



TRANSPARENCY AND ACCOUNTABILITY IN KENYA'S EXTRACTIVE SECTOR

**A Discussion Paper for the Transparency and
Accountability Panel Discussion during Jukwaa la
Madini, Mafuta na Gesi 2019 at Safaripark Hotel
and Casino, Nairobi.**

Institute for law and environmental Governance (ILEG)

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1. About this Discussion Paper

From 24-26th September 2019, the second edition of Jukwaa la Madini, Mafuta na Gesi 2019 will be held at Safaripark Hotel and Casino in Nairobi, with the goal of promoting dialogue and action towards accountable and sustainable resource extraction for improved livelihoods of host communities. The theme of this year's conference is "Getting it Right – Just and fair share of benefits from extractive resources". During the conference, Institute for Law and Environmental Governance (ILEG) has been tasked to constitute and facilitate a panel discussion on Transparency and Accountability (T&A) in the Extractive Sector in Kenya. This panel discussion will be on Day 3 (September 26th 2019) from 2-4pm. The panel will discuss the status (policy and practice) of T&A in Kenya's extractive sector; challenges facing realization of effective and meaningful T&A; and the interventions needed to catalyse greater T&A in the extractive sector.

This Discussion Paper is an information document for the panel discussion. The paper is not comprehensive, neither does it meet the markers of scientific writing. It didn't intend to either. Rather, it seeks to provoke debate and stimulate more in-depth discussion on the topic during the panel discussion. It is hoped that a more comprehensive Policy Brief will be developed after the conference, building on these exploratory thoughts and the outcomes of the conference. The Discussion paper starts by exploring the renewed interest in Africa's Extractive resources and the fear of "resource curse", followed by a discussion on the uniqueness of the extractive industry (in Kenya) and why Transparency and Accountability is critical. It then summarises some of the international policy instruments on transparency and accountability in Kenya's extractive sector that Kenya has ratified, and a summary of some of the key domestic policy and legal framework for transparency and accountability. It concludes with a summary of some of the challenges with the realization of meaningful transparency and accountability in Kenya's extractive.

2. Renewed interest in Africa's Extractive resources and the fear of "resource curse"

As mineral and petroleum resources decline in other continents, Africa is seeing renewed interest in resource extraction, with many foreign mining companies competing to have a piece of the pie. As new African sources come into production, resource-rich African nations are earning rising profits from their natural wealth. However, in many of these countries, people living in the extraction areas have in general, not reaped sufficient benefits from the exploitation of the natural resources. Stories abound of endemic poverty amid plentiful natural resources in many resource-rich African countries, a paradox that has been coined the "resource curse". Poverty is exacerbated in part by weak or corrupt institutions, government mismanagement of revenues, and a failure to re-invest in projects that benefit the public—such as infrastructure, education, and healthcare. Moreover, exploration and extraction of the resources as well as the attendant infrastructural developments often have many negative environmental and social impacts on the people.

3. Transparency and Accountability and why they are key to the extractive industry (in Kenya).

Transparency refers to a situation in which substantive and procedural information is available to, and broadly understandable by, people and groups in the society. This may be subject to reasonable limits e.g. to protecting security and privacy. On the other hand, accountability refers to procedures requiring officials and those who seek to influence them to follow established rules defining acceptable processes and outcomes, and to demonstrate that they have followed those procedures. Transparency and accountability, are now widely acceptable as some of the key principles of good environmental governance.

While transparency and accountability are key to the success of any sector, certain unique characteristics of the extractive industry make it extremely vulnerable to weaknesses or lack of transparency and accountability. These unique characteristics include: the fact that resource extraction often occurs in remote locations; the industry is highly technical; the industry is often characterised by volatility in terms of production and markets; the industry is capital intensive and also involve large and sudden revenue inflows. These characteristics have implications for effective management of the sector and the accruing benefits. At the same time, they provide opportunities for corruption, mismanagement and misallocation of accruing revenue. This therefore calls for transparency and accountability as a central pillar of the good governance framework required to catalyse the extractive sector's contribution to socio-economic development.

