

**SECTOR - SPECIFIC TRANSPARENCY AND ACCOUNTABILITY MECHANISM FOR
PETROLEUM REVENUE IN KENYA**

**Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
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BY

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DECLARATION

I, NORAH SYOKAU KATUNGA, 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: 17 April 2020

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

Signed:.....

KATE MAVUTI

ABSTRACT

Transparency and accountability are principles enshrined in the constitution of Kenya (2010). In 2019, there was enactment of the Petroleum Act, which states that there shall be an establishment of a transparency and accountability framework for revenue resources in the up – stream sector.

National income from petroleum operations are presumed that they should spur economic growth and social development. However, the experiences of some countries in the management of petroleum wealth offers a dramatic illustration of the problems that could arise from resource riches. Typically, petroleum exploration, extraction and revenue management are processes that are: highly technical; capital intensive; involve few people; experiences volatility in terms of production and market; take place in remote locations; and generate very large and sudden revenue inflows. At best, these circumstances challenge policy makers on how to effectively manage the new found wealth and ensure equitable distribution of benefits. At worst, they present prime opportunities for corruption and could trigger the much-dreaded “resource curse”.

Kenya’s petroleum discoveries also provide an unprecedented opportunity to boost its economic growth in some of the most remote, under-developed and impoverished areas in Kenya. However, there are concerns that failure to adequately manage the revenues could prevent Kenyans from enjoying the potential benefits from petroleum revenues, as has occurred in other resource-rich countries, which among other things could result in the worsening of the living standards of the people especially the host communities.

Due to the many risks related to the extraction of natural resource there is a need to have a transparency and accountability mechanism specifically for petroleum revenues which is propounded in this research. This study looks at the legal regime of transparency and accountability of petroleum revenues and its adequacy. The study also examines the adequacy of the legal regime and the efficacy of budget transparency specifically for petroleum revenues and its relevance in ensuring sustainable development. This research further looks at the impact of having a transparency and accountability for petroleum resource revenues and drawing lessons by studying Norway which has climbed the top of the human development indexes and avoided the Resource – curse at the same time.

LIST OF ABBREVIATIONS

EITI – Extractives Industry Transparency Initiative

IMF – International Monetary Fund

CoK – Constitution of Kenya

NRGI – Natural Resource Governance Institute

PIH – Permanent Income Hypothesis

GoK – Government of Kenya

ROSC - Reports on the Observance of Standards and Codes

RWI – Revenue Watch Index

SOC – State – owned Companies

AMG – African Mineral Governance

IBP – International Budget Partnership

NCS – Norwegian Continental Shelf

NPD – Norwegian Petroleum Directorate

NOC – National Oil Company

Bcm – Business Continuity Management

LIST OF CASES

1. *Pattni & another Vs Republic* [2001]
2. *Ethics & Anti-Corruption Vs Peter Mangiti and 17 others* [2016]
3. *Cortec Mining Kenya Limited Vs Cabinet Secretary Ministry of Mining and 9 others* [2015]
4. *Nairobi Law Monthly Company Limited Vs Kenya Electrical Generating Company and 6 others* [2013]

LIST OF STATUTES

KENYAN LEGAL INSTRUMENTS

1. Constitution of Kenya (2010)
2. Petroleum Act (2019)
3. Energy Act
4. Access to Information Act (2016)
5. Petroleum Development Fund
6. The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016
7. Kenya National Assembly Standing Order (2013)
8. Communication Strategy for the Petroleum Sector

INTERNATIONAL LEGAL INSTRUMENTS

1. Extractives Industry Transparency Initiative
2. International Monetary Fund
3. Revenue Watch Index
4. African Mineral Governance

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF THE PROBLEM

Kenya began exploring oil in the 1950s which was before independence.¹ It drilled 16 wells mainly in Lamu and in the Anza basin between 1960 and 1984 which were discovered to be dry.²

The petroleum industry in Kenya is divided into three sectors: upstream, midstream and downstream.³ The upstream sector which is also known as the exploration and production simply entails the process of exploring and producing crude oil and natural gas.⁴ The midstream sector involves storing, refining, transporting and marketing the crude oil, natural gas and natural gas liquids⁵. In Kenya we have only one refinery which is the Kenya Petroleum Refineries Limited in Changamwe, Mombasa which with time is now being used as a storage place for oil. The downstream sector deals with the process of supplying and distributing oil products to the customers which may include industries and gas stations.⁶ In Kenya we have a fairly advanced pipeline transport storage and retailers who increase day by day.⁷

The interest in exploring oil and gas, in Kenya, increased upon discoveries made in Uganda and on the offshore of East Africa. Tullow Oil which is a UK company discovered oil in 2012.⁸ It stated

¹ Energy Information Agency, 'Emerging East Africa Energy' (23 May 2013)

² Kenya Civil Society Platform on Oil and Gas, 'Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society (Nairobi, July 2014).

³ Kenya Civil Society Platform on Oil and Gas, 'Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society (Nairobi, July 2014).

⁴ Section 2, *The Petroleum Act* (Act No 2 of 2019)

⁵ Section 2, *The Petroleum Act* (Act No 2 of 2019)

⁶ Section 2, *The Petroleum Act* (Act No 2 of 2019)

⁷ Rift Energy, 'Overview of Upstream Oil and Gas Industry in Kenya' pg.1 available at www.riftenergycorp.com on 2nd March 2019.

⁸ www.tulloil.com/operations/east-africa/kenya

that in Turkana there was a potential to produce 300 million barrels of oil, giving Kenya a chance to become an oil producing nation hence making it an economic hub.⁹ Since 2012, Tullow Oil has explored and appraised drilling campaigns which has resulted in the drilling at the South Lokichar Basin.¹⁰

The key legislations dealing with the oil and gas sector include the Constitution of Kenya 2010 (CoK). The CoK provides for equal sharing of the benefits from exploitation, utilization and management of natural resources¹¹ for the benefit of the people.¹² The Income Tax Act Cap 470 Laws of Kenya and also the Petroleum Act of 2019 which was enacted in March also provide a statutory framework.

The repealed Act, ‘The Petroleum (Exploration and Production) Act Cap 380 Laws of Kenya and the Energy Act of 2006 which dealt with the upstream, mid-stream and downstream production of oil and gas were combined into the Petroleum Act of 2019.

With the well – formulated national policy and legal framework, the Government will have to address some of the challenges faced by other countries on the management of revenues accrued from oil and gas to have the optimal benefit and to evade the resource curse seen in Chad, Nigeria and Cameroon.¹³

1.2 STATEMENT OF THE PROBLEM

Oil, gas and mineral revenues are finite and volatile and therefore special. Due to the revenues that are accrued from oil, gas and minerals which are in surplus, they should be managed and allocated differently from other government revenues.¹⁴ The Petroleum Act of 2019 provides that there shall

⁹ Cordaid, ‘Oil Exploration in Kenya: Assessment of Community Perceptions of Oil Exploration in Turkana County Kenya (Report August 2015).

¹⁰ PwC Consortium, ‘Towards Petroleum Sector Master Plan For Kenya’ (Nairobi,2015) pg. 18

¹¹ Article 69 (1) (a), *Constitution of Kenya* (2010).

¹² Article 69(1) (h), CoK 2010.

¹³ HSE East Africa, ‘*Environmental and Social Challenges of Oil and Gas exploration in Kenya*’ International Journal of Innovation and Scientific Research, 1 Aug 2015.

¹⁴ Revenue Management and Distribution: Addressing the Special Challenges of Resource Revenues to Generate Lasting Benefits, Natural Resource Governance Institute, March 2015. NRG reader.

be developed an accountability and transparency framework for petroleum revenues for the up – stream sector. Additionally, it provides the establishment of a petroleum fund. Due to the difference in nature of petroleum revenues from other natural resource revenues, as they are sustainable enough to warrant special treatment. However, despite having a mechanism of collection and allocation there is a need to have a specific framework particularly for petroleum revenues for transparency and accountability. Budget transparency is something that is mostly overlooked and there is a need to have a model of allocation of the revenues to ensure transparency. Transparency is necessary, to avoid any uncertainty or lack of clarity and a mechanism of this would need to be agreed upon.

1.3 PURPOSE OF THE STUDY

1.3.1 Hypothesis

This study will test the following hypothesis;

“Having a sector specific transparency and accountability mechanism for petroleum revenue in Kenya will enhance the sustainability and development sector of Oil and Gas and avoid the Resource curse.

1.3.2 Rationale

The reasoning behind writing this paper is that there has been a number of cases of poor management in other sectors and corruption. This could prevent Kenyans from enjoying the potential benefits of oil revenues, as evidenced in other resource-rich countries. Therefore, having an adequate transparency and accountability framework in the petroleum revenue sector is critical for ensuring sustainable management of the petroleum resources for the benefit of the whole country.

Petroleum revenues are generated through product sharing which is an arrangement where a state owns the resources and the company that has entered into a contract with the state to extract and develop the oil and ownership of the resource remains with the state and the oil and gas company

is contracted to extract and develop the resource in return for a share of the production. They are also generated through royalties and taxes.¹⁵

Due to its finite nature and the revenues it accrues, there is a need to have a separate fund which is provided for under the Act and accountability mechanism.¹⁶

1.3.3 Research Objectives

The study seeks to reach the following objectives;

- a) Analyzing the legal and regulatory framework in Kenya under resource transparency legislation on petroleum revenue and identify the gaps.
- b) Showing that having budget transparency specifically for petroleum revenues will ensure transparency and accountability of petroleum revenue.
- c) Look at the impact of having proper transparency and accountability mechanism for petroleum revenue by analyzing Norway and draw lessons.

1.3.4 Justification of the Study

It is important to review the legal framework on transparency and accountability under the oil and gas sector, particularly on petroleum revenues as Kenya as a resource -rich country should benefit optimally from its resource revenues. With a framework that deals with transparency and accountability, it ensures proper management of petroleum revenues and avoids resource curse which has been experienced in several resource – rich countries. This study seeks to analyze the transparency and accountability framework of petroleum revenues, identify gaps and matters to be considered in making the framework and draw lessons from countries that have escaped resource curse. Kenya having not been an oil producer yet, having a framework that considers issues that

¹⁵ Sunley E, Baungarrd T and Simard D, ‘Revenue from the Oil and Gas Sector: Issues and Country Experience’ IMF Conference on fiscal policy formulation and implementation in oil producing countries, USA, 8 June 2002, 2 – 9.

¹⁶ Section 107, *Petroleum Act* (2019)

could arise in terms of transparency and accountability of petroleum revenues will place us ahead of the game when we start exporting our oil.

