency and accountability in the management of natural resources. They argue that it is only when the public have information that they can hold the government accountable for their actions. They argue that when the citizens have information, they are empowered to demand for better management of their resources. This is important in the Kenyan context because natural resources belong to the citizens of Kenya and are to be held in trust by the government for the people of Kenya. They also argue that transparency is important to alleviate the uneven power between the state and the citizens on the management of natural resources.^{67a}

Sharon Tugee discussed the importance of transparency and accountability in Kenya so as to avert the resource curse, which has been experienced in oil producing countries such as Nigeria.⁶⁸ She argues that transparency and accountability is very important in averting this resource curse.⁶⁹ She further argues that transparency and accountability can only be achieved through the right to access information as it is the means through which the citizens find out what their governments are doing, and they are able to hold their governments accountable for their actions.⁷⁰ Her discussions are very important to this study because it looks at transparency and accountability in the petroleum industry, with a focus on the role of access to information.

2.2.4 CONCLUSION

From the discussions above, we see the importance of transparency and accountability in the petroleum industry. We also see the importance of access to information in ensuring that transparency and accountability is achieved. Although various authors have written on the subject of access to information transparency and accountability in Kenya, there is a gap in knowledge on how to balance the right to access information to ensure transparency and

⁶⁶ Transparency International, 'Corruption Perceptions Index 2017', <https://www.transparency.org/country/KEN>

⁶⁷ Williams A, Billon P, *Corruption, Natural Resources and Development: From Resource Curse to Political Ecology*, Edward Edgar Publishing, Massachusetts, USA, 58.

⁶⁸ Tugee S, *A Critical View of Kenya's Legal Framework on Transparency and Accountability in Oil Exploration and Extraction; Averting the Resource Curse*, Published LLM Thesis, The University of Nairobi, 2017, x.

⁶⁹ Tugee S, *A Critical View of Kenya's Legal Framework on Transparency and Accountability in Oil Exploration and Extraction; Averting the Resource Curse*, Published LLM Thesis, The University of Nairobi, 2017, x.

⁷⁰ Tugee S, *A Critical View of Kenya's Legal Framework on Transparency and Accountability in Oil Exploration and Extraction; Averting the Resource Curse*, Published LLM Thesis, The University of Nairobi, 2017, x.

accountability and create a favourable environment for investment in the petroleum industry. This paper seeks to do a study that will contribute to closing this gap in knowledge.

2.3 CHAPTER SUMMARY

This Chapter discusses the theoretical framework and the literature review for this dissertation. It explains the social contract theory as the foundational theory for transparency and accountability in the petroleum industry. It also discusses the views of various authors in the topic.

3.0 CHAPTER 3; LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK IN THE EXPLORATION OF OIL; MAPPING A LEGAL TERRAIN

3.1 INTRODUCTION

Policy, institutional and legal frameworks are key in ensuring that there is transparency and accountability in the oil industry in Kenya. Transparency and accountability are engendered when access to information in the extractives industry is made possible. This chapter seeks to examine the existing policy, institutional and legal framework governing oil exploration in Kenya. The examination will be specific to transparency and accountability. The analysis will also focus on access to information as it is a necessary condition for transparency and accountability.

3.2 OIL EXPLORATION IN KENYA; A HISTORICAL PERSPECTIVE

The exploration of petroleum in Kenya started in the 1950's within the Lamu basin.⁷¹ The first commercially feasible discovery was made in 2012 in the tertiary rift.⁷² This was followed by significant discovery of gas in the offshore Lamu basin. Until date, above 86 wells have been drilled, a majority of them being in the Tertiary Rift.⁷³ An approximate of over 4 billion crude oil reserves have been encountered in the Lokichar basin by Tullow PLC with recovery oil estimated to be 750 million barrels.⁷⁴

From 1960 till date, the National Oil Corporation has set up cores and drill cutting storage facility which holds samples that are retrieved during drilling. National Oil is also setting up a Seismic Processing centre and a Geochemical-Petrophysical analysis laboratory in Kawi House, South C.⁷⁵

In 1986, the petroleum exploration and production legislation was revised so as to create incentives and make it flexible to attract international exploration in the country, and this led to the commencement of the Petroleum (Exploration and Production Act).⁷⁶ In 2012, President Mwai Kibaki affirmed the discovery of oil in Kenya after exploratory drilling by Tullow Oil,

⁷¹ Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 1.

⁷² Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 1.

⁷³ Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 1. Kariuki F, Kerecha G, Kirwa J, *Handling Extractives Related Grievances in Kenya, A Guide for Judicial Officers*, Extractives Baraza, Nairobi Kenya, 2019, 1.

⁷⁴ National Oil Website, <https://nationaloil.co.ke/upstream/> accessed on 20th November 2019.

⁷⁵ National Oil Website, <https://nationaloil.co.ke/upstream/> accessed on 20th November 2019.

⁷⁶ National Oil Website, <https://nationaloil.co.ke/> accessed on 20th November 2019.

which is an Anglo-Irish firm.⁷⁷ In March 2019, the Energy Act of 2019 and the Petroleum Act of 2019 were passed, which repealed the Energy Act of 2006 and the Petroleum (Exploration and Production) Act of 2017.⁷⁸

3.3 LEGAL FRAMEWORK.

3.3.1 THE CONSTITUTION OF KENYA, 2010.

The Constitution of Kenya 2010 is the supreme law of the land and it binds all citizens and all state organs and at both the county and national government.⁷⁹ All sovereign power belongs to the people of Kenya and shall be exercised in accordance with the constitution of Kenya.⁸⁰ The sovereign power is delegated to various state organs which are to be performed in accordance with the Constitution.⁸¹

3.3.1.1 Mineral Oils as Public Land.

The Constitution provides that all minerals and mineral oils constitute public land and shall be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National land Commission.⁸² The same was emphasized by Justice Mutungi in the case of *Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining and 9 others*⁸³. The Constitution also requires the government to utilize the natural resources for the benefit of the people of Kenya.⁸⁴ In addition, all agreements relating to natural resources are subject to ratification by Parliament if they involve a right or concession to another person for the exploitation of any natural resource in Kenya.⁸⁵ Parliament is the representative body in Kenya, and views addressed by Parliament reflect the views of the citizens of Kenya. Oil is therefore public land and its management must be exercised with the best interests of the citizens of Kenya at heart.