4. International policy instruments on transparency and accountability in Kenya's extractive sector.

Transparency and accountability, alongside other good governance principles like public participation and inclusion have in recent years become nearly universal features of international environmental governance. These principles have been captured in a number of international policy instruments some of which Kenya has ratified:

- **The Rio Declaration**

The Rio Declaration is one of the key outcome documents of the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil in June 1992. The Declaration stands out to date as the clearest expression of international commitment to solve environmental problems. It is a statement of 27 broad principles which outline a set of guidelines under three fundamental rights - access to information, access to public participation, and access to justice. On access to information, the Declaration requires that every person should have affordable, effective and timely access to environmental information held by public authorities upon request without having to prove a legal or other interest. Among the type of environmental information which is required to be made available are: information about environmental quality, environmental impacts on health and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

Further, the Declaration requires states to clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for such refusal should be interpreted narrowly, taking into account the public interest served by disclosure. The guidelines also require states to establish relevant systems to ensure

adequate flow of information, and to periodically prepare and disseminate at reasonable intervals, up-to-date information on the state of the environment, including information on its quality and on pressures on the environment. And in the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public to take measures to prevent such harm is disseminated immediately. Finally, the guidelines require states to provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information.

- **United Nations Convention against corruption**

The United Nations Convention against Corruption is a legally binding universal anti-corruption instrument. The Convention stands out as a unique anti-corruption tool due to the mandatory character of many of its provisions, as well as its far-reaching approach - preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. The Convention covers many different forms of corruption, such as bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector. The Convention also specifically targets asset recovery, aimed at returning assets to their rightful owners, including countries from which they had been taken illicitly.

- **The African Union Convention on Preventing and Combatting Corruption**

The African Union Convention on Preventing and Combatting Corruption was adopted at the Second Ordinary Session of the Assembly of the African Union (AU) in July 2003, and entered into force in 2006. The Convention has been signed by 49 African countries, 41 of which have ratified it. The Convention is unique in that it contains mandatory provisions on private-to-private corruption and on transparency in political party funding. It also has mandatory requirements of declaration of assets by designated public officials and restrictions on immunity for public officials (Art. 7). Further, it gives particular attention to the need for the media to have access to information.

- **Paris Declaration on Open Government**

The Paris Declaration on Open Government was endorsed by the Steering Committee of the Open Government Partnership on December 7th 2016. In the Declaration, countries and civil society organizations who are members of the Open Government Partnership reaffirmed commitment to the core values of transparency, integrity, public participation, and collaboration in order to forge more inclusive, just and sustainable democracies. Further, OGP members committed to push forward international cooperation fostering transparency, integrity and fight against corruption; climate change and sustainable development and the sharing of common digital tools and capacity.

- **African Mining Vision**

The Africa Mining Vision (AMV) was formulated by members of African Union (AU) to provide a long term and broad development objectives for mineral extraction. The AMV sets out how mining can be used to drive continental development. It seeks to promote

transparent, equitable and maximization of benefits from mineral resources in the continent. To deepen the commitment to implementing the AMV, the AU developed the African Minerals Governance Framework. The framework is a monitoring tool to help African countries to determine their progress with regard to realizing the transformative ambitions of the Vision. The Framework is touted as a home-grown, holistic and comprehensive instrument that responds to the specific challenges facing Africa's mineral sector.

- **Extractive Industries Transparency Initiative (EITI)**

The Extractive Industries Transparency Initiative (EITI) is a global standard to promote the open and accountable management of oil, gas and mineral resources. EITI broadly requires extractive industry companies to publish what they pay to governments, and governments to publish what they receive in an EITI Report. EITI is anchored on the belief that a country's natural resources belong to its citizens. Specifically, the EITI Standard requires the disclosure of information along the extractive industry value chain from the point of extraction, to how revenues make their way through the government, and how they benefit the public. This is aimed to strengthen public and corporate governance, promote understanding of natural resource management, and provide the data to inform reforms for greater transparency and accountability in the extractives sector. EITI is supported by a coalition of government, companies, and civil society. To date, 52 countries including Tanzania, Mozambique, Ghana, and Nigeria have signed to the framework. Kenya is yet to sign it despite promising multiple times to do so.