1.3.5 Scope and Limitation of the Study

The study has been limited to the use of secondary data. This is because, the use of primary data was not enough as this is a new sector in Kenya. The study has also been limited to the analysis of Norway revenue management legal framework on transparency and accountability. This study looks at only one sector of transparency and accountability which is budget transparency and there are many other sectors such as contract transparency.

Additionally, this paper has focused mainly on transparency despite it being a transparency and accountability framework. This is because, both sectors have a vast array of research and therefore this paper focused on the transparency sector more.

1.3.6 Definition of Terms

Transparency – the act of full disclosure of relevant information in a timely manner by the government and the private sector in their activities for the public’s comprehension.

Accountability - holding of all petroleum sector stakeholders, including but not limited to the public and private sectors, answerable and responsible for their actions and/or inactions.

Upstream – This is the exploration and production of crude oil and natural gas.

Midstream – Storage, refining, transporting and marketing the crude oil, natural gas and natural gas liquids.

Downstream – the process of supplying and distributing oil products to the customers which may include industries and gas stations.

Good-Governance - an approach to the management of public affairs in a manner that is committed to creating an equitable, just and fair system that protects peoples’ human, social, economic and environmental rights, and individual human rights and civil liberties

Resource - Rich Country – a country that the exports it non – renewable natural resources such as petroleum and it more than a quarter of the total exports of the country.

Resource Curse – an economic phenomenon that refers to a resource rich country not benefiting optimally from its natural resources but instead undergoes slow economic growth, conflict and authoritarianism unlike non – resource rich countries.

Budget – an estimate of income and expenditure for a set period of time.

1.3.7 Outline of the dissertation and its flow of Argument.

My dissertation looks at Constitution of Kenya, Petroleum Act 2019, Access to Information Act (2016), Kenya National Assembly Standing Order (2013) Communication Strategy for the Petroleum Sector and the Natural Resources (Classes of transactions Subject to Ratification) Act 2016 at the National Level, Extractive Industries Transparency Initiative (EITI) Standard, the International Monetary Fund Guide on Resource Revenue Transparency, Revenue Watch Index and the African Minerals Governance Framework at the International Level.

It assesses the Revenue Management laws under the legal framework in Kenya. The first step taken is the analysis of Good – governance theory to set some basic principles upon which different forms of government run its management of public affairs in a manner that ensures transparency.¹⁷, the Recourse Curse Theory on the argument that countries rich in mineral resources often have poor governance structure, weak institutions, and inequitable distribution of the resource wealth among the citizens of the State.¹⁸ The paper also uses the Permanent Income Hypothesis theory which states that an economic actor will aim to smooth their consumption and expenditure out between income peaks and troughs, and essentially expend the average of their expected total lifetime income.¹⁹

Thereafter the research paper gives a breakdown of an analysis, discussion and conclusion of my research objectives which is done by getting literature material from the Domestic and International laws, scholars, case law and analysing the budget transparency legal framework. It

¹⁷ Ekundayo W, ‘Good Governance Theory and the Quest for Good Governance in Nigeria’ 7 *International Journal of Humanities and Social Sciences* 5, 2017, 154.

¹⁸ Frankel J, ‘*The Natural Resource Curse: A Survey*’, Cambridge, MA: National Bureau of Economic research, 2010, 6.

¹⁹ Friedman M, ‘*A theory of the consumption function. Princeton*’, Princeton University Press, 1957.

also seeks to assess the impact of having transparency and accountability by drawing lessons from Norway.

1.3.8. Summary of Overall Results

Kenya is moving from the exploration and appraisal phase into the development and production phases, hence the issue of transparency and accountability of petroleum revenues is key. There are issues concerning how petroleum revenues are generated and allocated among the stakeholders. Transparency and Accountability of petroleum revenues under the Petroleum sector is a key issue in terms of economic growth of a resource – rich country. The need for transparency and good governance in the management of these revenues is essential for the appreciation of optimum benefits from the eventual production of Kenya’s petroleum.

1.3.9. Summary of Overall Conclusions

Transparency and accountability are principles enshrined in the constitution. The legal framework in Kenya on transparency and accountability on petroleum revenues has gaps in cases of mid – stream and downstream. There is a need for budget transparency to ensure collection and deposit of these revenues and expenditure in a transparent and accountable way. The Norwegian model of transparency and accountability is a model that has worked very well however, caution must be exercised when seeking to apply or replicate this model in Kenya as the specific set of circumstances present within the Kenyan jurisdictions is a defining factor for its success. There is a need to develop a revenue management act for petroleum revenues, access to information and inclusion of mid – stream and downstream transparency and accountability mechanism in terms of petroleum revenues.

1.3.10. Chapter Analysis

Chapter 1 – Introduction

The aims of this study are expounded within six distinct chapters. The current chapter is introductory. It elaborates on the historical background, statement of the problem, research problem, justification, conceptual framework, hypothesis, research questions, definition of key

terminologies, summary of overall results, summary of overall conclusions and finally the chapter layout used in this paper.

Chapter 2 – Theoretical Framework

The chapter will provide the theoretical framework on transparency and accountability under the petroleum sector. Various theories such as good-governance, resource curse and permanent income hypothesis and how it relates to the Kenyan context.

Chapter 3 – Legal and Regulatory Framework

An analysis of the legal and regulatory framework within the Kenyan context on transparency and accountability in the petroleum sector is carried out on this chapter. It analyses the domestic laws and international laws in Kenya.

Chapter 4 – Budget Transparency

The chapter analyses the adequacy of the budget transparency framework in Kenya and its relevance in ensuring Transparency and Accountability.

Chapter 5 – Impact of a Sector – Specific Transparency Framework

This chapter will look at the effect of having a sector – specific transparency framework in Kenya by analyzing the benefit drawing lessons from Norway

Chapter 6 – Conclusion and Recommendation

CHAPTER TWO: THEORETICAL FRAMEWORK AND METHODOLOGY

This research paper is informed by 3 theories that is the Good - Governance Theory, Resource – Curse theory and Permanent Income Hypothesis theory.

2.1 GOOD – GOVERNANCE THEORY

Governance theories deals with the different forms of governance and how they evolve over time.²⁰ Good – governance theory therefore propounds some basic principles such as accountability, control, public participation, transparency, responsiveness and efficiency which a good government should follow and maintain.²¹

The International Monetary Fund (IMF) states that good governance can be achieved by ensuring there is rule of law in a democratic state, ensuring accountability and transparency of matter under the public sector and dealing with issues of corruption to ensure prosperity of an economy.²² Good governance theory is aimed toward achieving potency publicly, service delivery, encouraging competition, privatization, officialdom reforms, decentralization, out-sourcing of services to key non-public suppliers among others.²³ Furthermore, good governance is double geared toward enhancing ways in which and means by that by which state bureaucracies carry out state activities and utilize state resources therefore shield individuals and private liberties.²⁴

Good governance is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most

²⁰ Ekundayo W, ‘Good Governance Theory and the Quest for Good Governance in Nigeria’ 154.

²¹ Ekundayo W, ‘Good Governance Theory and the Quest for Good Governance in Nigeria,’ 154.

²² International Monetary Fund, ‘IMF REFORM. Washington DC: Centre for International Governance Innovation (CIGI),’ IMF Headquarter, 2012.

²³ Williams D and Young T, ‘Governance, the World Bank and Liberal Theory. Political Studies,’ 42 *Political Studies* 1, 1994, 87.

²⁴ Sheng Y.K, ‘What is good governance?’ United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) 12 March 2013 <https://www.unescap.org/sites/default/files/good-governance.pdf> on 14 June 2019.

vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.²⁵

This theory is relevant as its principles will assist in the understanding of this paper. This theory will be used as a yard stick to understand the impact of good – governance in the revenue management in the oil and gas sector therefore ensuring sustainable development as seen in Norway. When it comes to the issue of good – governance it is observed that Kenya is lagging with the recent cases of corruption such as the Goldenberg Case²⁶, the National Youth Service Case²⁷, Aror and Kimwarer dam project among others. Therefore, this theory seeks to emphasize on the principles and will be applicable in the subsequent chapters.

2.2 RESOURCE – CURSE

The resource curse theory started off as a concept propounded in the book ‘Sustaining growth of mineral economies’ (1993) by Richard Aunty.²⁸ Resource – Curse is a phenomenon propounded to compare countries with abundant resources but have worse economic performance compared with countries with fewer resources but who have a better economic performance.²⁹

The resource – curse theory is based on three models, which is the Dutch Disease model, rent – seeking model and Norwegian model.³⁰

²⁵ Sheng Y.K, ‘What is good governance?’ United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) 12 March 2013 <https://www.unescap.org/sites/default/files/good-governance.pdf> on 14 June 2019.

²⁶ *Pattni & another V Republic* [2001]

²⁷ *Ethics & Anti-Corruption v Peter Mangiti and 17 others* [2016]

²⁸ Akyzbekova D, ‘Analyzing the Resource Curse theory: A comparative study of Kazakhstan and Norway’ Unpublished Bachelor Thesis, Lund University, Sweden.

²⁹ Akyzbekova D, ‘Analyzing the Resource Curse theory: A comparative study of Kazakhstan and Norway’ Unpublished Bachelor Thesis, Lund University, Sweden.

³⁰ Akyzbekova D, ‘Analyzing the Resource Curse theory: A comparative study of Kazakhstan and Norway’ Unpublished Bachelor Thesis, Lund University, Sweden.

2.2.1 Dutch-Disease

Dutch disease is used to describe a state in which a country reduces its export performance in other sectors due to an increase in the exchange rate after a natural resource (e.g. oil) has been discovered.³¹ The term Dutch disease can also be as a result of an appreciation of foreign exchange earnings from the export of gas that led to an increase of exchange rate in Netherlands in 1977 leading to loss of market share by competitive exporters and production of those exports fell.³²

The inflation and appreciation of the exchange rates can be detrimental to the economy over a few years, but the effect will be felt over a long period of time.³³ Countries such as Iran, Russia, Trinidad and Venezuela faced large increase in natural resources revenue which in turn hurt other sectors of the economy which shifted labour and capital from non – resource sectors to resource sectors.³⁴

These effects can be reduced in several ways such as by governments transform the resource revenue inflow to make investments that can stir up non – resource sector growth avoiding the epidemic.³⁵ Countries such as Norway and United Arab Emirates (UAE) have managed to control the Dutch – Disease.

2.2.2 Rent – Seeking

Rent – seeking is the state in which an individual or an entity seeks to increase their own wealth without creating any benefit of wealth to the society.³⁶ Contrast to the Dutch – Disease model, the

³¹ Barder O, ‘A Policymakers’ Guide to Dutch Disease’ Center for Global Development, Working Paper Number 91, 2006, 4 https://www.cgdev.org/sites/default/files/8709_file_WP91.pdf on 3 July 2019.