3.3.1.2 Transparency and Accountability.

Article 10 of the Constitution of Kenya provides for transparency and accountability as part of its national values.⁸⁶ The values bind all state organs, state officers, public officers and all

⁷⁷ BBC News, <https://www.bbc.com/news/world-africa-17513488> accessed on 20th November 2019.

⁷⁸ Energy, Petroleum and Regulatory Authority Website, < <https://www.epra.go.ke/services/petroleum/>> accessed on 20th November 2019.

⁷⁹ Article 2, *Constitution of Kenya 2010*.

⁸⁰ Article 1, *Constitution of Kenya 2010*.

⁸¹ Article 1(3), *Constitution of Kenya 2010*.

⁸² Article 62, *Constitution of Kenya 2010*.

⁸³ *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR*

⁸⁴ Article 62 (h), *Constitution of Kenya, 2010*.

⁸⁵ Article 70, *Constitution of Kenya 2010*.

⁸⁶ Article 10 (2)(f), *Constitution of Kenya 2010*.

other persons whenever any of them interprets the constitution, enacts or interprets any law, or makes or implements public policy decisions.⁸⁷ With regard to this paper, the role being looked at is the role to implement public policy decisions with regard to disclosing contracts between the government and oil exploration companies. Further, Article 225 of the Constitution requires Parliament to enact legislation to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation.⁸⁸

3.3.1.3 Access to Information.

Article 35 of the Constitution of Kenya provides for access to information as a fundamental human right and freedom. It provides that all citizens have a right to access information held by the state. It also requires the state to publish and publicize any important information affecting the nation.⁸⁹ Access to information is an important precondition in ensuring that there is transparency and accountability in the petroleum industry.

3.3.1.4 Limitation Framework for Rights

The Constitution of Kenya in Article provides for a limitation framework for fundamental rights and freedoms. It provides that a right or fundamental freedom shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.⁹⁰

3.3.2. STATUTORY LEGISLATIONS.

3.3.2.1 Petroleum Act of 2019.

The Petroleum Act commenced in 28th March 2019.⁹¹ The Act repealed the Petroleum (Exploration and Production) Act. The Act was enacted so as to consolidate the laws regarding petroleum operations. The Act provides for a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations so as to reflect the principles of the Constitution.⁹²

Section 119 of the Act requires the Cabinet Secretary in charge of Petroleum to develop a framework for reporting, transparency and accountability in the upstream petroleum accountability. sector, which includes the publication, of all petroleum agreements, records,

⁸⁷ Article 10 (1), *Constitution of Kenya 2010.*

⁸⁸ Article 225 (2), *Constitution of Kenya 2010.*

⁸⁹ Article 35, *Constitution of Kenya 2010.*

⁹⁰ Article 24, *Constitution of Kenya 2010.*

⁹¹ Petroleum Act, *Act No.2 of 2019.*

⁹² Petroleum Act, *Act No.2 of 2019.*

annual accounts and reports of revenues, fees, taxes, royalties and other charges, as well as, any other relevant data and information that support payments made by the contractor and payments received by the national government, county governments and local communities.⁹³

Section 23 of the Act mandates the Energy regulatory Commission to give access to information relating to non-exclusive exploration permits issued under the Act.⁹⁴ Section 46 of the Act requires that any disclosure of information must be done with prior consent in writing from the person whom the information was obtained.⁹⁵ The section further requires that the non-disclosure of the information should not restrict any furtherance of a person's rights provided for under the Constitution of Kenya or any other relevant laws.⁹⁶

Section 49 of the Act gives provision for confidentiality. It provides that the parties to the contract are required to maintain confidentiality. The parties are not required to disclose the information unless the information is: required to be published in accordance with the provisions of the Constitution, by a lawful order issued by a court of competent jurisdiction or by express consent by the other party.

3.3.3.1.1 Inadequacies of the Act.

The Act provides for a transparency framework instead of a law to ensure transparency and accountability in the petroleum industry. A law is more cogent and is more enforceable in law as opposed to a framework.⁹⁷ In addition, the Constitution requires Parliament to enact legislation on transparency and ensure the implementation thereof.⁹⁸

The Act also requires disclosure of information only to the authority. In the case where non-disclosure restricts the furtherance of a right, the act opens up the question presented for litigation in the High Court.⁹⁹ This is because Section 165 of the Constitution of Kenya 2010 gives the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.¹⁰⁰ The right in

⁹³ Section 119, Petroleum Act, Act No.2 of 2019.

⁹⁴ Section 23, Petroleum Act, Act No.2 of 2019.

⁹⁵ Section 46, Petroleum Act, Act No.2 of 2019.

⁹⁶ Section 46, (a)(3), Petroleum Act, Act No.2 of 2019.

⁹⁷ Tugee S, *A Critical View of Kenya's Legal Framework on Transparency and Accountability in Oil Exploration and Extraction; Averting the Resource Curse*, Published LLM Thesis, The University of Nairobi, 2017, 35.

⁹⁸ Article 225, Constitution of Kenya 2010.

⁹⁹ Tugee S, *A Critical View of Kenya's Legal Framework on Transparency and Accountability in Oil Exploration and Extraction; Averting the Resource Curse*, Published LLM Thesis, The University of Nairobi, 2017, 38.

