

Benefit sharing in Kenya's extractive industry: A look into what entails fair and equitable sharing of natural resources.

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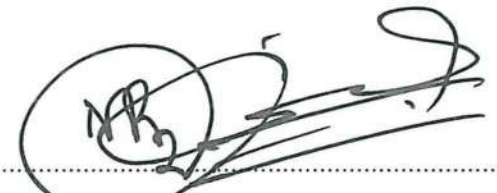
Declaration

I, LEMMY KAMAU NDIRANGU, 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: 29/5/2018

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

Signed: 

MOHAMMED RUWANGE

DEDICATION

To God for His grace and mercy and my family for their inspiration, support encouragements, good will and prayers which have followed me all my life.

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I am grateful to my supervisor Mr. Mohammed Ruwange for his guidance and encouragement. I am grateful to Strathmore Law School for giving me the opportunity to

undertake this study. I offer my sincere gratitude to my family and friends for the encouragement, inspiration and support during this study.

ABSTRACT

Exploitation of natural resources has often resulted in one affected party losing out or being exploited. This is because of the legal framework not making provisions to ensure that all citizens gained something from the natural resources being exploited.

This created the need to come up with the Natural Resources (Benefit Sharing) Bill of 2014 pursuant to article 69 of the Constitution of Kenya which made provisions for the natural resources should be shared in a fair and equitable manner.

This study will therefore be looking at what entails a fair and equitable sharing of benefits arising from the exploitation of natural resources in the extractives industry. The findings of what it entails will then be juxtaposed to the existing legal framework for purposes of deciding whether the framework reflects what fairness and equity entails.

LIST OF STATUTES

African Charter on Human and People's Rights 1998

Constitution of Kenya 2010

Constitution of Trinidad and Tobago 1976

Land Use Act of Nigeria 1978

Minerals Act of Nigeria 2000

Mining Act of Kenya 2016

National Energy Policy of Kenya 2017

Natural Resources (Benefit Sharing) Bill 2014

Natural Resources (Classes of Transaction Subject to Ratification) Act 2015

Petroleum Exploration and Production Bill 2017

CHAPTER 1 INTRODUCTION

Background

Article 21(1) of the African Charter on Human and Peoples' Rights provides that all peoples shall freely dispose of their wealth and natural resources; the interest of the people is to be promoted during the exercising of these rights. In addition, this free disposal of wealth shall be done in a manner that promotes international economic cooperation.¹ The Charter also looks at the interests and benefits of the nationals through placing upon state parties an obligation to prevent any form of foreign economic exploitation.²

The Africa Mining Vision³ talks about a mining sector that will be appreciated by the surrounding communities. It is clear that this appreciation can only take place when there is a benefit to the community.

Locally, the constitution provides that parliament shall enact legislation that ensures the local communities benefit from investments in property.⁴ The constitution further provides that the state has the obligation of ensuring the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.⁵

The Kenya Mining Act⁶ was enacted in May 2016. Notably, the following provisions stood out.

- i) Section 42(1)(c) which provides for community development as one of the factors that are taken into account during granting of mineral rights.
- ii) Section 43 spells out the activities that are contrary to good mining practices.

¹Article 21(1), *African Charter on Human and People's Rights*, 27 June 1981

² Article 21(5), *African Charter on Human and People's Rights*.

³ <http://www.africaminingvision.org> on 7 January 2017.

⁴ Article 66(2), *Constitution of Kenya*(2010)

⁵ Article 69, *Constitution of Kenya* (2010)

⁶ *Kenya Mining Act* 2016

- iii) Section 47 provides for social responsible investments for the local community and community development agreements when the operation is large-scale in nature.
- iv) Section 49 provides for a holder of a mining license to adhere to the capital expenditure limit prescribed by the Cabinet Secretary. Where the capital expenditure goes beyond the prescribed limit, the holder of the mining license shall list twenty percent of its equity to the public.
- v) Section 117(2)(j) provides for a mineral agreement to include terms and conditions relation to community development.

Pursuant to all of these legislative provisions, the Natural Resources(Benefit Sharing) Bill, 2014.⁷ The Act seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities.

The constitution makes it clear that the state is under a duty to ensure that there is equitable sharing of benefits that arise from the exploitation of natural resources.⁸ The Natural Resources (Benefit Sharing) Bill 2014 defines benefit sharing as sharing any benefits arising from the utilization of natural resources in a fair and equitable manner.⁹ Of importance in this definition are the terms fair and equitable manner. Equitable sharing of resources is also highlighted in the constitution which provides for the equitable sharing of accruing benefits arising exploitation utilization and management of natural resources.¹⁰

Of importance would be to define what fairness and equity is. Fairness is the quality of making judgments free from discrimination¹¹. Equity is the term that signifies the spirit of fairness, justness and right dealing; this is the equality of opportunity rather than equality of outcome¹².

⁷ *Natural Resources(Benefit Sharing) Bill*

⁸ Article 69, *Constitution of Kenya(2010)*

⁹ Clause 2, *Natural Resources(Benefit Sharing) Bill 2014*

¹⁰ Article 69, *Constitution of Kenya(2010)*

¹¹ <http://thelawdictionary.org/fairness> on 10 January 2017

¹² <http://thelawdictionary.org/equity> on 10 January 2017

Statement of problem.

The paper seeks to find what is fair and equitable in the context benefit-sharing in the extractives industry and whether fairness and equity has been brought out in the proposed law¹³.

In addition, the paper seeks to find out whether fairness and equity are the same.

Justification of the study.

The research is relevant as it will investigate the tenets of fairness and equity and place it in the context of benefit sharing in Kenya's extractives industry.

It is also relevant because the mining sector is a key driver of economic growth.¹⁴ It would therefore be imperative to ensure that the proposed law¹⁵ and current laws¹⁶ safeguard the interests of the local communities.

Statement of objectives.

¹³ *Natural Resources(Benefit Sharing) Bill 2014*

¹⁴ <http://www.africaprogresspanel.org/publications/policy-papers/africa-progress-report-2013> on 2 February 2017

¹⁵ *Natural Resources(Benefit Sharing) Bill 2014*

¹⁶ *Kenya Mining Act 2016*

The following are the objectives of this research paper:

- To determine what fair sharing of benefits arising from the utilization of natural resources encompasses.
- To determine what equitable sharing of benefits arising from the utilization of natural should encompass.
- To determine whether the legislative framework is in tandem with the tenets of fairness and equity.