5. The National Policy and legal framework for Transparency and Accountability: Great Strides.

- **The Constitution of Kenya 2010**

The Constitution of Kenya 2010 sets forth a formidable rights framework to facilitate responsible governance. In particular, the framework addresses itself to promoting prudent management and utilization of natural resources. For instance, the Constitution provides for legally binding national values and principles of governance. Notably, these include: good governance, integrity, transparency and accountability. Others are: sustainable development; the right to a clean and healthy environment; public participation in the management, protection and conservation of the environment; and the need to utilize environment and natural resources for the benefit of the people of Kenya.

- **Access to Information Act**

The Access to Information Act, 2016 give effect to Article 35 of the Constitution that gives every citizen the right of access to information held by the State or any other person and is required for the exercise or protection of any right or fundamental freedom. The overall objective of the Act is to ensure citizens have access of the information they need to participate meaningfully in democratic processes and that public officers are accountable to the citizenry. It is important to note that Act stipulates that the right to access information is not affected by reasons the person seeking information gives, nor by the belief of the public officer or entity as to the reason given by the person seeking information.

- **The Mining Act, 2016**

The Mining Act 2016 provides for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals. The Act has very progressive provisions with regard to transparency and accountability. Article 119 obliges the Cabinet Secretary to ensure access to information, including ensuring that mineral agreements are available in the official website of the responsible Ministry. The Cabinet Secretary is also mandated to make regulations to provide for accountable and transparent mechanisms of reporting mining and mineral related activities, including revenues paid to the government by mineral right holders, as well as production volumes under each licence or permit. Further, the Cabinet Secretary is to publish on the ministry website, annually, records, reports, mineral agreements and any other relevant information.

- **Petroleum (Exploration, Development and Production) Act**

The Act in Article 111 requires the Cabinet Secretary to develop a framework for reporting on transparency accountability in the upstream petroleum accountability. This 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.

- **Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016**

The Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 deals with classification of transactions regarding natural resources so as to make their granting subject to ratification by Parliament in accordance with Article 71 of the Constitution. It spells out the specific classes in the Schedule. These include, amongst others, mineral agreements with a threshold of US \$ 500 million; extraction of sea water within the territorial sea for private commercial use; extraction of underground steam within a water conservation or other water resource protected area; and extraction of oil, gas, and minerals within a wildlife conservation area or other wildlife protected area. Section 12 of the Act obliges the Cabinet Secretary to maintain a register of transactions on agreements relating to natural resources, and to publish a report of the transactions submitted on an annual basis.

- **Other laws relevant to transparency and accountability**

There are several other laws relevant to transparency and accountability such as the Public Finance Management Act and the Economic Crimes Act and Ethics and Integrity Act. In addition, land laws including the Community Land Act also have provisions on transparency and accountability.

6. Challenges with the realization of meaningful transparency and accountability in Kenya's extractive.

Despite the progress made in the policy sphere with regard to transparency and accountability, the same cannot be said of practical implementation on the ground.

Working and interaction with community members reveal intractable concerns about inaccessibility and/or insufficiency of relevant information, documents and data concerning: legal frameworks including petroleum/mining contracts and licences; beneficial ownership of mining and oil & gas and mining companies and their subsidiaries and subcontractors; exploration and production data; revenue collection, allocation and management; and social and environmental contributions. Moreover, complaints still abound about public officers and institutions such as the Ministries of Petroleum and Mining; Lands and Physical Planning; National Land Commission and the National Environmental Management Authority (NEMA) being unresponsive to community and stakeholder concerns.

Concerns have also been raised about risk of the sector exacerbating corruption. According to the Corruption Risk Assessment report in Mining Awards published by Transparency International-Kenya in 2017, cases of corruption go unreported due to lack of confidence in the authorities mandated to handle such cases. The report also sites lack of comprehensive complaints handling mechanisms coupled with weak legal framework to promote whistle-blowing in Kenya. The findings further indicate that despite the existence of the Access to Information Act, 2016, there still exist gaps with regards to knowledge of the legal framework that governs the mining and extractive sector in Kenya and availability and accessibility of relevant public documents and/or records. The report identifies risks which occur in the award process. They include: speculation around land that is subject to a mining permit application, lack of verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports by the relevant authorities, political and external interference and community participation among others. If these governance challenges are not urgently and comprehensively addressed, Kenya is likely to lose the much needed benefits from the extractive sector.