¹⁰⁰ Article 165, Constitution of Kenya 2010.

question in this case is the right to access information which is provided for in Article 35 of the Constitution.

3.3.2.2 Natural Resources (Classes of Transactions Subject to Ratification) Act.

This was enacted to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.¹⁰¹ The Act provides that authorization to extract crude oil or gas requires ratification by Parliament, pursuant to Article 71 of the Constitution of Kenya.¹⁰²

The Act also provides for confidentiality of agreements. It provides that the Cabinet Secretary in charge of the transaction may grant a request not to disclose agreements on account of commercial viability, national security or other public interest considerations.¹⁰³ The Act provides that where the confidentiality request is granted, the Cabinet Secretary responsible for the natural resource shall submit the agreement to parliament, and the ratification process shall be done in camera without disclosing any confidential material.¹⁰⁴ A summary of the agreement shall however be made available to the public. The decision of the High Court may be challenged by a person in the High Court, and the High Court shall have power to call for and examine the agreement in open camera before examining the matter.¹⁰⁵

3.3.2.3 Access to Information Act

The Access to Information Act was created to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.¹⁰⁶ Section 3 of the Act provides that one of the purposes of the Act is to promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information.¹⁰⁷ The Act provides that every citizen has the right to access information held by the state or any other person and where the information is required for the exercise or protection of a fundamental right or freedom.¹⁰⁸ Section 5 further provides for the disclosure of information held by public entities.¹⁰⁹ Section 6 of the Act provides for a limitation framework and provides that where the disclosure or access is likely

¹⁰¹ Natural Resources (Classes of Transactions Subject to Ratification) Act, *Act No. 41 of 2016*.

¹⁰² Section 4 (1) as read together with the First Schedule, Natural Resources (Classes of Transactions Subject to Ratification) Act, *Act No. 41 of 2016*.

¹⁰³ Section 13, Natural Resources (Classes of Transactions Subject to Ratification) Act, *Act No. 41 of 2016*.

¹⁰⁴ Section 13, Natural Resources (Classes of Transactions Subject to Ratification) Act, *Act No. 41 of 2016*.

¹⁰⁵ Section 13, Natural Resources (Classes of Transactions Subject to Ratification) Act, *Act No. 41 of 2016*.

¹⁰⁶ Access to Information Act, *Act No 31 of 2016*.

¹⁰⁷ Section 3 (2), Access to Information Act, *Act No 31 of 2016*.

¹⁰⁸ Section 4, Access to Information Act, *Act No 31 of 2016*.

¹⁰⁹ Section 5, Access to Information Act, *Act No 31 of 2016*.

to significantly prejudice commercial interests, the right can be limited.¹¹⁰ The Section further provides that despite the provisions for limitation, a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.¹¹¹

3.3.3 INTERNATIONAL LEGISLATION

The right to access information is not only recognized in the Constitution of Kenya as earlier expressed but has been recognized by various international legislations of which Kenya is part of. The right is enshrined in Article 19 of the Universal Declaration of Human Rights, (UDHR), Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the African Charter on Human and Peoples Rights (ACHPR). The international conventions aforementioned form part of Kenyan law by virtue of Article 2(6) of the Constitution of Kenya which makes any treaty ratified by Kenya part of the Kenyan law.¹¹²

3.4 POLICY FRAMEWORK.

The Petroleum Sector is guided by the policy set out in Sessional No. 4 of 2004.¹¹³ The objective of the policy is to ensure affordable, competitive, sustainable and reliable supply of energy to meet national and county development needs at least cost, while protecting and conserving the environment¹¹⁴ In addition, Section 119 of the Petroleum Act requires the Cabinet Secretary in charge of petroleum to come up with a transparency framework for the exploration and management of petroleum resources.¹¹⁵ To fulfil this, the Ministry of Energy in collaboration with The Strathmore Extractives Industry Centre,(SEIC) have come up with a transparency framework. The framework results from collaboration with all stakeholders in the petroleum industry.¹¹⁶ The framework provides set standards for decision makers at all levels of government to ensure that they manage petroleum resources in a transparent manner.¹¹⁷ The policy draws its standards from the Extractive Industries Transparency Initiative (EITI) Standard, the International Monetary Fund Guide on Resource Revenue Transparency, the Revenue Watch Index, the Resource Governance Index, the Natural Resource Charter

¹¹⁰ Section 6, Access to Information Act, *Act No 31 of 2016*.

¹¹¹ Section 6 (4), Access to Information Act, *Act No 31 of 2016*.

¹¹² Article 2(6), *Constitution of Kenya, 2010*.

¹¹³ Ministry of Energy and Petroleum, “Draft National Energy and Petroleum Policy”, June 2015, 11.

¹¹⁴ Ministry of Energy and Petroleum, “Draft National Energy and Petroleum Policy”, June 2015, 11.

¹¹⁵ Section 119, Petroleum Act, *Act No.2 of 2019*.

¹¹⁶ Ministry of Petroleum and Mining, *Transparency and Accountability Framework and Action Plan for the Petroleum Sector in Kenya 2019*, July 2019, 2.

¹¹⁷ Ministry of Petroleum and Mining, *Transparency and Accountability Framework and Action Plan for the Petroleum Sector in Kenya 2019*, July 2019, 7.

Benchmarking Framework, the World Bank Mining Investment and Governance Review, the African Minerals Governance Framework, the Ibrahim Index of African Governance, the World Bank Country Policy and Institutional Assessment Tool, the Publish What You Pay Extracting Equality Guide, and the African Peer Review Mechanism.¹¹⁸

The government of Kenya also included the oil and gas sector in its Vision 2030 Blueprint, defining it as a high potential for ensuring economic growth in the country.¹¹⁹ The plan highlights the various roles of different sectors in the extractives sector in ensuring that the industry is successful.¹²⁰

The management of petroleum resources should therefore be done in a transparent manner and the government should be accountable to the citizens of Kenya.