Research questions

The following are my research question:

- What does fair sharing encompass?
- What does equitable sharing encompass?
- If there are, do the proposed/current laws espouse these tenets?

Literature review

Although there is a wealth of literature on fairness and equity in the context of benefit sharing, there is an apparent scarcity regarding the issue this paper seeks to address. John Broome¹⁷

contextualizes fairness and equity by looking at people eligible to receive organs from donors. The important question therefore will be to decide who receives the organ he argues that it is the one who can utilize the organ to its fullest who deserves it. Jay Schulken and Paul Kleindorfer¹⁸ believe that since equity is a reflection of the culture one lives in then the public should be involved. The authors argue that the public should benefit from natural resources since they are finite in nature. In addition, acting fairly entails an equitable sharing of burden and benefit.

Reasonable benefit sharing is protection from harm and compensation for damage done to them by resource projects. The affected community should be consulted and this consultation shall be to incorporate the community's perspective and expectation into a project's net benefit design. Fairness and equity entails involving the following three stakeholders: the government, the mining company and the community.¹⁹

I shall look at the work of Elizabeth Wall and Remi Pelon²⁰ who say that is imperative to share in benefits and compensate for damages as a result of mining operations. The author refers to the community surrounding the mining activity as the host community. The author looks at sharing of benefits from two perspectives.

- Company perspective.
- Government perspective.

The first perspective is from a company perspective. Here, the companies are required by law to compensate those affected by the mining activities. In addition, this compensation should meet the expectations and the company should also engage in acts that result in a positive impact on the affected community. The author goes on to say that the aforementioned is a prerequisite to obtaining a "social license" which is granted by the social community upon investing in community development.

¹⁷ Broome J, Fairness, Proceedings of the Aristotelian Society, *Oxford Journals*, (1990) 91

¹⁸ Schulkin J and Kleindorfer P, 'Equity Decisions: Economic Development and Environmental Prudence', *Human Rights Quarterly*, (1995) 17

¹⁹ International Finance Corporation, *The Art and Science of Benefit Sharing in the Natural Resource Sector*, 2015.

²⁰ The World Bank, *The Experience with Foundations, Trusts and Funds*, 2011.

The second perspective is from a government perspective where the government has to ensure that there is benefit-sharing from the moment the mining activities begin. The government sets up tax regimes that accommodate direct and indirect payment to decentralized development authorities. Legislation to ensure redistribution at the local level will more often than not be put in place only when the host community receives the least amount of benefits after they receive limited benefits.

In the report on Profit Sharing with local communities²¹, Chandra Bhusan says that benefit sharing is merely on the basis of generation of significant economic rent. The author takes a case study approach is taken when looking at the question of benefit-sharing. In the report Papua New Guinea is among the countries featured. Here, the benefit-sharing mechanisms are the Mining resource and stabilization fund and the development forum.

Distribution of benefits in a way that strikes as unfair when comparing to the distribution of costs, risks and responsibilities without fair compensation may result in opposition to the development.²² The report also talks about equitable benefit sharing as one of the ways to prevent conflict between the mining companies and the local communities. These benefits must be in line with the community interests as well as being perceived to be delivered fairly.²³

Those affected by the projects i.e. local, national and regional communities should undergo sustainable development. One needs to have a full picture of the developmental needs of the communities. Fairness and equity involves looking at the rights and needs of the affected community, the contrary to which are negative externalities, social costs and the public backlash. In addition, fairness and equity can be said to be about what contributes the most to the local community. This includes health, food security, proper hygiene and sanitation, access to clean water, agricultural productivity and local farm-to-market-roads.²⁴

²¹ Center for Science and Environment, *Sharing the Wealth of Minerals*, 2011.

²² The United Nations Interagency Framework Team for Preventive Action, *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict*, 2011

²³ The United Nations Interagency Framework Team for Preventive Action, *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict*, 2011

²⁴ http://ccsi.columbia.edu/files/2014/01/CHIC10_Background_Notes.pdf on 3 February 2017

Theoretical framework

The theory that informs this research paper is that of justice as talked about by John Rawls.²⁵ The main question in this book is how a society can ensure justice to all its citizens. Rawls' theory is based on two key principles;

- Liberty principle; everyone has a claim to basic liberties and rights.
- Equality principle; how resources and privileges are distributed in society. Social and economic positions are to be to everyone's advantage and open to all.

Rawls posits that principles of justice are decided from behind a veil of ignorance. This is known as the original position. This veil conceals factors that set societies apart so that the decision made will not have bias or any predisposed advantaged. Through the use of the original position, a consensual social contract would be produced based on principles of liberty, equality and justice. This provides the primary social goods of basic rights and economic and social advantage.

In addition, this research paper is also informed by the Aristotelian conceptualization of justice²⁶. He classifies justice as being commutative and distributive. Commutative justice is the virtue that regulates those actions which involve the rights between one individual and another individual whereas distributive justice is concerns the nature of a socially just allocation of goods. A society in which inequalities in outcome do not arise would be considered a society guided by the principles of distributive justice.

Hypothesis

The research proceeds on the following hypothesis:

- i) Fairness is important when it comes to sharing of benefits.
- ii) Equity is important when it comes to sharing of benefits.
- iii) The Bill reflects the tenets of fair and equitable sharing.

²⁵ Rawls J, *A Theory of Justice*, Harvard University Press, 1999

²⁶ Chroust A. and Osborn D, Aristotle's Conception of Justice, *Notre Dame Law Review* (1942)

Research methodology

This author intends on undertaking a multi-faceted research methodology. I shall rely on primary and secondary sources.

The primary sources shall include relevant statutes as well as regulations in the Mining Act and proposed regulations²⁷ developed by the Ministry of Mining.

The secondary sources refer to literature produced by scholars in regard to fair and equitable sharing of benefits. These are books, journal articles and credible newspaper publications.

Limitations.

Benefit sharing is an emerging discussion²⁸ in Kenya and therefore the information available may not be as conclusive as it should be.