The challenges with the realization of meaningful transparency and accountability in Kenya's extractive sector can be summarised into: weak compliance and enforcement of laws; lack of political will; and lack of empowerment/ inadequate appreciation of citizen rights and obligations/complicity of citizens.

- **Weak compliance and enforcement of laws**

The promulgation of the Constitution of Kenya 2010 coincided with discovery of oil in Turkana and increased activities in the mining sector around the same time. Kenya then started on the premise that it needed to review the hitherto outdated petroleum and mining policy and legal framework. This was aimed not only to align them to the Constitution and the new realities, but also to potentially maximize benefits from the extractive sector. After years of discussions to date the country has put in place a raft of policies and laws relevant to the sector. These include the Mining Act 2016; The Petroleum (Exploration, Development and Production) Act, 2017; Natural Resources (Classes of Transactions Subject to Ratification) Act 2016; Access to Information Act; and Community Land Act. Others – such as The Local Content Bill and the Sovereign Wealth Fund Bill – are still under development. There is also the Mining and Minerals Policy and the Transparency and Accountability Framework and Action Plan for Kenya's Petroleum Sector (under

development), alongside other relevant sectoral policies and laws, as well regulations to operationalize them. Almost all these policies/laws have very progressive provisions for transparency and accountability.

Despite the existence of these statutes, there seem to be more rhetoric than honest efforts to implement them. There seem to exist a theory, especially among public officers and institutions, as well as investors, to do just enough to appear to be implementing them. So often, this is hardly enough. Slow implementation or lack thereof, is sometimes blamed on bureaucracies and processes such as lack of resources and confidentiality clauses in the case of mining contracts. While some explanations could be genuine, it is possible that willingness and an honest resolve to implement them can yield enormous progress. It is important to note that policy implementation and law enforcement may involve substantial resource investments. Therefore, from a purely profit perspective, it is possible that businesses can take advantage of weak enforcement of laws to circumvent compliance with provisions that they would comply with in jurisdictions with strict enforcement.

- **Lack of political good will**

It is important to note that many years of domination by a powerful and highly centralised government had helped to perpetuate a system of patronage and stranglehold on public resources, economic opportunities and information. It is fair to say the system also nurtured corruption, of which the most widespread was illegal and arbitrary appropriation and plunder of natural resources by the ruling elite and the politically-connected. Despite the changes brought about by the Constitution and new laws, constitutionalism is yet to take its rightful place in governance, and in very many respects, it seems the culture of patronage is yet to completely go away. This culture is however under threat from the principles of good environmental governance - such as transparency and accountability, public participation, equity, sustainable development and inclusivity - espoused in the new governance framework. It is therefore understandable and fairly evident that those in the ruling class and public/political offices, who benefited, are benefiting or seek to benefit from the current way of doing things may not fully and genuinely support implementation of laws/policies advocating for a paradigm shift in the way the country manages its natural resources.

- **Lack of empowerment/ inadequate appreciation of citizen rights and obligations/complicity of citizens.**

Adequate appreciations of the scope, reach and possible impact of the new constitutional order can be said of a vast majority of the Kenyan citizenry. While citizens continue to suffer consequences of lack of transparency and accountability, in many cases they are not fully empowered to effectively demand accountability from public institutions and investors. It may be because they don't have adequate resources, or they are not fully aware of their rights and obligations, or the right offices and procedures to demand accountability/information. Moreover, even where they have the resources and knowledge, they may be politically acquiescent due to many years of domination by a powerful executive. But citizens can also be complicit if one looks at it from the perspective of the

civic duty of the citizen to hire their leaders and rehire or retire them every five years through the power of the vote. Governance weaknesses in many instances boil down to the political system and integrity or lack thereof of individuals entrusted with public offices and those that they appoint. Given, there are challenges with Kenyan electoral system. Still, some governance challenges can simply be solved by carefully considering the leaders we entrust with public offices, and how we elect them to those offices.