3.5 INSTITUTIONAL FRAMEWORK.

As discussed in the literature review, institutions are important in ensuring that there is transparency and accountability in any given industry. The oil and gas industry in Kenya is governed by various institutions which deal with various aspects such as land, environment, water among many others. This section will focus on key institutions which deal with transparency and accountability.

The Ministry of Energy and Petroleum is tasked with the mandate to develop and implement policies that create an enabling environment for efficient operation and growth of Kenya's energy sector.¹²¹ In addition, we have the Energy and Petroleum Regulatory Authority (EPRA), which regulates the management of energy and petroleum resources.¹²²

Furthermore, we have the National Oil Corporation of Kenya (NOCK) which is a state corporation involved in all the aspects the petroleum supply chain covering the upstream oil and gas exploration, midstream petroleum infrastructure development and downstream marketing of petroleum products.¹²³

¹¹⁸ Ministry of Petroleum and Mining, *Transparency and Accountability Framework and Action Plan for the Petroleum Sector in Kenya 2019*, July 2019, 8.

¹¹⁹ Vision 2030, Republic of Kenya Sector Plan for Oil and Other Minerals, 2013-2017, iii.

¹²⁰ Vision 2030, Republic of Kenya Sector Plan for Oil and Other Minerals, 2013-2017.

¹²¹ Ministry of Energy website http://energy.go.ke/?page_id=439 accessed on 20th November 2019.

¹²² EPRA website, <https://www.epra.go.ke/about/>, accessed on 20th November 2019.

¹²³ National Oil website, <https://nationaloil.co.ke>, accessed on 20th November 2019.

In addition, we have the Energy and Petroleum Tribunal (EPT). The tribunal is tasked with the hearing and determination of all petroleum related disputes and appeals under the Petroleum Act as well as any other written law.¹²⁴

The institutions above work together so as to ensure the proper management of oil resources in Kenya.

3.6 CHAPTER SUMMARY

This Chapter summarizes the legal, Policy and institutional framework governing the management of oil and gas in Kenya. The provisions discussed above stress on the importance of transparency and accountability in the petroleum industry. The role of access to information is also seen to be key to ensure that there is transparency and accountability in the industry.

¹²⁴ Section 25, Section 36 (1), Energy Act of Kenya, *Act No. 1 of 2019*.

4.0 CHAPTER 4; BALANCING THE RIGHT TO ACCESS INFORMATION TO ENSURE TRANSPARENCY WITH CREATING A FAVOURABLE ENVIRONMENT TO ATTRACT INVESTMENT IN THE PETROLEUM INDUSTRY.

4.1 INTRODUCTION.

Transparency and accountability are key principles in any sector. More so in the petroleum industry due to its high revenue sources. On the other hand, temporary or permanent exemption from compliance with applicable standards in a country is a major incentive for investment.¹²⁵ Kenya lacks the infrastructure and expertise for oil exploration and therefore has to rely on multinational companies such as Tullow Oil to do the exploration. Multinational companies prefer to keep their agreements confidential. In fact, the maintenance of confidentiality is very important when it comes to International Investment Agreements, IIAs.¹²⁶ This preference for confidentiality of agreement inevitably affects the right to access information, enshrined in Article 35 of the Constitution of Kenya, 2010.¹²⁷ The government has a duty to manage natural resources for the benefit of the Kenyan people. There is therefore a need to strike a balance between the right of access to information to ensure transparency and create a favourable environment to attract investment, since the two are very important aims. This chapter therefore seeks to investigate how to create a balance between ensuring transparency and ensuring that the government creates a favourable environment for investment.

4.2 THE IMPORTANCE OF TRANSPARENCY AND ACCOUNTABILITY IN THE PETROLEUM INDUSTRY.

Contract transparency is important as it makes coordination among government agencies involved in the management of extractives easier.¹²⁸ This ensures that government agencies are accountable to each other.

Further, UN General Assembly resolution 1803 provides that;

¹²⁵ United Nations Conference on Trade and Development, *International Investment Agreements: Key Issues Volume Ii*, United Nations Publication, Geneva, Switzerland, 58.

¹²⁶ United Nations Conference on Trade and Development, *International Investment Agreements: Key Issues Volume Ii*, United Nations Publication, Geneva, Switzerland, 58.

¹²⁷ Article 35, *Constitution of Kenya 2010*.

¹²⁸ Rosenblum P, Maples S, Why Contracts confidential, Ending Secret deals in the Extractives Industry, Revenue Watch Institute, 2009.

“States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter of the United Nations”¹²⁹

This means that the people of Kenya have sovereignty over natural resources. This is further emphasized in the Constitution which provides that natural resources belong to the people of Kenya.¹³⁰ The people of Kenya therefore have a right to be made aware of any information concerning the exploitation of natural resources.

Further, when there is lack of transparency, it creates a breeding ground for corruption. The extractives industry is one that is prone to corruption, which is an impediment to development.¹³¹

Transparency is also important in averting conflict. Civil conflict in Angola, Yemen, Sudan, Iraq, Columbia, Nigeria, Indonesia, Algeria, Congo Brazaville and Burma are all connected to oil exploration.¹³² To avoid this conflicts, transparency and accountability in the petroleum industry plays a key role.

Transparency and accountability ensures that there is oversight in the management of oil and gas in the industry. This is because when information is made available to the public, the citizens are able to scrutinize the decisions made by their representatives. This enhances democracy.