Dissertation outline

This research paper looks at the constitutional provision of resources being shared in a fair and equitable manner. The first step taken is an analysis of the terms fair and equitable when it comes to benefit sharing which provides the yard stick when measuring whether the laws are in congruence with the findings. Thereafter, the research paper gives a breakdown of the legislative framework of benefit sharing as well as laws with respect to benefit sharing. A comparative study is also included in the research paper this is then juxtaposed to the conclusions from the second and third chapter to see whether the other jurisdictions are practicing a fair and equitable benefit sharing method.

CHAPTER 2 CONCEPTUAL FRAMEWORK

The aim of this chapter is to deduce the meaning of fair and equitable benefit sharing and ultimately draw conclusions on how a fair and equitable benefit sharing mechanism could best be

²⁷ *The Petroleum (Exploration, Development and Production) Bill*, 2015.

²⁸ <http://allafrica.com/stories/201511261596.html> on 20 January 2017

realized, bearing in mind that neither fair nor equitable has been defined. This shall be done by looking at the various reasons that necessitate benefit-sharing as it is the author's belief that the reasons will help explain what is fair and equitable in the context of benefit sharing in the extractive industry. The reasons for benefit-sharing will then pave way for a look into what the terms "fair" and "equitable" encompass.

The Organisation for Economic Cooperation and Development identifies the various stakeholders to whom the benefit-sharing agreements apply to.²⁹ Such people include:

- i) Land owners (formal and informal)
- ii) Nomadic communities
- iii) Communities living along rail or road transport routes
- iv) Commercial and subsistence fishers for offshore projects.
- v) Close to shore communities for offshore projects.
- vi) Communities living along pipelines.

Thereafter, strategies of engagement are developed for the different stakeholders identified. Stakeholder involvement not only involves identifying them but also availing them with information so as to allow them to engage with the extractive companies from an informed point of view when it comes to defending their interests or providing their perspectives.³⁰ Transparency and participation in the governance processes is vital when looking at the question of good mine-community relationships.³¹

In developed countries, tripartite agreements (these involve negotiations between communities, governments and companies) set the stage that allows inclusive development. This has resulted in a framework that provides for labour market planning, procurement planning, communications and taxation, royalty agreements and regional development planning.³² The overall effects of the

²⁹ OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, 2 February 2017

³⁰ OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*

³¹ Africa Mining Vision, *Mining in Africa: Managing the Impacts*, 2007

³² Soderhom P and Svahn N, Mining, Regional development and benefit-sharing in Developed Countries, *Resources Policy*, (2014)

aforementioned has been increasing the benefits accruing to natives and the communities around the mines.

Fairness and equity is looked into against the backdrop of Africa's mining legacy characterised by large unfilled holes and abandoned artisanal mining sites.³³ The Natural Resource Governance Institute conceptualizes identifies the reasons for making benefit-sharing arrangements as follows:³⁴

- a) Recognizing local claims on natural resources.
- b) Compensating for the negative impacts of extraction
- c) Promoting economic development in resource-rich regions.

Recognizing local claims on natural resources.

At this point, it is prudent to take note of the public trust doctrine³⁵ which provides that there exists in nature certain gifts that ought to be enjoyed and shared with amongst everyone. The same public trust doctrine also provides that natural resources belong to the public and it is the government that holds the resources in trust for the public. Therefore, all actions pertaining to the natural resources should be aimed at securing the public's best interests. Further, it is from the public trust doctrine that the right to a decent environment stems which is to the effect that by *ipso facto* being a member of the public, one can make a claim just as strong as a private property rights holder.

Communities at the heart of or in close proximity to an area where extractive activities are being carried out often have a sense of ownership over the natural resources³⁶. More so, this sense of ownership is enhanced if the community was occupying the area before the current state was established as well as the established government recognizing communal land through the constitution and legislations. As it has been concluded that the local communities have a stake in

³³ Africa Mining Vision, *Mining in Africa: Managing the Impacts*

³⁴ Natural Resource Governance Institute, *Natural Resource Revenue Sharing*, September 2016, 24

³⁵ Takacs D, The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property, *New York University Environmental Law Journal* (2011), 711

³⁶ Natural Resource Governance Institute, *Natural Resource Revenue Sharing*, September 2016, 24

the natural resources, the depletion thereof gives rise to the need for compensation; the compensation is through the benefit-sharing arrangements.

Compensating for the negative impacts of extraction.

With activities pertaining to extraction comes adverse effects; mostly felt at the local level and to a greater extent the country at large. These adverse effects are on two limb; the environment and people's livelihoods³⁷.

The environment may be viewed from three perspectives³⁸. First is the total of external conditions in which organisms exist. Second is the organisms which also include the floral and faunal community. Third is the physical bit of it which include the land forms. With regards to the environment, damage is caused for instance, as a result of gas flaring and acid mine drainage. The infrastructure and pollution that comes with mining activities is accompanied by the risk of affecting the health of the ecosystems and the resultant effect being the inability to provide goods and services essential for human and environmental well-being³⁹. In addition, local communities are the ones left to bear with the long-term effects of mining as the environmental effects persist long after the mine has been exhausted.⁴⁰

With regards to livelihoods, two things take place; disruption and loss. These occur when inhabitants of a certain area are forced to relocate or are displaced in favour of extractive activities. Further, livelihoods are forced to change due to the presence of mining companies in the area which has the result of raising the prices of things such as housing rent and non-tradeable services such as restaurants. In addition, a strain is placed on the public utilities such as roads and water delivery systems due to the large inflow of migrant workers.⁴¹

³⁷ Natural Resource Governance Institute, *Natural Resource Revenue Sharing*

³⁸ Aigbedion, I and Iyayi, S, Environmental effects of mineral exploitation in Nigeria, *International Journal of Physical Science* (2007), 2

³⁹ <http://www.miningfacts.org/Environment/How-can-mining-become-more-environmentally-sustainable> on 20th September 2017.

⁴⁰ Africa Mining Vision, *Mining in Africa: Managing the impacts*

⁴¹ Ratha D and Scheja E, *Impact of Migration on Economic and Social Development: A review of evidence and emerging issues*, Kunda Datar Memorial Lecture, 2010

In addition to the land and compensation question, involuntary displacement usually has significant adverse socio-economic and environmental impacts. Key among them is abandonment of homes, dismantling of mainly subsistence agricultural production systems and loss of assets and income.⁴² People may also be relocated to environments where their skills may be less applicable, the competition for resources may be greater, and host populations may be hostile or culturally incompatible.