³² Barder O, ‘A Policymakers’ Guide to Dutch Disease’, 4.

³³ Natural Resource Governance Institute, *The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth*, March 2015, 3.

³⁴ Natural Resource Governance Institute, *The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth*, March 2015, 3.

³⁵ Natural Resource Governance Institute, *The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth*, March 2015, 3.

³⁶ Corporate Finance Institute, ‘What is Rent – Seeking?’ <https://corporatefinanceinstitute.com/resources/knowledge/economics/rent-seeking/> on 12 July 2019.

rent – seeking model is brought about by power groups and institutional models. The concept was developed by Gordon Tullock in 1967³⁷ but the term was coined by Anne Krueger.³⁸ Adam Smith explains rent to be an activity of lending one’s own resources in exchange for some benefits.³⁹

In rent – seeking model the economy has two sectors: a proper economical sector and an informal less economical one. The taxes levied from the formal sector square measure the supply of business enterprise transfers to powerful teams to safeguard their profits from taxation, powerful teams assign their profits within the shadow sector, which has lower rate of come. The official sector has high returns and countries with monopolies answer enhanced revenues by high business enterprise payment and slower economic process. The low economic performance indicates that public capital expenditure don’t seem to be used with efficiency and taken over revenues were consumed, endowed in informal sector or abroad.⁴⁰ The revenues (e.g. oil revenues) are often wasted without gain in in welfare or growth.⁴¹

2.2.3 The Norwegian Model

In this model, institutions determine how natural resources abundance affect economic growth.⁴² Resource curse appears in countries with poor institutional structures.⁴³ Countries such as Norway and Botswana have good institutions and low level of corruption while counties like Nigeria and Venezuela have worse economic growth.⁴⁴

³⁷ Tullock, G, ‘The welfare costs of tariffs, monopolies, and theft’ *Western Economic Journal*, 5, 1967, 224-232.

³⁸ Tollison R, ‘Economic theory of Rent seeking’ *Public Choice*, 74 <https://www.jstor.org/stable/pdf/41483753.pdf?refreqid=excelsior%3A4ce0acf8f7967d23d1c1f788a913c1b6> on 23 July 2019.

³⁹ The Library of Economics and Liberty, <https://www.econlib.org/library/Enc/bios/Smith.html> on 23 July 2019.

⁴⁰ Tornell, Aaron & Lane, Phillip, ‘The Voracity Effect’ 89 *The American Economic Review* 1, 1999, 22-46.

⁴¹ Akyzbekova D, ‘Analyzing the Resource Curse theory: A comparative study of Kazakhstan and Norway’ Unpublished Bachelor Thesis, Lund University, Sweden.

⁴² Mehlum, Halvor; Moene, Karl; Torvik, Ragnar, ‘Institutions and the Resource Curse’ *The Economic Journal* 116, 2006, 3.

⁴³ Mehlum, Halvor; Moene, Karl; Torvik, Ragnar, ‘Institutions and the Resource Curse,’ 3.

⁴⁴ Akyzbekova D, ‘Analyzing the Resource Curse theory: A comparative study of Kazakhstan and Norway’ Unpublished Bachelor Thesis, Lund University, Sweden.

The Norwegian model is a structure that allows ‘separation of powers’ of institutions where we have an institution that deals with the commercial activities, another one that deals with the regulations and another one that deals with the creation of policies.

Countries with producer friendly institutions such as Norway rent -seeking and production are activities that complement each other. This is because of low levels of corruption, rule of law and low risk of government defaulting on its bargain of the contract this is unlike grabber friendly institutions which lead to corruption and shady dealings.⁴⁵

2.3 THE PERMANENT INCOME HYPOTHESIS THEORY (PIH)

The Permanent Income Hypothesis was propounded by Milton Friedman in 1957.⁴⁶ It states that a state saves in anticipation of possible future decline in labor income.⁴⁷ She also saves for precautionary reasons but removes the saving due to impatience.⁴⁸

In the case of oil and gas, the government invests all oil and gas revenues in a Sovereign Wealth Fund which subsequently generates interest.⁴⁹ PIH implies that a government will spend only the equivalent to the interest of their country’s total oil and gas wealth.⁵⁰

⁴⁵ Akylbekova D, ‘Analyzing the Resource Curse theory: A comparative study of Kazakhstan and Norway’ Unpublished Bachelor Thesis, Lund University, Sweden.

⁴⁶ Twinamatsiko A, ‘Desirable Revenue Management Practices for Sustainable Oil and Gas Industry in Uganda’ Unpublished MBA Proposal, Uganda Technology and Management University, Bugolobi, 2016, 4.

⁴⁷ Campbell, John Y, ‘Does Saving Anticipate Declining Labor Income? An Alternative Test of the Permanent Income Hypothesis’ *Econometrica*, 1987, 55(6), 1249–73.

⁴⁸ Wang N, ‘Caballero Meets Bewly: The Permanent – Income Hypothesis in General Equilibrium’ 93 *The American Economic Review* 3, 2003, 927.

⁴⁹ Meghir, ‘A Retrospective on Friedman’s Theory of Permanent Income’ The Institute for Fiscal Studies, 2004, 1 – 28.

⁵⁰ Twinamatsiko A, ‘Desirable Revenue Management Practices for Sustainable Oil and Gas Industry in Uganda’ Unpublished MBA Proposal, Uganda Technology and Management University, Bugolobi, 2016, 5.

This has the advantage of intergenerational equity which is preserving the wealth for future generations.⁵¹ However, by allowing the government to spend an equal amount to the interest being generated in the Sovereign Wealth Fund during and after the production of wealth, it overlooks the challenges of the current generation such as poverty and the greater economic need in generating capital in an environment with scarce capital.⁵²

São Tomé and Príncipe adopted a rule on Permanent Income Hypothesis having drawn lessons from the success of Norway on their Revenue Management mechanism. It was anticipated that São Tomé and Príncipe would have sustainable government consumption, ensure intergenerational equity and still having a foreseeable stream of oil revenue.⁵³

In the case of Kenya, the Constitution of Kenya provides that:⁵⁴

“There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that--

- (a) Is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or
- (b) May, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.”

However, the Petroleum Act of 2019, provides that Petroleum Revenues shall be deposited into the Petroleum Fund.⁵⁵ This therefore implies that Petroleum revenues are exempted from the provisions of the CoK of being deposited in the consolidated funds as a general revenue. It is a possibility that the oil wealth to be generated in Kenya will end up being so large, which could

⁵¹ Apostolou T, ‘The permanent income hypothesis: Estimation of a European Union consumption function’ Published thesis in Applied Economics, State University College at Buffalo, 2011.

⁵² Meghir, ‘A Retrospective on Friedman’s Theory of Permanent Income’ The Institute for Fiscal Studies, 2004, 1 – 28.

⁵³ Segura A, ‘Management of Oil Wealth under the Permanent Income Hypothesis: The Case of Sao Tome and Principe’ IMF Working Paper, 6, 183, 2006, 1 <https://www.ssrn.com/abstract=926238> on 23 August 2019.

⁵⁴ Article 206 (1), *Constitution of Kenya* (2010)

⁵⁵ Section 58 (2), *Petroleum Act* (2019)

prevent full and efficient use of the funds are stipulated under the PIH rule due to the extent to which the country has borrowed. The concept of Sovereign Wealth Fund is captured in the Benefit Sharing Bill 2014 and the National Sovereign Wealth Fund Bill 2014.⁵⁶

⁵⁶ The Extractives Policy Working Group, 'Revenue Sharing and Management in Kenya Petroleum Sector' Kenya Extractives Policy Dialogues: Technical Paper No. 1, 2018, 18.

CHAPTER THREE: LEGAL AND REGULATORY FRAMEWORK

3.1 INTRODUCTION

The Petroleum Sector in Kenya is new and growing. The Government of Kenya (GoK) is aware of the risks that come with the sector and having observed other countries that have immersed themselves in the drilling, production and selling of petroleum, it has come up with a number of laws and regulations concerning transparency and accountability in the sector. For the achievement of accountability, good governance and sustainable development in an economic sector there is need of transparency especially in the extractives industry.⁵⁷ The petroleum sector comes with the expectation of wealth and economic development, however, without a good transparency and accountability legal and regulatory framework, these expectations may not be met.⁵⁸

The government of Kenya is to ensure transparency and accountability by giving information on how it interacts with those involved in the petroleum sector which should be readily available. It is important to recognize that openness and access to information is a fundamental right⁵⁹ in activities that affect the state, communities and individuals whether positively or negatively.

This Chapter seeks to analyze the current legal framework, regulatory framework and policy under the petroleum sector to ensure Transparency. The GoK is in the process of updating legislation in Kenya concerning the Petroleum Sector as provided for under the CoK.⁶⁰ With regards to the laws and regulations, this chapter will discuss the Constitution of Kenya, Petroleum Act 2019, the Natural Resources (Classes of transactions Subject to Ratification) Act 2016, the Kenya National Assembly Standing Orders (2013), the Petroleum Fund Act, the Communication Strategy for the

⁵⁷ Extractives Baraza, 'Transparency FAQs' - <http://extractives-baraza.com/resources/faqs/transparency-faqs> on 27 August 2019.

⁵⁸ Wasunna M, Ruwange M, Kimani E, 'Transparency in Kenya's Extractives Sector – An Analysis Against The Natural Resource Charter Benchmarking Framework' Extractives Baraza, 12.

⁵⁹ Article 35, *Constitution of Kenya* (2010)

⁶⁰ Golombok R, Jones M.I, *Oil Governance in Uganda and Kenya: A review of efforts to establish baseline indicators on the impact of the oil sector in Uganda and Kenya*, UNEP, Nairobi Kenya, 2005.

Petroleum Sector and the Access to Information Act (2016) at the National Level. Extractive Industries Transparency Initiative (EITI) Standard, the International Monetary Fund Guide on Resource Revenue Transparency and the African Minerals Governance Framework at the International Level.

3.2 DOMESTIC LAW

3.2.1 The Constitution of Kenya 2010

The Constitution of Kenya is the supreme law of the Republic.⁶¹ It binds all persons and state organs at the National Level and County Level.⁶² The Constitution establishes a National Governance framework and provides for legislative reforms under the Fifth Schedule which include transparency.⁶³ This is relevant for the development of the petroleum sector.

Article 10 of CoK provides for national values and principles of Governance and transparency as one of the national values and principles of governance which binds all state organs, state officers, public officers and all persons.⁶⁴ This indicates that transparency is a core principle and with its recognition under the Constitution, it covers all sectors including the Petroleum Sector in its management.