4.3 THE ROLE OF ACCESS TO INFORMATION IN ENSURING TRANSPARENCY AND ACCOUNTABILITY.

The petroleum industry has three main actors stakeholders; The petroleum company who extract the petroleum and in turn get their financial benefits, the government, which is the custodian of the people, the regulating authority and the stakeholder who receives and spends petroleum revenues, and thirdly, the general public who are supposed to benefit from the revenue.¹³³ The government and the petroleum companies have direct access and control over

¹²⁹ United Nations General Assembly, Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII)
New York, 14 December 1962

¹³⁰ Article 62, *Constitution of Kenya 2010*.

¹³¹ Organisation for Economic Co-operation and Development (OECD), *Corruption in The Extractive Value chain: Typology of Risks, Mitigation Measures and Incentives*,

¹³² Indemudia U, *The changing phases of the Niger Delta Conflict; Implications for Conflict Escalation and the return of peace*, Conflict, Security and Development, 307-331

¹³³ Ministry of Petroleum and Mining, *Transparency and Accountability Framework Action Plan for Kenya's Petroleum Sector*, July 2019, 4.

the revenues derived from petroleum. It is therefore important to ensure that the processes of decision making in the petroleum chain are done in a transparent and accountable manner.¹³⁴ Access to information enhances democracy and ensures that citizens participate significantly in democratic processes. This was echoed by Justice Forest in the case of *Dagg v Canada* (Minister of Finance).¹³⁵

Access to information is important in ensuring that there is transparency and accountability. This is because you cannot hold someone accountable for information you don't have. You require the knowledge on government activities in order to ensure transparency and accountability.¹³⁶ In addition, access to information ensures that there is good governance and prevents corruption. This is because it gives the citizens an opportunity to review their government and hold them accountable.¹³⁷

Access to information serves as a first step to ensuring transparency.¹³⁸ This is because it prevents opportunities for the government to do wrong and misdirect the funds of the public by providing a basis through which the citizens can scrutinize budgets and the decision making of its governments.¹³⁹ This in turn ensures public participation and promotes a culture of openness which is important in preventing corruption.¹⁴⁰

As seen clearly from the discussion above, access to information is a means to achieving transparency and accountability. Without the information, citizens cannot hold the government accountable for their actions and there is absence of transparency. Therefore, the right to access information is crucial for the achievement of transparency and accountability in the petroleum industry.

¹³⁴ D L Marais, M Quayle and J K Burns, 'The role of Access to Information in Enabling Transparency and Public Participation in Governance: A Case Study of Access to Policy Consultation Records in South Africa' (2017) 9 (6) *African Journal of Public Affairs* 36-49; Ofori Jerome Jeffison Yaw, 'The Role of Information Accessibility in achieving Transparency and Accountability in Ghana's Oil Industry: A Reality Check from Cape Three Point' (MSC – Natural Resources Management, Norwegian University of Science and Technology, May 2013) 6.

¹³⁵ *Dagg v. Canada* (Minister of Finance), Federal Court of Appeal of Canada, 1997-06-26

¹³⁶ Bhat R, *Right to Information Act: A Great Step to Tackle Corruption*, Research on Humanities and Social Sciences, www.iiste.org ISSN (Paper)2224-5766, 2015.

¹³⁷ Rajak J, *Right to Information Act: A Vital Tool to Fight Against Corruption in India*, International Journal of Political Science and Development, Vol. 2(5), May 2014. 68-75.

¹³⁸ Herrero A, Lopez G, *Access to Information and Transparency in the Judiciary A Guide to Good Practices from Latin America*, World Bank Institute, 2010,8.

¹³⁹ Transparency International, *Using the Right to Information as an Anti-Corruption Tool*, Transparency International, 2006, 3.

¹⁴⁰ Boserup L, *An Introduction to Openness and Access to Information*, Danish Institute for Human Rights, 2005, 56.

4.4 LIMITING THE RIGHT TO ACCESS INFORMATION.

In Kenya, the right to access information is enshrined in Article 35 of the Constitution of Kenya and Section 4 of the Access to Information Act, which is a reflection of the Constitution.¹⁴¹

The limitation framework is enshrined in Article 24 of the Constitution and Section 6 of the Access to Information Act.¹⁴²

4.4.1 Limitation Framework.

The Constitution of Kenya in Article provides for a limitation framework for fundamental rights and freedoms. It provides that a right or fundamental freedom shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.¹⁴³ The relevant factors include,

“(a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”¹⁴⁴

The section further provides that the limitation of the right or freedom shall not go so far as to derogate it from its core or essential content.¹⁴⁵

The Access to information Act delves deeper into the limitation framework and provides that information disclosure can be limited where the disclosure is likely to;

“(a)undermine the national security of Kenya; (b)impede the due process of law; (c)endanger the safety, health or life of any person; (d)involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made; (e)substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained; (f)cause substantial harm to the ability of the Government to manage the economy of Kenya; (g)significantly undermine a public or

¹⁴¹ Article 35, *Constitution of Kenya 2010*, Section 4, *Access to Information Act, Act No 31 of 2016*.

¹⁴² Article 24, *Constitution of Kenya 2010*, Section 6, *Access to Information Act, Act No 31 OF 2016*.

¹⁴³ Article 24, *Constitution of Kenya 2010*.

¹⁴⁴ Article 24 (1)(a)(b)(c)(d)(e), *Constitution of Kenya 2010*.