In a country where the citizens are still recovering from the adverse exploitative effects of the colonialists, locals are more cautious of the transformative effects of extractive projects on their territory.⁴³

Promoting economic development in resource-rich regions.

Extractive activities more often than not occur in remote areas where development is not as pronounced compared to other parts of the country. The sectors of development that are not vibrant include infrastructure, education and healthcare.⁴⁴ Benefit-sharing comes in to build the aforementioned sectors not only in the surrounding areas but also other areas where development is desperately needed. Stronger pressure is placed on mining companies to make social and economic contributions to communities, as well as to involve local people in relevant decision-making.

There is a disconnect between the huge profits made by the mining companies and the existing lack of regional benefits. A classic example of this is the weighing of benefits of mining whilst observing the contradictions of capitalism by the men of Maimafu.⁴⁵ Due to the copious amounts of money made by the mining companies, it would only be fair if the future's interests was also secured in terms of regional economic development.⁴⁶

⁴² Ratha D and Scheja E, *Impact of Migration on Economic and Social Development: A review of evidence and emerging issues*

⁴³ Filer C and Macintyre M, Special Issue:Melanesian Mining Modernities: Past, Present, and Future, *The Contemporary Pacific* (2006) 18

⁴⁴ Natural Resource Governance Institute, *Natural Resource Revenue Sharing*

⁴⁵ Filer C and Macintyre M, Special Issue:Melanesian Mining Modernities: Past, Present, and Future, *The Contemporary Pacific*

⁴⁶ Soderhom P and Svahn N, Mining, Regional development and benefit-sharing in Developed Countries

The aforementioned show that when looking at benefit sharing different people are affected dependent on where they lie. Secondly, it also apparent that benefit sharing is important due the various underlying reasons. However, an issue still remains unresolved. What then does it mean for benefit-sharing to be done in a “fair” and “equitable” manner? What then do the terms “fair” and “equitable” mean when it comes to the benefit-sharing specifically with respect to the extractive industry?

One cannot talk about fair and equitable without looking at Aristotle’s definition of justice who goes to look at justice from two view-points i.e. distributive justice and commutative justice. Distributive justice concerns the nature of a socially just allocation of goods. A society in which inequalities in outcome do not arise would be considered a society guided by the principles of distributive justice.⁴⁷ Distributive justice paves the way for the realization of a fair division of a certain good amongst a group of recipients.

Commutative justice on the other hand has to do with external and commensurable things; it is concerned with the proportionate ratio of commensurable goods. At the core of proportionate fairness is the principle of equality which encompasses acts of distributing certain matters between two or more persons.⁴⁸

From the Aristotelian definition of justice, Jonge posits that fair and equitable benefit sharing brings up the issue of fair compensation where each party gives one thing then receives another with a focus on the equivalence of exchange.⁴⁹ Any transaction comprises of two parties so if a just exchange of these resources is to be actualized it is essential that the users are an active party in the arrangements.

In the context of the extractive industry, the parties involved in the exchange are the providers and the users of natural resources. The providers in this case may be national or county government or the local community whereas the user may be the person or entity exploiting the natural resource. Being active party in the arrangement means that one is involved from the onset.

⁴⁷ Chroust A. and Osborn D, Aristotle's Conception of Justice

⁴⁸ Chroust A. and Osborn D, Aristotle's Conception of Justice

⁴⁹ Jonge B, What is Fair and Equitable Benefit Sharing, *Journal of Agricultural and Environmental Ethics* (2011) 24

What is fair and equitable can also be looked at from the perspective of the principle of entitlement and issues of procedural and cognitive justice.⁵⁰ Reference is made to distributive justice which deals with how to apportion to each his due; what is due is explained by the principle of entitlement and it means that which one has a right to.

Procedural justice, as highlighted above, aims at the accuracy of legal processes and participating rights of those involved. It is important in the context of fair and equitable benefit-sharing as it sheds light on the fairness of the processes through which this is realized.⁵¹ Fair procedures puts the powerful and the weak on a level playing field as they have equal participatory rights. This is important for the extractive industry as the legal process often involves huge companies and communities with very basic education.

Fair and equitable benefit-sharing also involves taking cognizance of cultural differences. This points to varied dimensions to the community's demand of benefit-sharing as a result of its own self-determination.⁵² This implies that some traditional communities may have a varied understanding of what constitutes benefit-sharing and thus the differences coupled with the imbalances in negotiation capacity, have to be taken into consideration if fair and equitable benefit sharing is to take center stage.

Lastly, the principles of desert, need and equity shed more light on what is fair and equitable.⁵³ The aforementioned principles are to the effect that a person's due is based what one deserves in light of one's actions; better explained with the phrase "you reap what you sow." The Bonn guidelines⁵⁴ elucidate that benefits should be shared in a fair and equitable manner because of the existing resource management to which people have contributed to it.

⁵⁰ Jonge B, What is Fair and Equitable Benefit Sharing

⁵¹ Jonge B, What is Fair and Equitable Benefit Sharing

⁵² Jonge B, What is Fair and Equitable Benefit Sharing

⁵³ Jonge B, What is Fair and Equitable Benefit Sharing

⁵⁴ Secretariat of the Convention on Biological Diversity, *Bonn guidelines on access to genetic resources and fair and equitable sharing of the benefits arising out of their utilization*, 2002.

Therefore, from the foregoing one comes to the conclusion that the criteria to determine fair and equitable benefit sharing is as follows:

- i) There should be fair compensation as there are two parties involved, who were actively participating in the arrangements.
- ii) Giving to each his or her due and ensuring there is a fair procedure so as to promote transparency.
- iii) Taking cognizance of possibilities of communities having different approaches to benefit sharing.

CHAPTER 3

LEGISLATIVE FRAMEWORK ON BENEFIT SHARING IN KENYA.

This chapter shall be looking at the laws behind benefit sharing pursuant to the Natural Resources (Benefit Sharing) Bill 2014⁵⁵ defining benefit sharing as sharing any benefits arising from the utilization of natural resources in a fair and equitable manner. This shall be giving a history of how benefit sharing got to the point it is currently.