The Constitution provides that mineral oils as defined by law constitute public land.⁶⁵ This therefore means that petroleum being a mineral oil falls under land which the constitution provides that it should be managed in a manner that is equitable, efficient, productive and sustainable in a transparent manner.⁶⁶

⁶¹ Section 3, *Judicature Act* CAP 8 (1967)

⁶² Article 1 (1), *Constitution of Kenya* (2010)

⁶³ Golombok R, Jones M.I, *Oil Governance in Uganda and Kenya: A review of the efforts to establish baseline indicators on the impact of the oil sector in Uganda and Kenya*, UNEP, Nairobi Kenya, 2005.

⁶⁴ Article 10, *Constitution of Kenya* (2010)

⁶⁵ Article 62(1)(f), *Constitution of Kenya* (2010)

⁶⁶ Article 60(1)(d), *Constitution of Kenya* (2010)

Article 225 of the Constitution provides that “Parliament shall enact legislation to ensure both expenditure control and transparency in all governments and establish mechanism to ensure their implementation under financial control.”⁶⁷

Budget processes and transparency do not exist on their own as they are anchored by existing laws. The constitution of Kenya 2010 is the supreme law of land and it binds all persons and all level of governments. ⁶⁸ The constitution therefore gives authority and thus no person may claim or exercise state authority unless stipulated under the constitution.⁶⁹ Hence the Constitution governs laws on budget.

The constitution of Kenya creates the office of Controller of Budget.⁷⁰ He or she shall submit to each House of Parliament a report on implementation of budgets of the national and county government every four months of the fiscal year.⁷¹ Additionally, it creates the office of the Auditor General⁷² who audits and reports accounts of entities funded from public funds⁷³ which shall confirm whether or not public money has been applied lawfully and in an effected way as stipulated in the budget. ⁷⁴

In essence, these two offices are mandated to ensure budget transparency which will facilitate the allocation and monitoring of budgetary resources.

3.2.2 Petroleum Act 2019

The Preamble to the Petroleum Act 2019 states that it is “an act of Parliament to provide a framework for the contracting, exploration, development and production of petroleum; cessation

⁶⁷ Article 225, *Constitution of Kenya* (2010)

⁶⁸ Article 2 (1), *Constitution of Kenya* (2010)

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

⁷⁰ Article 228 (1), *Constitution of Kenya* (2010)

⁷¹ Article 228 (6), *Constitution of Kenya* (2010)

⁷² Article 229 (1), *Constitution of Kenya* (2010)

⁷³ Article 229 (5), *Constitution of Kenya* (2010)

⁷⁴ Article 229 (6), *Constitution of Kenya* (2010)

of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes.”⁷⁵

This paper’s interest is the provision for transparency and accountability. The Act states that

“The Cabinet Secretary shall develop a framework for reporting, transparency and accountability in the upstream petroleum sector, which includes the publication, of all petroleum agreements, records, 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.”⁷⁶

The Act makes reference to a framework instead of a more cogent structure like regulations or a law that in line with the constitutional provisions.

“For reporting purposes, the transparency and accountability framework for the upstream petroleum sector shall be disaggregated into each petroleum agreement, nonexclusive permit, drilling permit, production permit, and plug and abandonment permit in the following categories- payment type by each contractor (i.e., taxes, fees, royalties, and other charges); production volumes by each contractor measured at the delivery point of sale; transfers of all upstream petroleum sector revenues from the national government to county governments and communities, including royalties; and all contractor contributions in cash or in kind to county governments and local communities.”⁷⁷

The framework should involve all persons in the petroleum chain as information tends to flow top down where a party at the top is not required to provide information, they do not. Additionally, there should be an independent and accountable body which ensures transparency and accountability.

3.2.3. The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016.

The Act provides for classes of transactions that are subject to ratification by Parliament. This goes in line with the provisions under Article 71 of the CoK which provides that agreements relating to

⁷⁵ Preamble, Petroleum Act (2019)

⁷⁶ Section 119 (1), Petroleum Act (2019)

⁷⁷ Section 119 (2), Petroleum Act (2019)

natural resources is subject to ratification by the Parliament.⁷⁸ Section 13 of the Act makes provisions for confidentiality. This confidentiality clause provides a limit to transparency in a case of accessing contracts and agreements. It provides that in a case where one would like to challenge the confidentiality, it is done through the court⁷⁹ and the decision to disclose is only made by the Cabinet Secretary.⁸⁰ This creates a challenge for the public as court processes are tedious and tend to take long and the power to disclose vesting on an individual and not a body, gives the Cabinet Secretary so much power.

3.2.4 Kenya National Assembly Standing Order (2013)

The Kenya National Assembly Standing Orders (2013) No. 207, No. 205 and No. 206 establishes the parliamentary watchdog committee Budget and Appropriation Committee,⁸¹ Public Accounts Committee⁸² and Public Investment Committee⁸³ respectively to enhance the effectiveness of the surveillance over the budget, collection and issuance of payment of public money.

3.2.5 Petroleum Development Fund Act.

The Petroleum Development Fund Act provides that expenditure on development programs shall be on the basis and limited to the annual budget.⁸⁴ This therefore indicates that petroleum revenues shall be spent depending on what is agreed on the annual budget.

⁷⁸ Article 71, *Constitution of Kenya* (2010)

⁷⁹ Section 13 (3), *The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016*

⁸⁰ Section 13 (2), *The Natural Resources (Classes of Transactions Subject to Ratification) Act 2016*

⁸¹ No 207, *National Assembly Standing Orders* (4th Edition 2013)

⁸² No 205, *National Assembly Standing Orders* (4th Edition 2013)

⁸³ No. 206, *National Assembly Standing Orders* (4th Edition 2013)

⁸⁴ Section 4 (5), *Petroleum Development Fund Act* (CAP 426C)

3.2.6 Communication Strategy for the Petroleum Sector

In January 2018 the government of Kenya adopted this strategy to develop the foremost applicable and effective understanding and generating support from the stakeholders within the petroleum sector.⁸⁵ The Strategy acknowledges the low levels of awareness about upstream and midstream activities of the petroleum sector among the general public, creating a need to increase knowledge and understanding about these activities. Further, there are misconceptions about the benefits emanating from the petroleum sector and evidence of suboptimal inter-agency cooperation and likeliness of vested interests affecting the development and growth of the sector, particularly among politicians. In light of this, the Draft Strategy seeks to address people's concerns, perceptions and motivations and suggests ways to communicate the vision and agenda of the Ministry of Petroleum and Mining about the growth of the petroleum sector. In relation to communities, the Strategy identifies the key information requirements as follows:⁸⁶

- i) Developmental benefits that will accrue to the community from petroleum, and in particular percentage of revenue share to the community, education scholarships for children and new health facilities among others;
- ii) Employment opportunities available from the petroleum value chain especially in the upstream and mid-stream activities;
- iii) Reliable and accessible information on impact of the petroleum exploration on their (community) livelihoods and environment;
- iv) Basic information on the business opportunities in petroleum activities including number of trucks to be contracted for crude oil transportation, frequency of use, among other contracting requirements;
- v) Health and safety information and awareness to community in case of leakage or other ecological disasters;

⁸⁵ Republic of Kenya, 'Communication Strategy for the Petroleum Sector' Ministry of Petroleum, State Department of Petroleum, 2018, 10.

⁸⁶ Transparency and Accountability in Kenya's Petroleum Sector, Draft Interim Report, Unpublished, 2018, 34.

- vi) Information on the clear role and mandate of each the different key stakeholders’ namely national government, county government and the exploration companies on the ground.

The Strategy further recognizes the importance of information sharing and dialogue as critical towards providing the public feedback mechanisms to facilitate openness and accountability required at the time when Kenya’s oil industry is at the development stage to avoid the so called “resource curse” in the long run.⁸⁷ Among other commitments in the Strategy, the Government has committed to rolling out a phased and branded multi-media communication program to increase public knowledge and understanding to effectively participate in the ongoing discussions on using revenues generated from the petroleum sector as a source of national and community/county⁸⁸

3.2.7 Access to Information Act (2016)

This is the citizens right to have access to information from the government or any other person where such information is required to uphold the right or fundamental freedom of the citizen. Section 3 of this Act provides for the objects and purpose of the Act, which include promoting

“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.”⁸⁹

In addition, consumers have the right to access information in order for them to fully gain from goods and services regardless of whether the goods and services are provided by public bodies or private entities.⁹⁰ Public entities are to facilitate access to information in their possession, which information may include to provide any person with the reasons for any decision taken by them or particulars to a contract entered into.⁹¹ Interestingly, the Access to Information Act 2016 provides that even when there is an imperative as to confidentiality, as long as the information is a matter

⁸⁷ Transparency and Accountability in Kenya’s Petroleum Sector, Draft Interim Report, Unpublished, 2018, 35.

⁸⁸ Transparency and Accountability in Kenya’s Petroleum Sector, Draft Interim Report, Unpublished, 2018, 35.

⁸⁹ Section 3, *Access to Information Act* (2016)

⁹⁰ Article 46(1)(b), *Constitution of Kenya* (2010)

⁹¹ Section 5(1)(d), *Access to Information Act* (2016)

of public interest, disclosure has to take place and the person making the disclosure is protected⁹² against punitive actions or any form of discrimination as a direct result of the disclosure.

3.3. INTERNATIONAL INSTRUMENTS

3.3.1. Extractive Industry Transparency Initiative (EITI)

Established in 2002 by Tony Blaire in efforts to improve governance on resource revenues.⁹³ This allows better management of the resources which promotes economic and political stability. It is a voluntary initiative which aims at improving transparency and accountability in countries rich in oil, gas and mineral resources.⁹⁴

The principles of EITI are in line with provisions provided for under the constitution, which is the sustainable use of natural resource wealth, should be important to ensure sustainable economic growth but if not managed properly, can create a negative social and economic impact.⁹⁵

The EITI implementation process takes place at a country level where companies publish what they pay to governments and governments disclose receipt of payments received from companies.⁹⁶ Countries reputation as an investment hub is promoted by the EITI indicating that the country is committed towards establishing an effective governance and regulatory environment.⁹⁷ However, Kenya is not a member of EITI therefore is not bound by its provisions.

⁹² Section 16, *Access to Information Act* (2016)

⁹³ Tugee S, 'A Critical Review of Kenya's Legal Framework on Transparency and Accountability in the Oil Exploration and Extraction: Averting the Resource Curse' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 51.

⁹⁴ Tugee S, 'A Critical Review of Kenya's Legal Framework on Transparency and Accountability in the Oil Exploration and Extraction: Averting the Resource Curse' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 53.

⁹⁵ EITI, *Extractives Industry Transparency Initiative Source book*, March 2005, 7 – 10.

⁹⁶ Strathmore Extractives Industry Centre (SEIC), *International Best Practices and Standards for Transparency and Accountability*, 1.