¹⁴⁵ Article 24 (2)(c), *Constitution of Kenya 2010*.

private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; (h) damage a public entity's position in any actual or contemplated legal proceedings; or (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.”¹⁴⁶

The section further provides that despite the provisions for limitation, a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.¹⁴⁷

Courts in Kenya have also discussed the importance of the right to access information in Kenya and how the right can be limited. A good example is the case of *Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company & 2 Others*.¹⁴⁸ In this case, Justice Mumbi Ngugi stated that the right to access information imposes a duty on the government to publicize or publish any information that affects the nation. She further stated that the government should not only publish and publicize the information, but it should create open access for the information. The court in its analysis stated that; “The scope of exceptions to disclosure of information should, however, be limited, and such exceptions should be clear, narrow and subject to strict ‘harm’ and ‘public interest’ tests, and to the rights and interests of others.”¹⁴⁹

4.4.2 Is attracting Investment a legitimate aim for Limiting the Right to Access Information?

As discussed in the limitation framework above, the limitation of any fundamental right must be legitimate. Section 6(1)(e) of the Access to Information Act provides that a right can be limited when it is likely to substantially prejudice commercial interests.¹⁵⁰ A commercial interest is any interest related to trade.¹⁵¹ Investment can be regarded as a commercial interest.¹⁵² The petroleum industry in Kenya requires high level infrastructure and machinery that Kenya lacks. This therefore means that Kenya must depend on multi-national companies to do the exploration of oil. The interests of the multi-national companies become very

¹⁴⁶ Section 6, Access to Information Act, *Act No 31 of 2016*.

¹⁴⁷ Section 6 (4), Access to Information Act, *Act No 31 of 2016*.

¹⁴⁸ *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others* [2013] eKLR

¹⁴⁹ *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others* [2013] eKLR, para 38.

¹⁵⁰ Section 6(1)(e), Access to Information Act, *Act No 31 of 2016*.

¹⁵¹ <https://dictionary.reverso.net/english-definition/commercial+interests> accessed on 20th November 2019.

¹⁵² <https://www.omicsonline.org/open-access/effect-of-interest-rates-on-business-investment-performance-of-selected-commercial-banks-in-kisii-town-kisii-county-kenya-2168-9601-1000221.php?aid=87192> accessed on 20th November 2019.

important in the petroleum chain. The companies prefer to keep their agreements confidential, which denies the public access to the information that they hold.

Attracting and creating a favourable investment environment is therefore a legitimate reason for limiting the right to access information. This limitation however has to ensure that it does not substantially prejudice transparency and accountability. Even in the limitation, transparency and accountability has to be ensured so that it does not breed an environment of corruption.

4.4.3 How do we create a balance between the right to access information to ensure transparency and create a favourable environment for investment at the same time?

As seen from the discussion above, there is a need to balance between the right to access information and attract investment in the petroleum industry. This is because Kenya lacks the expertise and infrastructure for petroleum exploration and therefore requires dependence on multinational companies. Most multinational companies prefer to keep their agreements confidential and prefer investing in governments which are willing to bend the law for them. Transparency and accountability in the petroleum industry is also very important and this has been demonstrated in the previous chapters.

It is very possible to maintain confidentiality and ensure transparency at the same time. The information in question is usually undisclosed to the general public. The government has full access to all the information held by multinational companies. Kenya is a democratic nation. Ideally, by electing the leaders, citizens give the government responsibility and authority to make decisions on their behalf. Through the right to vote, citizens are able to make a choice on the kind of leaders they want to lead them. They have an opportunity to elect leaders who will have their best interest at heart. The elected and appointed leaders are also expected to act in the best interests of the citizens. They have a duty to ensure transparency in their decisions and undertakings. Article 94 of the Constitution provides that Parliament is the legislative authority of the republic, and it manifests the diversity and general will of the people and exercises their authority.¹⁵³ Parliament should therefore have unlimited access to the IIAs, and this is made possible in Kenya by the requirement for ratification of any agreements on the exploitation of natural resources.

¹⁵³ Article 94, Constitution of Kenya 2010.

The proceedings for the ratification of the agreements can be done in private, and the general public barred from accessing them. As we have established in the discussions above, creating a favourable investment environment is a legitimate reason to limit the right to access information. When the disclosure of the information (contracts) is done to the executive and the legislative arm of government, who represent the general will of the people, it can be seen as the disclosure has been done to the public in general.

In addition, where the public cannot access sensitive documents due to confidentiality requirements, the public can be furnished with a summary of the content of the information. The summary should not reveal sensitive information that would prejudice the requirement for confidentiality but should give the public a general idea of the contents of the agreement.¹⁵⁴

4.5 CASE STUDIES

4.5.1 NORWAY.

Norway is one of the richest economies in the world. It is an example of an oil producing country that has wisely managed its oil resources. Its transparent management of petroleum resources creates a good example for other countries to follow.¹⁵⁵

Norway has an independent yet accountable body that ensures transparency and accountability in the petroleum industry. There is a separation between the Ministry of Petroleum, the National Oil Company and the Petroleum Directorate, which is a management authority that ensures transparency and accountability.¹⁵⁶

Kenya should also borrow from this and set an independent yet accountable body that will ensure that the exploration and management of petroleum resources is done in a transparent and accountable manner. Disclosure of contracts could also be done to this body, in addition to Parliament and the executive, which is represented by the Cabinet Secretary.

4.5.2 NIGERIA

Nigeria is one of the countries that has experienced the resource curse. The oil boom for Nigeria was experienced in the 1970's. In fact, a Nigerian military head allegedly boasted that money was no longer the country's problem, but how to spend it.¹⁵⁷ The Nigerian civil war between

¹⁵⁴ This is provided for in Section 13 of the Natural Resources (Classes of Transactions Subject to Ratification) Act, Act No. 41 of 2016.

¹⁵⁵ Onyeukwu J, *Resource Curse in Nigeria; Perception and Challenges*, Open Society Institute, 2007.

¹⁵⁶ Norwegian Petroleum Directorate website, <https://www.npd.no/en/>.

¹⁵⁷ Obi C, *The State of Crisis of Nation Building in Africa, A key Concept of Peaceful Conflict Transformation*, London Pluto Press, 2004, 111.