The discovery and exploitation of natural resources in a particular area has always led to the expectation that the local communities and country in which the resources are found would develop economically and socially and that the benefits of such resource exploitation would trickle down to the communities. It has however been found that this is often not the case particularly owing to:

- i. lack of capacity by the local communities to participate in the extractive or connected activities owing to lack of capacity or involvement in the said processes
- ii. lack of technology and technical know-how.
- iii. lack of public participation.
- iv. lack of a legal framework for the exploitation of natural resources in a manner that ensures that the benefits accruing from such exploitation find their way to the communities and country as a whole.

National Land Policy

The National Land Policy can be seen as the earliest indication of benefit-sharing in the country. The policy came into force in August 2009 and was later given constitutional backing by the Constitution which provides that the principles of land policy shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.⁵⁶

⁵⁵ Laws of Kenya

⁵⁶ Article 60(2), *Constitution of Kenya*(2010)

The land policy recognizes one of the ways of securing land-based resources as deriving benefits from the resources.⁵⁷ The aforementioned policy goes on to further provide that at the heart of benefit-sharing is looking at the economic, social and environmental considerations of land activities in unison.

While developing benefit-sharing strategies, the national land policy spells out that the nature of the resources involved and contribution of the diverse actors to the management of the resources should be taken into consideration.⁵⁸ In order to facilitate benefit-sharing, the government shall take the following course of actions:

- i) Put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable.⁵⁹
- ii) Make benefit-sharing mandatory where land-based resources of communities and individuals are managed by national authorities for posterity.

Constitution of Kenya.

The aforementioned policy stipulations set the stage for article 69(1) (a) which provides that:

“The State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.”

This points to constitutional recognition of the fact that citizens shall enjoy benefits arising from the exploitation of natural resources and that it is the state’s duty to ensure every citizen receives such benefits. In addition, to complement the 2009 policy the Draft National Land Use Policy of 2016 was formulated and one of its key principles is public benefit-sharing.⁶⁰

It is important to note the contents of article 60 of our constitution which outlines the principles of land policy and provides that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following

⁵⁷ Paragraph 99(j), *National Land Policy*, 2006

⁵⁸ Paragraph 99, *National Land Policy*

⁵⁹ Paragraph 100 c, *National Land Policy*

⁶⁰ *National Land Use Policy* 2016

principles—equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.⁶¹ These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.⁶²

All minerals and mineral oils forms part of public land⁶³ and it is therefore held by the government in trust for Kenyan citizens and administered by the National Land Commission on its behalf by Kenyan citizens.⁶⁴ In line with this, the constitution makes a provision for the establishment of the aforementioned commission.⁶⁵ Thereafter, one of the functions relevant to this paper is that the national land commission manages public land on behalf of the national and county governments.⁶⁶

The constitution also imputes a responsibility on parliament to enact legislation ensuring that investments in property benefit local communities and their economies.⁶⁷ A transaction relating to the exploitation of a natural resource in Kenya purporting to grant a right or concession by or on behalf of any person is subject to ratification by parliament.⁶⁸ Pursuant to this, parliament came up with legislation that spells out the classes of transactions subject to its ratification.⁶⁹ The classes of transactions subject to ratification are the following five:⁷⁰

⁶¹ Article 60 (1), *Constitution of Kenya*(2010)

⁶² Article 60(2), *Constitution of Kenya*(2010)

⁶³ Article 62(f), *Constitution of Kenya*(2010)

⁶⁴Article 62 (3), *Constitution of Kenya*(2010)

⁶⁵ Article 67 (1), *Constitution of Kenya*(2010)

⁶⁶ Article 67(2)(a), *Constitution of Kenya*(2010)

⁶⁷ Article 66(2), *Constitution of Kenya*(2010)

⁶⁸ Article 71(1)(a), *Constitution of Kenya*(2010)

⁶⁹ Article 71(2) , *Constitution of Kenya*(2010)

⁷⁰ Section 4(2)(a),*Natural Resources (Classes of transactions subject to ratification) Act, 2015*

- i) The grant of a concession or right to exploit a natural resource through a permit, licence or other authorization issued in accordance with the requirements of national or county government legislation.
- ii) The grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract.
- iii) the grant of a concession or right to exploit a natural resource for scientific research, educational or other non-commercial purposes unless the exploitation involves taking the natural resource or an portion of it outside of the jurisdiction of Kenya.
- iv) The exploitation of a natural resource by a Kenyan national for subsistence purposes in circumstances in which the law does not require that a permit, licence or other authorization be obtained.
- v) The exploitation of a natural resource in quantities falling below a threshold prescribed by the Cabinet Secretary by notice in the Gazette or below a threshold specified in the Schedule to the Act.

When ratifying an agreement, there are several considerations in deciding whether to ratify an agreement. They include:⁷¹

- i) Applicable government policy
- ii) Recommendations of the relevant regulatory agency.
- iii) Extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreements.
- iv) Benefits which the local community is likely to enjoy from the transaction.
- v) Law has been complied with in the process of granting a concession.

Natural Resources (Benefit Sharing) Bill 2014.

With all this in mind, parliament came up with a specific law to address benefit sharing; the Natural Resources (Benefit Sharing) Bill.⁷² The Bill first lists down the principles that are to inform matters pertaining to benefit-sharing. The principles⁷³ are transparency and inclusivity, revenue maximisation and adequacy, efficiency and equity, accountability and

⁷¹ *Natural Resources (Classes of transactions subject to ratification) Act, 2015*

⁷² 2015 (Government Printer, Nairobi, 2015)

⁷³ Clause 4, *Natural Resources (Benefit Sharing) Bill 2014*.

participation of the people and lastly the rule of law and respect for human rights of the people.

The Bill also seeks to establish a Benefit Sharing Authority⁷⁴ whose mandate shall be to:

- i. Coordinate the preparation of benefit sharing agreements between local communities and affected organisations ;
- ii. review, and where appropriate, determine the royalties payable by an affected organization engaged in natural resource exploitation;
- iii. identify counties that require to enter into a benefit sharing agreement for the commercial exploitation of natural resources within the counties;
- iv. oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement;
- v. monitor the implementation of any benefit sharing agreement entered into between a county government and an affected organization;
- vi. conduct research regarding the exploitation and development of natural resource and benefit sharing in Kenya;
- vii. make recommendations to the national government and county governments on the better exploitation of natural resources in Kenya;
- viii. determine appeals arising out of conflicts regarding the preparation and implementation of county benefit sharing agreements; and
- ix. advise the national government on policy and the enactment of legislation relating to benefit sharing.