⁹⁷ Strathmore Extractives Industry Centre (SEIC), *International Best Practices and Standards for Transparency and Accountability*, 1.

3.3.2 International Monetary Fund (IMF) Guide on Resource Revenue Transparency

Due to the complexity, volatility of resource revenue resources and the magnitude of transactions in the petroleum sector, the IMF guide seeks to help resource rich countries through issues that may arise.⁹⁸ It also provides a framework for assessing resource specific issues within Reports on the Observance of Standards and Codes (ROSC) fiscal transparency modules. The Guide also recommends good practices in the use of resource revenues. The four pillars of fiscal transparency highlighted in the Guide are, clarity of roles and responsibilities; open budget processes; public availability of information; and assurances of integrity.⁹⁹

3.3.3 Revenue Watch Index (RWI)

The RWI is a measurement and comparison of government disclosure in the management of oil, gas and minerals, an especially important economic sector in Africa. The RWI Index, created in 2010 in partnership with Transparency International, is an assessment of information published by governments on revenues, contract terms and other key data. The RWI Index is based on a detailed questionnaire used to collect publicly available information on management of the extractives sector from official sources. The RWI organizes its indicators and questions into three themes: access to information, revenue management and oversight and control mechanisms: institutional & legal setting, reporting practices and safeguards & quality controls. To measure revenue transparency, the Revenue Watch Index evaluates the availability of information covering seven key areas of natural resource management:¹⁰⁰

- i. Access to Resources – availability of data detailing contracts and licensing procedures;
- ii. Generation of Revenue – availability of data published by government on production and payments;

⁹⁸ IMF, Guide on Resource Revenue Transparency, IMF, Washington, DC, 2007. <https://www.imf.org/external/np/fad/trans/guide.htm> on 2 August 2019.

⁹⁹ IMF, Guide on Resource Revenue Transparency, IMF, Washington, DC, 2007. <https://www.imf.org/external/np/fad/trans/guide.htm> on 2 August 2019.

¹⁰⁰ Revenue Watch Institute, 2010 Revenue Watch Index – Transparency: Governments and the Oil, Gas and Mining Industries, 2010. http://www.revenuwatch.org/rwindex2010/pdf/RevenueWatchIndex_2010.pdf

- iii. Institutional setting – rules, roles and responsibilities of main actors in revenue generation and management and presence of internal controls and checks;
- iv. State-owned companies (SOCs) – availability of information on their governance and reporting practices;
- v. Natural resource funds – rules governing operation of funds and how they function;
- vi. Sub-national transfers – laws on revenue sharing and assessment of existing reporting practices; and
- vii. EITI – the extent to which members have fulfilled EITI criteria e.g. publication of reports.

The RWI currently ranks transparency in 41 countries among the world’s top producers of petroleum, gold, copper and diamond.¹⁰¹ It serves as an important tool for policy makers, civil society and other actors seeking increased public disclosure regarding information disclosure and greater accountability in the extractives sector.

3.3.4 African Minerals Governance Framework

The African Minerals Governance Framework was developed in 2017 to safeguard the commitment to implementing the Africa Mining Vision (AMV) by monitoring the progress of African countries in achieving the goals of the AMV and to address the challenges faced by African Countries in the minerals sector.¹⁰² Adopted by African heads of State in 2009, the AMV seeks to foster transparent, equitable and optimal exploitation of resources.¹⁰³

The following themes are highlighted in the framework:¹⁰⁴

¹⁰¹ Revenue Watch Institute, 2010 Revenue Watch Index – Transparency: Governments and the Oil, Gas and Mining Industries, 2010. http://www.revenuwatch.org/rwindex2010/pdf/RevenueWatchIndex_2010.pdf on 17 August 2019.

¹⁰² Strathmore Extractives Industry Centre (SEIC), *International Best Practices and Standards for Transparency and Accountability*, 6.

¹⁰³ Strathmore Extractives Industry Centre (SEIC), *International Best Practices and Standards for Transparency and Accountability*, 6.

¹⁰⁴ African Union, *Africa Mining Vision: African Minerals Governance Framework*, 2018, 20 – 39.

- a) legal and institutional mining frameworks (for contracts and licensing);
- b) geological and mineral information systems;
- c) fiscal regime and revenue management;
- d) linkages, investment and diversification;
- e) artisanal and small-scale mining;
- f) Environmental and social issues.

The framework intends to enhance transparency in an equitable manner to enable sustainable development of mineral resources to promote sustainable growth and socioeconomic development in Africa.¹⁰⁵

Kenya heavily borrows AMV principles such as a focus on community rights, job creation, accountability and disclosure of information which allows transparency, amongst other principles.

3.4 CONCLUSION

This Chapter has sought to look at the legal and regulatory framework in Kenya in light of transparency under the Petroleum Sector. It is clear that the current laws do not address the issue of transparency fully.

Kenya having not signed the EITI, there lack of potential peer – learning where Kenya learns from others states on sub – national payment and transfers. Additionally, the fact that Kenya seeks to be as transparent and accountable as much as possible, not being part of EITI which seeks the same end seems rather alarming considering the growth of the Petroleum Sector.

This Chapter has therefore affirmed that Kenya lacks enough laws that deal with the issues of transparency under the petroleum sector.

¹⁰⁵ African Union, *Africa Mining Vision: African Minerals Governance Framework*, 2018, 1.

CHAPTER FOUR: BUDGET TRANSPARENCY

4.1 INTRODUCTION

The National Budget is an annual government spending and revenue collection proposal that reflects its policy priorities and fiscal targets.¹⁰⁶ With the rise of debt burden, high interest rates and inflation rates in Kenya, the fiscal policy appears to be an area facing a number of challenges.¹⁰⁷ In addition, with the rise in corruption in Kenya there is a need of openness in the budget process and implementation to ensure economic growth. Particularly in the petroleum industry, budget transparency on the oil revenues is key in order to avoid resource curse. For example, a country like Azerbaijan still has high rate of corruption leading to increased poverty despite good progress on revenue transparency side with EITI. It requires a budget transparency framework to reduce poverty and eliminate corruption.¹⁰⁸

Budget transparency¹⁰⁹ helps build confidence among potentially disruptive groups that petroleum revenues are being accounted for and well spent by the government. Petroleum industry being a complex industry with volumes of revenues expected and the high level of interest from the public to better their lives, a budget transparency framework on petroleum revenues is needed. Transparency is a key element for good governance. The budget is the single most significant policy document for governments where policy objectives are reconciled and enforced in concrete terms.

Natural resources in Kenya are vested on the state. It therefore follows that oil revenues fall under government revenues which should be accounted for in the budget unless well-specified and

¹⁰⁶ Gachocho M, Mwenda A, 'Budget Transparency: Kenyan Perspective' Institute of Economic Affairs, Paper Series No. 4, 2003, 11 <https://www.internationalbudget.org/wp-content/uploads/Budget-Transparency-Kenyan-Perspective.pdf> on 12 August 2019.

¹⁰⁷ Gachocho M, Mwenda A, 'Budget Transparency: Kenyan Perspective,' 11.

¹⁰⁸ Global Witness, *Oil Revenue Transparency: A strategic Component of U.S Energy Security and Anti – Corruption Policy*, March 2007, 6.

¹⁰⁹ Defined as 'The full disclosure of all relevant fiscal information in a timely and systematic manner.' OECD 2001, 1.

monitorable alternative arrangements are in place.¹¹⁰ Spending of petroleum revenues must also be fully accounted for, as if it does not happen or it is partly accounted for, the public and the policymakers cannot adequately assess and monitor the utility of benefit from the petroleum sector or measure their impact to development priorities, for instance reduction of poverty and infrastructural developments.

This chapter seeks to analyze the legal framework on budget transparency in Kenya and why there is a need to have budget transparency framework on petroleum revenues. Budget transparency as discussed in this chapter highlights the importance of budget transparency to ensure proper cash management and public participation.

4.2 ADEQUACY OF THE BUDGET TRANSPARENCY ON PETROLEUM REVENUES

The Petroleum Act establishes the Petroleum Fund to accommodate revenues from “appropriations from Parliament; contributions from the petroleum sector players; Government securities and corporate bonds; recovered assets from proceeds of crime in the petroleum sector; grants, gifts and donations; and monetary sanctions imposed by the Authority;”¹¹¹ government profit share of oil produced before tax and dividends on government participation in the upstream petroleum operations.¹¹² The Act however does not provide any mechanisms for the collection and deposit of these revenues and expenditure in a transparent and accountable way. Although the Act calls for a transparency and accountability Framework which stipulates that all accounts, revenues, fees taxes royalties and other charges are to be made public, it is however silent on the manner in which to achieve this initiative. It is left to the regulations, which have yet to be published, to asserting how and which agencies will be responsible for the publication, collection, monitoring and evaluation of petroleum revenues and more so, the budget and utility of such revenues. The act prescribes how petroleum revenues are to be shared among the government and the communities that is 75:20:5 for the National Government, County Government and Local Community

¹¹⁰ International Monetary Fund, *Guide on resource revenue transparency*, 2007, 38.

¹¹¹ Section 107 (2), *Petroleum Act* (2019)

¹¹² Section 57(2), *Petroleum Act* (2019)

respectively.¹¹³ However, guidelines on even utility, budget practices, distribution mechanism etc. are still wanting with the lack of regulations. Currently, Petroleum revenues fall under the mandate of the National Treasury and the Ministry of Petroleum and Mining.

4.3 RELEVANCE OF HAVING A BUDGET TRANSPARENCY FRAMEWORK

As stated in the constitution all minerals and mineral oil are public land¹¹⁴ and therefore held by the National Government on behalf of the people of Kenya. This was asserted in the case of *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and 9 others*.¹¹⁵ This therefore indicates that the citizens are co – owners of the resources and have the right to know how petroleum revenues are used and this is stipulated in the budget after the transfer of petroleum revenues to the treasury and gradually shifting to a classification by economic nature.

In the national budget, information concerning the petroleum revenues should be indicated and if not indicated, there should be an explanation in the relevant money reports. Material transfers between national and subnational government entities should also be disclosed and reconciled. The government should also be accountable for how petroleum revenues are utilized at the national level and the host community level. County officials and those elected to manage the revenue share allocated to the host communities will need to be accountable to their electorates. Revenue management and expenditure ought to contain a description of any oil revenues earmarked for specific programs or geographic regions. Public disclosure should also include information on the allocation of revenue between the state budget and the petroleum funds.

4.3.1 Budget transparency ensures Good Governance

Petroleum revenues should spur economic growth and development. With good governance this can be achieved. The ability of a government to develop economically effective and responsible public management method that its receptive, subject participation that strengthens a democratic

¹¹³ Section 58, *Petroleum Act* (2019)

¹¹⁴ Article 62, *Constitution of Kenya* (2010)

¹¹⁵ *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and 9 others* [2015] eKLR

system of presidency ensures smart governance. ¹¹⁶ Budget transparency increases a government's accountability and improves the decision-making process. Government performance and political processes are usually shaped by budgets as they drive the economy of a country and therefore budget transparency is good.