Biafra and the rest of Nigeria was also partly provoked by the control of oil in Nigeria.¹⁵⁸ The civil war was caused by disagreements on sharing the oil benefits.¹⁵⁹ This led to poor economic performance as well as high poverty levels in the country.¹⁶⁰

From Nigeria, we learn the importance of transparency and accountability in the petroleum industry. When citizens are aware of the activities of their governments, they are able to trust their governments, and this is key in avoiding conflicts. We also learn oil can be a major source of conflict as is seen in Nigeria. Kenya should therefore put in place transparency mechanisms to ensure that it does not go through what Nigeria went through.

4.6 CHAPTER SUMMARY.

This chapter looks into how to balance the right to access information in the petroleum industry and at the same time create a favourable environment for investment. The chapter discusses the role of the right to access information in ensuring transparency and accountability. The chapter also looks into the limitation framework of the right to access information. It also discusses how to balance the right to access information and still create favourable room to attract investment through maintaining confidentiality. The chapter also does a brief case study with Norway and Nigeria.

¹⁵⁸ Idemudia, Uwafiokun, *The resource curse and the decentralization of oil revenue: The case of Nigeria*, Journal of Cleaner Production, Tennessee, United States, 2012 183–193

¹⁵⁹ Idemudia, Uwafiokun, *The resource curse and the decentralization of oil revenue: The case of Nigeria*, Journal of Cleaner Production, Tennessee, United States, 2012 183–193

¹⁶⁰ Idemudia, Uwafiokun, *The resource curse and the decentralization of oil revenue: The case of Nigeria*, Journal of Cleaner Production, Tennessee, United States, 2012 183–193

CHAPTER 5; CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter will highlight the summary of findings on the study. It will also conclude the study and give recommendations that the government and the citizens of Kenya should consider solving the problem at hand. The chapter is based on an analysis of the preceding chapters which

5.2 Summary of findings

This study sought to examine how to create a balance between ensuring transparency and accountability through access to information and creating a favourable environment for investment. The study sought to analyse the law on transparency and accountability as well as the law on access to information in Kenya.

The objectives of the study were to: analyse the current legal system governing transparency and accountability in the petroleum industry, analyse the role of access to information in ensuring that there is transparency and accountability, and to analyse how to create a balance between the right to access information and create a favourable environment for investment.

The hypothesis of the study was that Kenya lacks the infrastructure and expertise to carry out petroleum exploration and therefore has to rely on multinational companies through FDI. Transparency and accountability on the other hand is very important to ensure that Kenya does not experience the resource curse which has been experienced by oil producing countries such as Nigeria. In addition, multinational companies prefer to keep their dealings confidential and this is evidenced by comprehensive confidentiality clauses in foreign direct investment contracts. The Constitution of Kenya 2010 provides for the fundamental right of access to information. There is therefore a need to strike a balance between the right to access information and create a favourable environment for investment. This study proved the hypothesis if this study to be true.

The research design used was an exploratory design. The research was based on primary sources, secondary sources, internet research as well as a comparative study.

The study was divided into five chapters. The first chapter was an introduction to the study, outlining the background, problem statement, hypothesis, definition of terms and the objectives of the study. The second chapter then discussed the theoretical framework used for the study

and did a literature review on the study. The third chapter discussed the legal framework governing transparency and accountability in the Kenya. The fourth chapter then discusses the role of access to information in ensuring transparency and accountability in the petroleum industry and how to balance the right with creating a favourable environment for investment.

5.3 CONCLUSIONS.

The study sought to examine how to balance the right to access information to ensure transparency and accountability in the petroleum industry and create a favourable environment for investment.

In Chapter one, it came out that transparency and accountability are key principles enshrined in the Constitution. Access to information is also very important in ensuring that there is transparency and accountability. In addition, Kenya does not have the expertise for oil exploration and therefore has to rely on multinational companies through FDIs. FDIs contain comprehensive confidentiality clauses which in essence violate the right of Kenyans to access information. This chapter highlighted the need to create a balance between the right to access information and create a favourable environment for investment at the same time.

Chapter two discussed the theoretical framework and the literature review. This study relied on the social contract theory, highlighting both Jean – Jacques Rousseau’s views and Thomas Hobbes views. Rousseau postulated that law is a reflection of the general will of the people and therefore the government should at all times act according to the general will. This theory is important in highlighting the duty of the government to ensure transparency, accountability and access to information. Thomas Hobbes expressed the view that man could not live in a state of lawlessness and therefore needed a government for administration. Through a social contract, man surrendered its rights to the government to be governed. The government therefore has a duty to ensure that it acts in the best interest of man. The government should therefore ensure transparency and accountability and also ensure that it creates a favourable environment for investment, so as to benefit its citizens. The chapter also discussed various literature and examined views of various authors who stress the need for transparency and accountability together with their opposers. This chapter also highlighted the need for the government to ensure transparency and accountability through access to information and create a favourable environment for investment.

Chapter three discussed the legal, policy and institutional framework regarding oil exploration and had a specific focus on transparency and accountability through access to information. The

Chapter examined the Constitution of Kenya, The Petroleum Act, The Natural Resources (Classes of Transactions Subject to Ratification) Act and The Access to Information Act. The chapter also discussed the policy framework in place and the institutions that are tasked with the mandate of oil exploration in Kenya. This chapter highlights the current legal, institutional and policy framework in the petroleum industry.

Chapter four discussed the role of access to information in ensuring transparency and accountability. The Chapter also discussed the limitation framework of the right to access information. The chapter found that the right can be limited if it substantially prejudices commercial interests of which creating a favourable environment for investment is one of them. This chapter found that the public can be denied access to information to ensure that the government creates a favourable environment for investment but at the same time ensure that it ensures that all activities in the petroleum chain are done in a transparent and accountable manner.