The proposed establishment of a benefit-sharing authority with clearly spelt out mandates points to the place of benefit-sharing; the significance of benefit-sharing is underscored.

Petroleum (Exploration, Development and Production) Bill 2017.

Benefit sharing is highlighted in the very recent Petroleum (Exploration, Development and Production) Bill of 2017.⁷⁵The aforementioned Bill in its preliminary section looks at benefit-sharing as a way of promoting local content;⁷⁶ a way of adding value brought to the Kenyan

⁷⁴ Clause 6(1), *Natural Resources Benefit Sharing Bill 2014*

⁷⁵ Laws of Kenya.

economy from petroleum related activities. The proposed legislation goes further to provide that the government shall undertake to ensure that upstream petroleum operations and infrastructure development are geared towards the benefit of Kenyan citizens.⁷⁷

The profits from upstream petroleum operations shall be shared by the national government, county government and the local community.⁷⁸ The county government shall receive twenty percent⁷⁹ whereas the local community shall receive ten percent⁸⁰ from the national governments share. The monies received shall be for the benefit of the present and future generations.⁸¹

In a nutshell the key portion with respect to benefit-sharing in the aforementioned Bill is Part II which speaks to ensuring investments carried out are to the benefit of the people of Kenya. The interests of the future generation are also catered as they too have a stake in the accrued benefits. This is done through depositing revenues from petroleum into a Sovereign Wealth Fund.⁸²

The fund shall be used to invest so as to stabilize the economy and enhance intergenerational equity in Kenya.⁸³ This is pursuant to the provisions of article 201 of the constitution of Kenya which is to the effect that revenue raised nationally shall be shared equitably among national and county governments.⁸⁴

National Energy Policy.

The National Energy Policy also recognizes the importance as well as the need for benefit-sharing and that the strategies that shall promote it are putting in place a legislative framework and putting in place a transparent mechanism for the allocation of revenues derived from petroleum.⁸⁵ Finally, the icing on the cake when it comes to the legislative framework of benefit sharing is the African Charter on human and people's rights which obligates state parties ensure

⁷⁶ Preliminary, *Petroleum Exploration and Production Bill 2017*

⁷⁷ Clause 9(2), *Petroleum Exploration and Production Bill 2017*

⁷⁸ Clause 85(1), *Petroleum Exploration and Production Bill 2017*

⁷⁹ Clause 85(2), *Petroleum Exploration and Production Bill 2017*

⁸⁰ Clause 85(4), *Petroleum Exploration and Production Bill 2017*

⁸¹ Clause 85(5), *Petroleum Exploration and Production Bill 2017*

⁸² Part VII, *Petroleum Exploration and Production Bill 2017*

⁸³ Preliminary, *Sovereign Wealth Fund Bill 2014*

⁸⁴ Article 201(b)(ii), *Constitution of Kenya*.

⁸⁵ Article 9.7.2, *National Energy Policy 2015*

that all activities pertaining to exploitation of natural resources result in the people fully benefiting.⁸⁶

To sum it all up, benefit sharing was first looked at from a legislative point of view as highlighted in the national land policy which took note of deriving benefits from natural resources. This set the stage for the provisions of article 69 of the Constitution which is to the effect that benefits accruing from the exploitation and utilization of resources shall be shared equitably.

The Constitution then went on to provide for the principles of land policy and the notable ones are that land should be used in a manner that is equitable. This touches on the extractive industry as minerals and mineral oils form part of public land which is held by the government in trust for the Kenyan citizens. Therefore, the exploitation and the policies surrounding minerals and mineral oils should result in fair and equitable distribution of benefits.

Parliament has also been roped in as one of the institutions that are to advance fair and equitable benefit sharing. The constitution requires parliament to enact legislation to secure local communities benefit on matters pertaining to investment of property. In addition, pursuant to the constitutional provisions, parliament is called upon to ratify transactions relating to exploration of a natural resource. Whilst ratifying, the salient consideration shall be benefits to the country as well as the local communities.

The concept of benefit sharing slowly steadily gained traction and it culminated in the Natural Resources (Benefit Sharing) Bill which defined benefit sharing as sharing, in a fair and equitable manner, the spoils of the exploitation of natural resources. The proposed legislation also incorporated very elaborate principles such as efficiency and equity. The other notable feature of the proposed legislation is the establishment of the Benefit Sharing Authority which will really play a pivotal role when it comes to promotion and securing a fair and equitable sharing of benefits.

Lastly, the other notable legislation is the Petroleum Exploration and Production Bill which gives provisions on benefit sharing; specifically to how the benefits shall be shared. The Bill spells out the national government, county government and the local community shall each receive a

⁸⁶ Article 21(5), *African Charter on Human and People's Rights*.

certain percentage from the royalties collected. All this shows the journey benefit sharing has had in the country and the direction it has taken. What also comes out is the areas where benefit sharing has been addressed in the law.

CHAPTER 4

A COMPARATIVE ANALYSIS OF FAIR AND EQUITABLE BENEFITSHARING.

Having examined the meaning of what is fair and equitable as well as looking at the Kenyan laws, this chapter focuses on benefit sharing in other jurisdictions and how they have implanted it in comparison to Kenya. The author shall focus on Trinidad and Tobago because of their robust extractive industry. In 2013, the total value of Trinidad and Tobago's export in the extractive industry was 12.8 billion dollars.⁸⁷

The other country selected is Nigeria because it has been in the industry for nearly fifty years and the oil and gas sector contributes to 53% of the total revenue of the government.⁸⁸ Nigeria is also good for comparison because of its government structure which comprises three levels of government⁸⁹; a structure somewhat similar to Kenya's devolved system.

TRINIDAD AND TOBAGO

The preamble of their constitution is to the effect that the principles of social justice shall be employed and that the manner in which the economic system shall be operated should result in common good taking precedence when it comes to distribution of the material resources.⁹⁰ In Trinidad and Tobago, mineral operations are placed on a higher pedestal as they greatly influence livelihood of a large portion of persons in rural and semi-rural areas, such as Sangre Grande and its environs.⁹¹ The government has also laid down strategies to promote increased benefits from mineral operations to host communities. These strategies are as follows:⁹²

- i) Advance the investment onto host communities by mineral operators.