Budget transparency contributes to reducing corruption, improving government performance, and holding bureaucrats and politicians accountable for their actions. Hence, the budgetary system and the public budget process on petroleum revenue have an impact on the way government operates.

4.3.2 Right to Access to Information

As earlier stated, citizens are co – owners of natural resources which is held in trust for them by the government. There is therefore a need for the public to have information and the state to publish every relevant fact to the budget process and decision as they affect the public.

Article 35 of CoK provides for access to information in the Bill of Rights.¹¹⁷ One would argue that it is not an absolute right and can be limited. However, in the case of *Nairobi Law Monthly Company Limited v Kenya Electrical Generating Company and 6 others*¹¹⁸ states that it should be the obligation of the public body to show that a legitimate aim is trying to be achieved by non – disclosure of information.

The Access to information Act provides that a “public entity or a private body maybe required to disclose information where the public interest in disclosure outweighs the harm to the interest being protected.”¹¹⁹

¹¹⁶ Albassam A, ‘The Influence of budget transparency on quality governance’ Journal of political science and Public Affairs, 2015, 3 <https://www.longdom.org/open-access/the-influence-of-budget-transparency-on-quality-of-governance-2332-0761-1000-S1-009.pdf> on 21 August 2019

¹¹⁷ Article 35, *Constitution of Kenya* (2010)

¹¹⁸ *Nairobi Law Monthly Company Limited v Kenya Electrical Generating Company and 6 others* [2013] eKLR

¹¹⁹ Section 6(4), *Access to Information Act* (2016)

Budget transparency seeks to promote accountability of government and public participation in government and therefore access to information provides a platform for informed debates on government policies and actions which will also help in fighting corruption.¹²⁰

4.3.4 Corruption

Transparency is good for minimizing the risks of corruption and mismanagement and for ensuring accountability. In the recent years, Kenya has been plagued with the issue of corruption. There are cases of corruption being broadcasted at least every month in the public sector. The Vision 2030 states that the government will continue to intensify the anti – corruption program by bettering investigations and prosecution, eliminating discretionary decision making in the public sector, public education and judicial and legal reforms.¹²¹ Hence, budget transparency is a tool to deter corruption in the petroleum sector.

Budget secrecy allows public officials to not be held accountable for the allocation of revenues that would otherwise lead to misappropriation of funds. In a case where citizens have more information on the budget decisions of the government, the government has an incentive to make sound decisions and public officials can be held accountable for misappropriation of petroleum funds.

4.3.5 Budget Literacy

Budget literacy is important for realizing the benefits associated with increased government transparency and accountability.¹²² However, this is only possible if the budget is transparent enough for the citizens to be aware of the economic concepts under a petroleum revenue budget

¹²⁰ Tugee S, ‘A Critical Review of Kenya’s Legal Framework on Transparency and Accountability in the Oil Exploration and Extraction: Averting the Resource Curse’ Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 41.

¹²¹ Tugee S, ‘A Critical Review of Kenya’s Legal Framework on Transparency and Accountability in the Oil Exploration and Extraction: Averting the Resource Curse’ Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 68.

¹²² Briseno A, Agarwal S, Pfeil H, Masud H, ‘International Practices to Promote Budget Literacy : Key Findings and Lessons’ World Bank Group, 2017, 7
<https://openknowledge.worldbank.org/bitstream/handle/10986/26956/9781464810718.pdf?sequence=2&isAllowed=y> on 12 September 2019.

system. An understanding of economic concepts can promote active citizenship and provide an analytical framework that citizens in a democratic society can adopt.¹²³

Open and effective governance can't be realized whereas a disconnect remains between an extreme focus on the supply-side aspects of government budget data (transparency) —accessibility, timeliness, and comprehensiveness—and the capability of citizens to meaningfully analyze their government's budget information and contribute to the budget process by having budget literacy.¹²⁴

4.4 CONCLUSION

This chapter has sought to analyze the adequacy of a budget transparency framework under the Petroleum Act and the need to have it especially under the petroleum sector as petroleum revenues are volatile and can change significantly.

The International Budget Organization ranks Kenya as 46 out of 100 on the Global Budget Transparency Index as per 2017.¹²⁵ The IBP considers countries that score above 60 on the open budget index as providing enough budget information to enable budget discussions in an informed

¹²³ Briseno A, Agarwal S, Pfeil H, Masud H, 'International Practices to Promote Budget Literacy : Key Findings and Lessons' World Bank Group, 2017, 7 <https://openknowledge.worldbank.org/bitstream/handle/10986/26956/9781464810718.pdf?sequence=2&isAllowed=y> on 12 September 2019.

¹²⁴ Briseno A, Agarwal S, Pfeil H, Masud H, 'International Practices to Promote Budget Literacy : Key Findings and Lessons' World Bank Group, 2017, 7 <https://openknowledge.worldbank.org/bitstream/handle/10986/26956/9781464810718.pdf?sequence=2&isAllowed=y> on 12 September 2019.

¹²⁵ <https://www.internationalbudget.org/open-budget-survey/results-by-country/country-info/?country=ke> on 12 September 2019.

manner.¹²⁶ Despite Kenya doing considerable well on budget transparency there is a need to improve especially when petroleum revenues are introduced into the economy.

The next chapter will look at Norway and how transparency on petroleum revenues has had an impact on its economy and development.

¹²⁶ <https://www.internationalbudget.org/open-budget-survey/results-by-country/country-info/?country=ke> on 12

September 2019.

CHAPTER FIVE: IMPACT OF SECTOR - SPECIFIC TRANSPARENCY FRAMEWORK

5.1 INTRODUCTION

The economy of resource rich countries with great natural resource wealth tend to grow slower than countries that are resource poor.¹²⁷ This means that despite resource rich countries having resources, they tend to misuse the resource revenues or over depend on resource revenues leading to corruption and poverty making the economy to grow slower. This phenomenon is referred to as the resource curse which has been referred to in Chapter two of this Paper.¹²⁸

Example of countries that have experienced this curse include Nigeria, Colombia and Ivory Coast¹²⁹ In these countries, though resource rich, factors such as corruption, poverty, lack of capacity etc. override the development and enjoyment of the financial, economic and other benefits that accrue from petroleum operations thus plunging them deeper into resource curse. The consequences of the curse cause, macroeconomic instability and export concentration which is the country depends on a small number of exports making it prone to volatility; slow growth and poverty; corruption; authoritarianism and conflict.¹³⁰

¹²⁷ J Sachs and A Wamer, 'Natural Resources and Economic Development' *European Economic Review*, 2001, 828 <https://www.earth.columbia.edu/sitefiles/file/about/director/pubs/EuroEconReview2001.pdf> on 23 November 2019.

¹²⁸ Katunga N, Sector – Specific Transparency and accountability mechanism for Petroleum revenue, Chapter 2, Strathmore University 2019,16.

¹²⁹ Kvelland E, 'A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan' 3 The Macalester Review 1, 2013, 13 <https://slidex.tips/downloadFile/a-new-nation-a-brighter-future-strategic-norwegian-oil-development-assistance-in> on 23 November 2019.

¹³⁰ Kvelland E, 'A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan,' 13 – 14.

However, countries such as Norway which is a resource rich country has managed to escape this curse by turning the natural resources into fortune for their citizens and have ensured transparency and accountability in their oil and gas sector.¹³¹

This chapter looks at the case of Norway by looking at its oil history, and the strategies put to ensure the best optimal benefit from its oil and gas sector and this chapter, particularly focuses on the transparency and accountability structure/ framework Norway has used.

This paper has looked at Norway and not any other country because of its professional, prospective, predictable and sustainable management of petroleum industry which has transformed Norway into an important, international energy player.¹³² In 2015, according to the International Energy Agency (IEA), Norway was the third largest global net gas exporter with 107 bcm (after Russia – 179 bcm, and Qatar – 119 bcm) and covers more than 20% of the EU's demand gas, competing with the Russian Federation for the top position. It was also the 15th largest oil producer in 2014 with 1904 thousands of barrels per day and this is according to the US Energy Information Agency.¹³³

The petroleum industry in Norway's ranks at the very top in terms of value creation, state revenues and export value.¹³⁴ This therefore provides a good basis for a country like Kenya on how to have optimal benefits if its petroleum revenues through transparency and accountability.

¹³¹ Larsen E, 'Norway, the Resource Curse, and the Dutch Disease' 65 *American Journal of Economics and Sociology* 3, 2006, 34.

¹³² Dospial - Borysiak K, 'Model of State Management of Petroleum Sector – Case of Norway' *Interdisciplinary Political And Cultural Journal*, 2017, 108 <https://content.sciendo.com/downloadpdf/journals/ipcj/20/1/article-p97.xml> on 9 March 2020

¹³³ Dospial - Borysiak K, 'Model of State Management of Petroleum Sector – Case of Norway' *Interdisciplinary Political And Cultural Journal*, 2017, 108 <https://content.sciendo.com/downloadpdf/journals/ipcj/20/1/article-p97.xml> on 9 March 2020

¹³⁴ Dospial - Borysiak K, 'Model of State Management of Petroleum Sector – Case of Norway' *Interdisciplinary Political And Cultural Journal*, 2017, 108 <https://content.sciendo.com/downloadpdf/journals/ipcj/20/1/article-p97.xml> on 9 March 2020

5.2 NORWAY

In order to avoid injecting oil revenues directly into the economy, Norway developed institutions and prudent strategies.¹³⁵ Norway has developed a fund similar to a Sovereign Wealth Fund which is known as the Government Pension Fund of Norway.¹³⁶ Transparency and Accountability are characteristics of the fund where in democratic institutions, the managers are directly accountable to it and transparency is in high degree.

Norway was the first country to publish its oil revenues figures in 2010 in the Organization for Economic Cooperation and Development as part of EITI, which aims to strengthen governance in the natural – resources industry.¹³⁷

The rule of law, developed democratic institutions and political will has helped avoid the resource – curse which is the reason for the success in Norway.¹³⁸

Despite the success in Norway, its advanced strong democratic institutions that existed before the discovery of oil helped in its success and therefore cannot be replicated exactly in another democratic state. Nevertheless, Kenya could be able to adopt its political and economic strategies and particularly on revenue transparency, diversified investment for long – term goals and public accountability through public participation.