5.4 RECOMMENDATIONS.

From the discussions in the study, it is clear that there is need to strike a balance between the right to access information to ensure transparency in the petroleum industry and still create a favourable environment for investment. I would also like to acknowledge that the recommendations below may not fully curb the problem, but rather, they would improve the situation.

5.4.1 The Role of Parliament.

Parliament is the institution in Kenya that has been mandated to represent the views of the Kenyan people. It is the body that is empowered with representing the will of the people and it exercises the people's sovereignty. The Constitution of Kenya 2010 provides that any agreements that relates to the exploitation of natural resources has to be ratified by parliament.¹⁶¹ They also have the mandate to enact legislations. Therefore, Parliament should approve all oil exploration contracts to ensure that the will of the people is represented. Even with the requirement to maintain confidentiality of contracts, when the representatives of the people are aware of the affairs affecting the citizens, then they are able to make decisions that will benefit the citizens of Kenya the most.

¹⁶¹ Section 71, *Constitution of Kenya 2010*.

Article 94 of the Constitution of Kenya also gives Parliament the role of oversight.¹⁶² Therefore Parliament should oversee the exploitation of oil in the country. It should also enact legislation that ensures that oil resources in Kenya are used for the benefit of the Kenyan people. A good example of where this has worked is in Norway. The Parliament in Norway creates the framework for petroleum exploration. They enact legislations concerning petroleum activities. They also adopt propositions and approve major projects.¹⁶³

Parliament also plays an important role in the approval of contracts in countries such as Egypt, Libya and Sierra Leone. All these countries require ratification of contracts by Parliament which is also reflected in Article 71 of the Kenyan constitution.

5.4.2 Ensuring proper institutions for the management of oil and gas.

The importance of proper institutions for the management of petroleum resources was clearly brought out in the literature review. Management of petroleum resources should therefore vest in an independent yet accountable body.¹⁶⁴ The body should have the capacity to manage the petroleum resources.¹⁶⁵

The Petroleum Act gives the cabinet secretary the power to negotiate contracts. So as to ensure that there is transparency and the government is also able to maintain confidentiality, so as to create a favourable environment for investment. Instead, I would propose a body that should negotiate the contracts. The proposed body should contain representatives from every stakeholder involved in the petroleum chain. The body should contain representatives from the three arms of government, the executive, legislature, judiciary. The body should also contain representatives from civil society and representatives from the local community. This way, all the views of the various stakeholders are taken into consideration, and this ensures that there is transparency and accountability.

The proposed body of stakeholders who approve the contracts should be accountable to Parliament, as Parliament is the representative body of the citizens of Kenya. The proposed body should also be accountable to the Cabinet Secretary. In Norway for example, we have the

¹⁶² Article 94, *Constitution of Kenya 2010*.

¹⁶³ Cullen R, *The good oil. State roles in the Norwegian petroleum sector*, Lincoln University, New Zealand.

¹⁶⁴ Tugee S, *A Critical View of Kenya's Legal Framework on Transparency and Accountability in Oil Exploration and Extraction; Averting the Resource Curse*, Published LLM Thesis, The University of Nairobi, 2017,102.

¹⁶⁵ Tugee S, *A Critical View of Kenya's Legal Framework on Transparency and Accountability in Oil Exploration and Extraction; Averting the Resource Curse*, Published LLM Thesis, The University of Nairobi, 2017,102.

Norwegian Petroleum Directorate which manages the exploration of oil and is independent from the Ministry.¹⁶⁶

5.4.3 Ensuring proper stakeholder engagement.

The public as well as other stakeholders should be engaged in coming up with petroleum exploration policies so as to ensure that the correct decisions are made. The government should ensure that it practices democracy by ensuring public participation in the decision-making processes in the petroleum industry. Public participation is important as it ensures that there is a social license for the exploration of oil in Kenya. It gives confidence to the public that their resources are being used in a transparent and accountable manner.

A good example is the clashes in Turkana Kenya where Turkana residents blocked trucks carrying crude oil.¹⁶⁷ Such incidences can be avoided by engaging all stakeholders engaged in oil exploration.

The petroleum companies should also be willing to adjust their confidentiality clauses in IIAs, so as to ensure that they do not violate the fundamental rights of Kenyan citizens.

5.4.4 Political Goodwill

Political goodwill is key in ensuring that there is transparency and accountability in the oil industry. When the leaders are willing, implementation of transparency is enabled. The government should ensure that it publicizes key information such as the revenues collected, to ensure that the citizens are aware of what is due to them.

Political goodwill is important for political stability which ensures a proper environment for oil exploration. It also ensures that citizens have confidence in their leaders. It ensures that resources are managed in a transparent and accountable manner.

5.5 CONCLUSION

The study shows the importance of transparency and accountability in the petroleum industry. It also shows that there is a need to create a favourable environment for investment, as the country lacks the expertise for oil and gas exploration. Access to information is very important in ensuring transparency and accountability in the oil and gas industry. In fact, it is quite

¹⁶⁶ <https://www.npd.no/en/> accessed on 20th March 2020.

¹⁶⁷ <https://www.nation.co.ke/counties/turkana/Residents-block-oil-trucks-over-insecurity/1183330-4634856-31umw6z/index.html> accessed on 20th March 2020.

impossible to ensure transparency and accountability without information. The balance between creating a favourable environment for investment by maintaining confidentiality and ensuring transparency and accountability can be achieved by using already existing structures such as Parliament which is the representative body of the citizens.

Stakeholder cooperation from all stakeholders in the petroleum chain is also very important in ensuring that transparency and accountability in the petroleum industry is enhanced.

The government of Kenya should therefore consider the recommendations proposed by this study to ensure a successful and robust petroleum industry.

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