⁸⁷ Viruet S, *The Mineral Industries of the Islands of the Caribbean Aruba, Dominican Republic, Jamaica, Trinidad and Tobago and other islands*, Mineral Yearbook

⁸⁸ <https://eiti.org/nigeria> on 10th January 2018.

⁸⁹ <https://www.globalsecurity.org/military/world/nigeria/government.htm> on 10th January 2018.

⁹⁰ Preamble, *Constitution of Trinidad and Tobago* (1976)

⁹¹ Ministry of Energy and Energy Affairs, *White Paper on National Minerals Policy*, June 2015

⁹² Ministry of Energy and Energy Affairs, *White Paper on National Minerals Policy*, June 2015

- ii) Encourage minerals-related companies to be good corporate neighbours and be more responsive to the concerns of host communities. Host communities will be encouraged to accommodate these companies.
- iii) Stimulate further economic development in host communities through promotion of mineral exploitation activities.

The Mineral Act also makes provisions for the director of minerals to promote and facilitate effective and efficient management and development of mineral resources in general.⁹³

A review of the petroleum fiscal regime undertaken in 2005, led to the introduction of a new styled Production Sharing Contract, referred to as a “taxable PSC” that comprised three major features. Firstly, Government received a Share of Profit Petroleum in lieu of some taxes viz Supplemental Petroleum Tax, Royalty, Petroleum Impost and Petroleum Levy. Contractors were therefore exempt from payment of the aforementioned taxes but were required to pay all other taxes namely, Petroleum Profits Tax, Unemployment Levy, Green Fund Levy and Withholding Tax directly to the Ministry of Finance; this represented a departure from the earlier models in which the government paid these taxes on behalf of the Contractor.

Secondly a windfall profits feature was introduced to capture higher shares of profit petroleum as petroleum prices increased. Thirdly consolidation of the new PSCs, by type either deep water or land/shallow marine was permitted. This was to promote multi-block development and facilitate investment by consortia and in so doing minimize their exposure to risks.⁹⁴

All actors in the oil, gas and mining industry must operate in the best interest of the citizens of Trinidad and Tobago. Pursuant to this objective, several legal instruments exist which spell out the requirements of the different actors within the extractive industry. The sectors focused on are as follows:⁹⁵

- i. Petroleum Industry: To provide contractual arrangements, such as Production Sharing Contracts (PSCs) under which companies can explore and develop hydrocarbons.

⁹³ Section 10(a), *Minerals Act 2000*

⁹⁴ <http://www.energy.gov.tt/for-investors/fiscal-regime/tax-laws/> on 6th January 2018

⁹⁵ Trinidad and Tobago Extractive Industry Transparency Initiative Report 2014 and 2015, *Connecting citizens with the country's energy resources*.

Among other things, PSCs require companies to pay special taxes on their net profits and gross income. The fiscal package also provides incentives to stimulate continued exploration of hydrocarbon provinces.

- ii. Minerals: To make provisions for royalties to be paid to the Government by companies with mining licenses, to rehabilitate lands affected by mining and to regulate mining activities on State and private land.
- iii. Energy Mid and Downstream. To ensure that NGC and petrochemical companies pay differential taxes on the profits that they earn and that operators contribute towards conserving the environment, the tax rate on these companies (35 percent) is above that of the other non-petroleum companies in Trinidad and Tobago. The framework is also set up to encourage operators to invest by providing them with capital allowances. Further, it seeks to safeguard against the mismanagement of extractive revenues received by the Government through the use of audits of state enterprises completed by the Auditor General.
- iv. Health, Safety and Environmental: To minimize or avoid any negative biophysical or social effects on the environment from extractive industry development projects (e.g. drilling and mining). Further it ensures that operators and their employees adhere to health and safety regulations to prevent bodily harm and the loss of life.
- v. Freedom of Information: To ensure that certain documents and information held by public authorities relevant to the operations of the sector are made available to the public. The Freedom of Information Act 1999 outlines specific documents that are exempt from being accessed by the public. However, it gives citizens the right to access a range of reports and audits of public authorities such as departments of the Ministry of Energy and Energy Industries and Joint Select Committees.

The country also has a national strategic plan which has a section dedicated to the energy sector. Amongst the goals set out under this sector, two goals stand out i.e. encouraging local players within the energy sector and contributing to the enhanced development of human capital.⁹⁶ The former goal is actualized through non fiscal measures such as local content as well as local

⁹⁶ Trinidad and Tobago Vision 2020, National Strategic Plan

participation. The goal focusing on enhanced development on human capital is actualized through transfer of technology and know-how from the international companies.

NIGERIA

Nigeria is Africa's largest oil exporter, and the world's tenth largest oil producer, accounting for more than 2.2 million barrels a day. In addition, its petroleum industry is about five decades old with a plethora of exclusionary laws with regards to active participation of host communities in the control, ownership and management of resources on 'their' land.⁹⁷

The Nigerian federal government passed to law that all land in the territory of each state in the federation shall be vested in the Governor of that state and shall be held in trust and administered for the use and common benefit of all Nigerians.⁹⁸ Cohen and Uphoff looks at participation on three limbs:

- i) What kind of participation is under consideration (is it participation in decision-making, participation in implementation, participation in benefits (or harmful consequences), or participation in evaluation? ;
- ii) Who is participating in it (local residents, local leaders, government personnel or foreign personnel); and
- iii) How is participation occurring (basis of participation, form of participation, extent of participation and effect of participation)?⁹⁹

Nigeria's Minerals and Mining Act specifically provides for Community Development Agreements to the effect that the Holder of a Mining Lease, Small Scale Mining Lease or Quarry Lease prior to the commencement of any development activity within the lease area, shall conclude with the host community where the operations are to be conducted an agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community.¹⁰⁰

⁹⁷ Itse S, "Ownership and Control of Nigerian Petroleum Resources: A legal Angle", Nigerian Petroleum Business: A Handbook 1997

⁹⁸ *Land Use Act Nigeria*, 1978

⁹⁹ Nwapi C, *A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria*, Journal of African Law (2010) 54

¹⁰⁰ *Minerals and Mining Act*, 2007

The Community Development Agreement shall contain undertakings with respect to the social and economic contributions that the project will make to the sustainability of such community. The Community Development Agreement shall address all or some of the following issues when relevant to the host community:

- a) educational scholarship, apprenticeship, technical training and employment opportunities for indigenes of the communities;
- b) financial or other forms of contributory support for infrastructural development and maintenance such as education; health or other community services, roads, water and power;
- c) assistance with the creation, development and support to small scale and micro enterprises;
- d) agricultural product marketing; and
- e) methods and procedures of environment and socio-economic management and local governance enhancement.