5.2.1 Norway Oil History

In 1959, Norway discovered oil off the Dutch Coast. In 1963, Norway began to conduct seismic surveys in hope of finding oil within the territory. Licenses were issued to international oil companies and the Norwegian Continental Shelf (NCS) was proclaimed to be sovereign. The

¹³⁵ Campbell J, Norway, Nigeria and the lessons of oil, Transparency and Accountability Initiative, 4 November 2011 <http://www.transparency-initiative.org/archive/news/norway-nigeria-and-the-lessons-of-oil> on 5 October 2019.

¹³⁶ Norges Bank Investment Management, ‘About us’ <https://www.nbim.no/en/the-fund/about-the-fund/> on 6 October 2019.

¹³⁷ Norway and the EITI, Government of Norway <https://www.regjeringen.no/en/sub/eiti---extractive-industries-tranparency/les-mer/norway-and-eiti/id634673/> on 6 October 2019

¹³⁸ Campbell J, Norway, Nigeria and the lessons of oil, Transparency and Accountability Initiative, 4 November 2011 <http://www.transparency-initiative.org/archive/news/norway-nigeria-and-the-lessons-of-oil> on 6 October 2019.

companies hit many dry wells over several years but in 1969 oil was discovered by Philips Petroleum. Oil development was done by international companies while investing for economic returns and offering licenses was a role played by the state. In 1972, the government founded Statoil where the government would have fifty percent participation in each license. However, this was reorganized in 1985 where the state's role was changed to be decided on an ad hoc basis. Most of its revenue management has been effective due to the institutions and good governance which are both key factors to avoid resource curse.¹³⁹

5.2.2 Factors that lead to the Success in Norway

Several factors played a role in the success of managing the oil industry in Norway. Countries from all over the world that are resource – rich through their policy makers have made efforts to draw lessons from Norway on developing their oil industry however, they can't reapply the Norwegian blueprint in its entirety for success as different democratic states require different strategies to ensure success due to differences such as the country's history.

It is essential to briefly examine several preconditions that Norway had that helped in fulfillment within the management method. However, a country must not have to have a similar standard, but the result of the criteria outlined is powerful for making policy agreements that are new and coherent to the political atmosphere.

A number of factors that contributed to a different political environment in Norway before the discovery of oil in Norway that is before 1969 are: a highly efficient civil service system, strong traditions in international norms and human rights, well – developed system of governance, a well – established judicial system, state separation in industrial development, well developed educational system, well – developed scientific and industrial research institutions, maritime traditions, strong position in the Western world, a good environment for technical advancement.¹⁴⁰ Before the 'oil era' in Norway, it was believed that Norway lacked advance technology and was

¹³⁹ Larsen E, 'Norway, the Resource Curse, and the Dutch Disease' 65 *American Journal of Economics and Sociology* 3, 12.

¹⁴⁰ Kvelland E, 'A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan' 3 *The Macalester Review* 1, 2013, 28.

poor according to the Western European view.¹⁴¹ However, the social democracy and cultural traditions enabled the success of resource development and even distribution of resources within the society.¹⁴²

5.2.3 Norwegian Petroleum Directorate

In 1972, Norway developed an administrative body known as the Norwegian Petroleum Directorate (NPD) which manages the petroleum sector. Its aim is:

“To contribute to the greatest possible values of the oil and gas activities to the Norwegian Society, through efficient and responsible resource management.”¹⁴³

The Directorate has four main functions to achieve its objective¹⁴⁴

- Advise the Ministry of Petroleum and Energy through professional integrity and interdisciplinary expertise.
- Analyses data of the National Continental Shelf. Offshore activities are broadly based on these analyses.
- A driving force for realizing resource potential with special regards to long term solutions, upside opportunities, joint operations and ensuring time – critical resources are not lost.
- Overseer of petroleum activities when cooperating with other authorities to ensure comprehensive follow-up.

This directorate maps resources, collecting petroleum data for the Oil Development Program and administering competence. This body has contributed to the transparency and accountability mechanism of Norway due to its contribution to the management of petroleum wealth which in turn is one of the factors that has helped avoid resource – curse.

¹⁴¹ Kvelland E, ‘A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan’ 3 The Macalester Review 1, 2013, 28.

¹⁴² Kvelland E, ‘A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan’ 3 The Macalester Review 1, 2013, 29.

¹⁴³ The Norwegian Petroleum Directorate, “About Us,” July 7, 2008 <http://www.npd.no/en/About-us/>

¹⁴⁴ The Norwegian Petroleum Directorate, “About Us,” July 7, 2008 <http://www.npd.no/en/About-us/>

5.2.4 Petroleum Fund Management

Norway has developed a Petroleum Fund that works as a long – term savings tool to ensure intergenerational equity and smoothen out spending of oil revenues to accumulate financial assets.¹⁴⁵ The fund works in way that it money allocated in the fund is that of budget surplus.¹⁴⁶ It also works as a tool to ensure transparency of petroleum revenues for fiscal management. This is because, the fund should reflect the budget surplus in the country.¹⁴⁷ Access to information which ensures transparency is ensured when Norges Bank in Norway, reports costs quarterly, risks and results which are released through a press conference and in the internet.¹⁴⁸ This ensures transparency and accountability of the petroleum funds.

Summary of the Fund Mechanism. Petroleum activities and the return on investment made on oil revenues constitute the income of the fund. The funds are then transferred to the Treasury which incorporates the money into the budget when there is a deficit in the budget from non – oil revenues. Money is the accumulated in the fund if there is a surplus in the budget and oil income thus indicating the budget surplus.¹⁴⁹

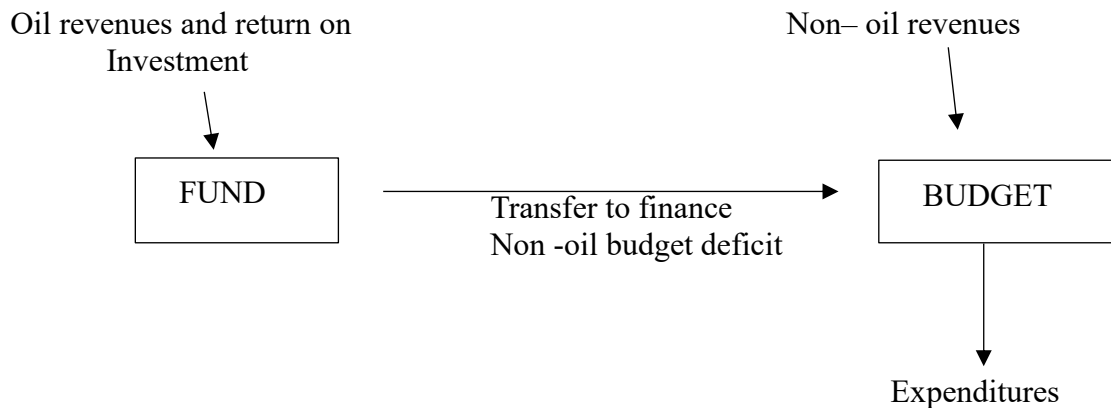
¹⁴⁵ Davis J, Fedelino A, Ossowski R, ‘Fiscal Policy and Petroleum Fund Management in Norway’ IMF, 2003 <https://www.elibrary.imf.org/view/IMF071/02513-9781589061750/02513-9781589061750/ch12.xml?redirect=true>

¹⁴⁶ Davis J, Fedelino A, Ossowski R, ‘Fiscal Policy and Petroleum Fund Management in Norway’ IMF, 2003 <https://www.elibrary.imf.org/view/IMF071/02513-9781589061750/02513-9781589061750/ch12.xml?redirect=true>

¹⁴⁷ Davis J, Fedelino A, Ossowski R, ‘Fiscal Policy and Petroleum Fund Management in Norway’ IMF, 2003 <https://www.elibrary.imf.org/view/IMF071/02513-9781589061750/02513-9781589061750/ch12.xml?redirect=true>

¹⁴⁸ Flathen K, The Norwegian Government Petroleum Fund, Ministry of Finance, The Fund management model, Page 2 https://unfccc.int/sites/default/files/200305_insurance_action_norway.pdf

¹⁴⁹ Davis J, Fedelino A, Ossowski R, ‘Fiscal Policy and Petroleum Fund Management in Norway’ IMF, 2003 <https://www.elibrary.imf.org/view/IMF071/02513-9781589061750/02513-9781589061750/ch12.xml?redirect=true>



5.2.5 Lessons learnt

5.2.5.1 Government Intervention

The Norwegian government has been insistent on assisting in the development process from the beginning.¹⁵⁰ The Norwegian government put a structure in which the international oil companies made profits and competed for licenses which the government received its share of profits. This is a win – win situation. Taxation is heavy, with 78 percent tax, reflecting the high profitability in the extraction of petroleum resources. Yet the tax system was also seen as stable and transparent, implying that international oil companies have always seen the Norwegian sector as attractive for business purposes.¹⁵¹ Kenya could learn from this, that is having a transparent system of tax, despite it being high, International Oil Companies will still find it as a lucrative and the government benefits from it.

The government also ensured that the International oil companies passed its expertise to the national oil companies so as to gain knowledge and avoid over reliance on the international oil

¹⁵⁰ The Norwegian Parliament, Stortinget White Paper no. 28, 2010-2011, 5 https://www.regjeringen.no/contentassets/19da7cee551741b28edae71cc9aae287/en-gb/pdfs/stm201020110028000en_pdfs.pdf on 24 October 2019.

¹⁵¹ Holden S, 'Avoiding the Resource Curse the case Norway' University of Oslo, 2013, 14 https://www.researchgate.net/publication/276214540_Avoiding_the_resource_curse_the_case_Norway accessed on 9 March 2020

companies. This was beneficial for Norway as it reduced the risk of exploitation by international companies as if they depended on their own expertise, it encloses the oil activities into the control of the government.

Norway having not been in a hurry to produce oil; the government played an oversight role in ensuring that it avoided any fast rate of development that would be detrimental to the state and avoid the distribution of private licenses in an uncontrolled manner. The Norwegian experience suggests that the benefit of the petroleum activities to the overall economy increases over time. This might indicate that one should aim for a long duration of the production phase.

The public plays a major role in ensuring transparency and accountability due to the state's democratic tradition. Government intervention created diversity of licenses which avoided the risk of monopolies and increased competition which led to efficiency in the sector. The National legislature also establishes legal frameworks that the International Oil company and the National oil company abide by. Kenya could adopt a system of where there is a diversity of licenses and establish a legal framework for both International and Domestic Oil Companies could abide in ensuring transparency and accountability.