Multinational oil companies have some responsibility to their host community for mutual co-existence. It is only proper that they put something back to where they are profiting. There is no denying the fact that today, CSR goes far beyond the old philanthropy of the past-donating money to good causes. Host communities must be part of any CSR project. CSR must be community driven, particularly in project identification. Participation in natural resources management is now widely accepted as inevitable. This must also be extended in infrastructural development of host communities. The concept of CSR in the petroleum sector, is an attempt at equitable distribution of the benefits from petroleum resources.

The Nigerian perspective on what is fair and equitable entails the following:¹⁰¹

- i) A legal framework to enable oil companies and host communities enter into Impact Benefit Agreements/Community Benefit Agreements. This will ensure that host communities participate in policy and decision making processes concerning petroleum development in their communities.

¹⁰¹ Atsegbua L, *Host communities and the equitable distribution of costs and benefits in the course of petroleum development in Nigeria*

- ii) Derivation of revenue should not be less than 50 percent.
- iii) A fund whose revenue source is from the proceeds of the extractives industries. The fund shall be directed towards developmental activities.
- iv) Good governance and accountability in resource use and management.

As earlier established, the criteria for what is fair as well as what is equitable lies in the following three points:

- i) There should be fair compensation as there are two parties involved, who were actively participating in the arrangements.
- ii) Giving to each his or her due and ensuring there is a fair procedure so as to promote transparency.
- iii) Taking cognizance of possibilities of communities having different approaches to benefit sharing.

The table below shows a summary breakdown of the criteria and the corresponding course of action taken by the countries mentioned above.

Criteria	Trinidad and Tobago	Nigeria
Fair compensation of parties participating in the arrangements.	Paying of royalties to the government and rehabilitating the environment. Parties participating in the arrangements also have access to information relating to the extractive industry.	Through the Community Development agreements, host communities participate in the policy and decision making process.
Giving to each his or her due and ensuring there is a fair procedure so as to promote transparency	Revenues received by the government are constantly audited to prevent mismanagement and promote transparency.	A fund has been established and the fund shall be for purposes of development activities.

<p>Taking cognizance of possibilities of communities having different approaches to benefit sharing.</p>	<p>The government is constantly encouraging the companies dealing in extractive operations to respond to the concerns of the local host communities.</p>	<p>The laws provide that a Community Development Agreement shall be in place so as to take into account the social and economic aspects that are to be taken into account.</p>
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**CHAPTER 5:
CONCLUSION**

The constitution of Kenya ushered in a new era by giving life to fair and equitable benefit sharing. Initially, it was just a concept not really given much consideration but with the advent of the national land policy and the promulgation of the constitution, the topic slowly gained traction.

The research paper sought to answer the following question of what fair and equitable sharing encompasses and whether the tenets as deduced through answering the research questions were brought out by the proposed and the current laws. A look at the conceptual framework shows that fair and equitable benefit sharing entails the following three key points:

- i) There should be fair compensation as there are two parties involved, who were actively participating in the arrangements.
- ii) Giving to each his or her due and ensuring there is a fair procedure so as to promote transparency.
- iii) Taking cognizance of possibilities of communities having different approaches to benefit sharing.

From the aforementioned points, one arrives at the conclusion that when it comes to the extractives industry, any transaction involves two parties. One party seems to gain more of an advantage than the other and therefore it is necessary to make a fair compensation. Compensation is deemed to be fair when it takes into account all the effects of the extractive activities. These effects include loss of livelihood and damage to the environment.

Secondly, fair and equitable benefit sharing entails each person receiving what they deserve. While promoting this, transparency is at the heart of it all as once there is a clear path showing who deserves what and why they deserve it, fairness and equity will be said to prevail. Lastly, each community is different and therefore a blanket approach should not be taken when it comes to sharing benefits which may be in monetary or non-monetary form. Some communities may prefer monetary benefits due to their situation whereas other groups may prefer non-monetary benefits.

A look at the landscape of the laws with respect to benefit sharing shows that it is a concept that has slowly been building up. The laws were looked at under the lens of the conclusions from the second chapter. It started off from the national land policy which provided put forth the principles of land holding. These principles set the stage for the constitutional provisions that

speak to the land policy principles. This portion is relevant as mineral and mineral oils, which is under the purview of the extractives industry, forms public land and therefore should be used in a manner that is equitable, efficient and sustainable.

With this in mind, the constitution placed upon parliament the obligation to come up with laws pursuant to the local communities benefitting on matters pertaining to investment in property. This brought about the Natural Resources (Benefit Sharing) Bill which specifically brought about the matter on fair and equitable sharing of benefits.

The following table is an analysis of the parameters of what constitutes fair and equitable sharing vis-à-vis Kenya's legal provisions.

Criteria	Kenya
Fair compensation of parties participating in the arrangements.	<p>According to the National Land Policy, the government is mandated to carry out the following: Put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable: and</p> <p>Make benefit-sharing mandatory where land-based resources of communities and individuals are managed by national authorities for posterity</p> <p>The Constitution provides that all minerals and mineral oil are public land held in trust for the people by the government and therefore the people are also parties in the arrangement.</p>
Giving to each his or her due and ensuring there is a fair procedure so as to promote transparency	Article 69 of the Constitution provides that the State shall ensure that everyone receives a share of the benefits.

	Article 60 of the Constitution provides that land must be used in manner that is equitable, efficient, productive and sustainable.
Taking cognizance of possibilities of communities having different approaches to benefit sharing.	The constitution also imputes a responsibility on parliament to enact legislation ensuring that investments in property benefit local communities and their economies

Conclusion

This research paper has met the objectives as it has determined what is fair and equitable benefit sharing in the context of the extractives industry. In addition, the research paper has also achieved the objective of looking at the legal framework as evident in the third chapter. With the findings from the second chapter juxtaposed against the findings of the third chapter, the laws reflect the tenets of fair and equitable benefit sharing.

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