4.2.5.2 Socio – Economic Impact Management

For the less developed countries, the discovery of oil is a factor that boosts the GDP and increases the economic growth. Oil being a resource that streams large amounts of money, this might be a little bit of a hurdle for less developed countries, where it might lead to an over – heated economy where it brings about the increase in supply but the decline in demand leading to issues of inflation together with the risk of experiencing the “Dutch disease.”¹⁵²

In order to avoid these risks, the government of Kenya must put in place measures or strategies to ensure that the other industry sectors grow as the oil industry grows. This can be achieved by establishing a Sovereign Wealth Fund (SWF). Norway has developed an oil fund which is the Government Pension Fund that ensures that the needed amount of oil income is injected into the

¹⁵² Kvelland E, A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan, 2013, 32.

economy for stable economic growth and also work as an insurance policy for the country.¹⁵³ The fund also helps in the diversification of investments as it not only depends on oil revenues but also income from other sectors. This becomes beneficial when there is a fluctuation on the rise and fall of oil prices.¹⁵⁴

With the SWF, transparency and accountability is ensured by being composed of both oil and non - oil revenues which must be accounted for before being accumulated in the fund.

5.2.5.3 Public Participation

Less developed countries tend to have challenge with this issue of public participation where the citizens participate in public matters and hold the government responsible for matters within in jurisdiction. This poses a challenge because the government has to take part in commercial activities in both the public and private sector for stronger economic growth.¹⁵⁵

When there is an increase of transparency through the media, it allows the public and the civil societies to hold both the government and the International companies accountable therefore limiting challenges such as corruption and poor revenue management.¹⁵⁶ People must realize their role as challenges such as corruption limit the development growth of a society.

Kenya should adopt a system of ensuring public participation in order to ensure transparency and accountability. Currently there is a public participation Bill that is yet to be enacted, Kenya should makes strides to implement it and make sure it comes into force to improve on transparency and accountability.

¹⁵³ The Norwegian Ministry of Finance, “The Management of the Government Pension Fund – Global,” February 6, 2007, <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pensionfund/The-Management-Model.html?id=429362>

¹⁵⁴ The Norwegian Ministry of Finance, “Retningslinjer for Bruk av Oljepenger (Handlingsregelen) [in Norwegian], February 11, 2007, http://www.regjeringen.no/en/dep/fin/tema/norsk_ekonomi/brukav-oljepenger-/retningslinjer-for-bruk-av-oljepenger-ha.html?id=450468

¹⁵⁵ Kvelland E, A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan, 2013, 33.

¹⁵⁶ Kvelland E, A New Nation, A brighter future? Strategic Norwegian Oil Development Assistant in South Sudan, 2013, 33.

5.2.6 National Organization of the Petroleum Sector ¹⁵⁷

The Norwegian government being a strong promoter of increased transparency in the extractives sector and particularly the petroleum sector, it has established institutions to ensure transparency and predictability of resource revenue and good governance. The ‘separation of powers’ ensures sustainability and optimal gain of petroleum resources in Norway. Norwegian petroleum operations have many institutions, but this paper will look at three that deal with the creation of policy, regulations and the commercial activities.

a. The Ministry of Petroleum and Energy

The Ministry of Petroleum and Energy holds the overall responsibility for management of petroleum resources on the Norwegian continental shelf. This includes ensuring that the petroleum activities are carried out in accordance with the guidelines drawn up by the Storting¹⁵⁸ and the government. The Norwegian Petroleum Directorate is administratively subordinate to the Ministry of Petroleum and Energy. In addition, the ministry holds a particular responsibility for monitoring the state-owned corporations such as Petoro AS, Gassco AS and others.

This is the overall institution that oversees resource management and the sector as a whole. ¹⁵⁹

b. The Norwegian Petroleum Directorate

The Norwegian Petroleum Directorate plays a major role in the management of the petroleum resources and is an important advisory body for the Ministry of Petroleum and Energy.¹⁶⁰ The Norwegian Petroleum Directorate exercises management authority in connection with exploration for and exploitation of petroleum deposits on the Norwegian continental shelf. This also includes authority to issue regulations and make decisions according to rules and regulations for the

¹⁵⁷ Transparency in the Norwegian Petroleum Sector, EITI OSLO 2006, 9 – 10
<https://www.regjeringen.no/globalassets/upload/kilde/ud/bro/2006/0038/ddd/pdfv/293033-tnps.pdf>

¹⁵⁸ The Norwegian parliament, it creates the framework for Norwegian petroleum activities.

¹⁵⁹ Transparency in the Norwegian Petroleum Sector, EITI OSLO 2006, 9 – 10
<https://www.regjeringen.no/globalassets/upload/kilde/ud/bro/2006/0038/ddd/pdfv/293033-tnps.pdf>

¹⁶⁰ Transparency in the Norwegian Petroleum Sector, EITI OSLO 2006, 9 – 10
<https://www.regjeringen.no/globalassets/upload/kilde/ud/bro/2006/0038/ddd/pdfv/293033-tnps.pdf>

petroleum activities. This is the body that deals with regulations of the petroleum sector therefore ensuring transparency and accountability.

c. Norwegian National Oil Company (NOC), Equinor

Statoil represents the state through active participation in the petroleum industry. It is a limited liability company that engages in exploration and production of oil and gas, research and development and decommissioning.¹⁶¹ It deals with the commercial sector of petroleum sector therefore ensuring transparency and accountability.

5.3 CONCLUSION

Despite Norway having pre – existing institutions that enabled good governance which spearheaded the maximization of petroleum revenues for the Norwegian people, it was still able to come up with structures to ensure transparency and accountability of its petroleum revenues.

The Norwegian Model is acclaimed as the threshold for good governance particularly with regard to promoting transparency and accountability. However, caution must be exercised when seeking to apply or replicate this model in other jurisdictions as the specific set of circumstances present within those jurisdictions is a defining factor for its success.

¹⁶¹ Equinor Annual Report 2018, <https://www.equinor.com/no/about-us.html#the-equinor-way>

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1 RECOMMENDATIONS

It is clear that there is a need to uphold the principle of transparency and accountability especially in the petroleum sector on petroleum revenues. In order to avoid the resource curse, Kenya should put in place a mechanism for transparency and accountability for petroleum revenues.

The following recommendations should be able to inform the reforms to ensure transparency and accountability of petroleum revenues.

6.1.1. Enactment of Petroleum Revenue Management Act

The Parliament derives its authority from the people and in this regard, is responsible for the enactment of legislations. Further, the National Assembly determines the allocation of revenues.¹⁶² Kenya should enact a Petroleum Revenue Management Act that will deal specifically with revenues from petroleum, this will ensure that there are no gaps in the law concerning petroleum revenues and helps in ensuring transparency and accountability in the sector.

Resource rich countries such as Ghana have a similar legislation which is Ghana's Revenue Management Act to govern the management of the revenues to accrue from the new-found resource in a transparent and accountable manner. It has arguably improved the transparency of petroleum revenue allocation. This is borne out by Public Interest and Accountability Committee (PIAC) established under the act, Ministry of Finance, Ghana National Petroleum Corporation and Bank of Ghana publications regarding how much petroleum revenues are collected and where they go.¹⁶³

6.1.2. Access to Information

Transparency in the petroleum sector can be achieved through access to information. In a case of public interest, the state ought to publish information in accordance with Article 35¹⁶⁴ of the

¹⁶² Article 71, *Constitution of Kenya* (2010)

¹⁶³ Adam A, 'Ghana Petroleum Revenue management Act: Back to Basics' Natural Resource Governance Institute, 2017. 1 https://resourcegovernance.org/sites/default/files/documents/ghana-petroleum-revenue-management_act.pdf

¹⁶⁴ Article 35, *Constitution of Kenya* (2010)

constitution. This will enable citizens to be aware of what is happening and will manage the expectations of the citizens. This should be done by providing regular reports on petroleum data and allow citizens to participate by giving their views in certain matters. This will enable public officers to be accountable for their action in cases where there is an error and will allow reduce corruption in Kenya considering that it is a problem in our country at the moment.

6.1.3 Inclusion of Mid - Stream and Down - Stream

The Petroleum Act provides for an accountability and transparency framework for up – stream. This, however, does not provide for mid – stream and down – stream, which are sectors that require transparency and accountability to ensure optimal benefit from petroleum resources. The Energy Act provides for provisions on mid – stream and downstream on licenses, permits and environmental, health and safety standards but there is no mechanism for transparency and accountability to ensure these provisions are actualized.¹⁶⁵ Despite Kenya not being an oil producing country yet, there is a need develop frameworks on the transportation and storage of petroleum and also the distribution.

6.2 CONCLUSIONS

This paper set out to analyze the petroleum revenues under the Petroleum Sector in Kenya and it particularly looked at the principle of transparency and accountability as enshrined in the constitution. The paper has shown that there is an inadequacy of the law on this sector and there is a need to establish a framework that is sector – specific for transparency and accountability for oil revenues given that mineral oils and minerals is public land which is to be held in trust for the citizens which is the people of Kenya by the National Land Commission.

However, the framework on transparency and accountability is yet to be published as a draft framework has been formulated by the Extractives Baraza through the Ministry of Petroleum and Mining.

¹⁶⁵ Part IV, *Energy Act* (2012)

In Chapter One, it emerged that the principle of transparency and accountability is key as it is stipulated under the constitution. With regards to the petroleum sector there is no enabling requirement to ensure this.

In Chapter Two, it emerged the underlying need for good governance in resource rich countries to avoid resource curse and permanent income hypothesis which would not bring about optimal benefit of natural resources to its citizens.

In Chapter Three, it emerged that the current legal framework has weaknesses in terms of transparency and accountability of petroleum revenues. The Petroleum Act 2019 under section 119(1)¹⁶⁶ provides that a framework for transparency and accountability shall be developed for the upstream sector. This is a weakness as it does not cover the mid – stream and down – stream. Similarly, Kenya has not part of EITI which is an International Initiative to ensure transparency and accountability of natural resources in resource rich countries such as Kenya. This chapter has achieved the first objective which is to analyze the legal and regulatory framework in Kenya under resource transparency legislation on petroleum revenue and identify the gaps.

In Chapter Four, aimed to show the need for budget transparency and its adequacy in the Kenyan legal framework and it emerged that the Petroleum Act having established the Petroleum Fund does not provide any mechanisms for the collection and deposit of these revenues and expenditure in a transparent and accountable way. This chapter has achieved the second objective which is to show that having a budget expenditure transparency will ensure transparency and accountability of petroleum revenue.

In Chapter Five, it was shown how Norway has been able to avoid the resource curse and benefited from its resources and has presented to Kenya of how to benefit from its resources by picking some of the aspects it could emulate. This chapter has achieved the third objective which is to look at the impact of having proper transparency and accountability mechanism for petroleum revenue by analyzing Norway and draw lessons.

In Chapter Six, it has been shown the conclusions and recommendations of the study which are enactment of the petroleum revenue management act, access to information and inclusion of mid – stream and downstream in the transparency and accountability framework.

¹⁶⁶ Section 119(1), Petroleum Act (2019).

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