



Transparency and accountability in Kenya's extractives sector: What works, what doesn't?

Policy Brief No. 1 of 2020

March 2020

Institute for Law and Environmental Governance (ILEG)

About ILEG

The Institute for Law and Environmental Governance (ILEG) is a leading not-for-profit public interest policy research and advocacy organization based in Nairobi, Kenya. The organization's mission is to promote good governance and management of the environment and natural resources. We support effective use of governance tools – principally laws and policies – to promote evidence-informed equitable, inclusive and sustainable use of the environment and natural resources in Kenya and the East Africa region.

ILEG policy briefs

These policy briefs cover a range of content relevant to good governance and management of the environment and natural resources. They may focus on current issues, debates and enduring challenges facing sustainable development policymakers, programme managers and practitioners. They synthesize or draw on relevant findings from research, programmes, projects, workshops, seminars and other events conducted by ILEG, as well as other rigorous evidence, to offer new analyses, findings, insights and recommendations.

About this policy brief

This policy brief, Transparency and accountability in Kenya's extractives sector: What works, what doesn't, synthesizes insights from a national conference on Minerals, Oil and Gas - Jukwaa la Madini, Mafuta na Gesi 2019 – hosted by ILEG in partnership with other civil society players working on oil & gas and mining issues in Kenya. Themed 'Getting it right: Just and Fair Share of Benefits from the Extractive Sector', the conference was held in Safaripark Hotel in Nairobi from 24-26th September 2019. It sought to promote dialogue and action towards accountability and sustainability in a way that would improve community livelihoods in areas affected by oil & gas and mining operations. The conference brought together more than 200 stakeholders in the extractives sector, including extractive companies, community organizations from the counties with potential and active mining, oil and gas operations, civil society organizations and the government. The conference was structured around receiving input on community perspectives, reconciling community expectations and company perspectives, and roping in the government in a way that would see forward movement. Specifically, this policy brief discusses the impact of the interventions by these different stakeholder groups on increasing citizens' knowledge, awareness, trust, and demand for transparency & accountability and civic action, as well as their implications for environmental and development outcomes.

The content of this policy brief is the sole responsibility of ILEG and does not represent the opinions of the civil society partners who hosted the 2019 Jukwaa nor their donors. Any errors and omissions are also the sole responsibility of ILEG. Please direct any comments or queries to Duncan Okowa d.okowa@ilegkenya.org.

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INTRODUCTION

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.

Although Kenya has engaged in mining activities since 1950s, discovery of commercial quantities of Oil in 2012 and increased mineral exploration around the same time led to increased interest and activities in the country’s extractive sector. Since then, there have been massive developments in the sector ranging from creation of the Ministry of Mining and the subsequent adoption of the Minerals and Mining Policy of 2016 and the Mining Act, 2016, to adoption of the Petroleum Act, 2019, capacity building of government agencies to the interventions by civil society organizations and development partners. Subsequent efforts include the development of the Mining Cadaster and the development of Community Development Committee guidelines which have subjected mining companies to fairly increased scrutiny. While it may be too early to judge the success of these initiatives, multilateral organizations, researchers, activists and policymakers believe that their success will depend to a great extent on transparency and accountability mechanisms put in place and implemented. Indeed, concerns abound over lack of openness, limited information flow, secrecy of mining and oil & gas contracts and unaccountable sector institutions and companies.

As part of initiatives to promote dialogue and action towards accountable and sustainable resource extraction, ILEG in partnership with other civil society players working on oil & gas and mining issues in Kenya hosted a national conference on Minerals, Oil and Gas - Jukwaa la Madini, Mafuta na Gesi 2019. The 3-day conference ran from 24-26th September 2019 and was held at Safaripark Hotel and Casino in Nairobi, under the theme “Getting it Right – Just and fair share of benefits from extractive resources”. During the conference, ILEG hosted a panel discussion on Transparency and Accountability (T&A) in the Extractive Sector in Kenya. The panel discussed 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 catalyze greater T&A in the extractive sector. This policy brief synthesizes insights from the panel discussion, the wider conference and general literature and practice on transparency and accountability in Kenya’s extractive sector.

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 characterized 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 catalyze the extractive sector's contribution to socio-economic development.

INTERNATIONAL POLICY INSTRUMENTS ON TRANSPARENCY & ACCOUNTABILITY IN THE 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. Principle 10 of the Rio Declaration outlines a set of guidelines under three fundamental rights - access to information, access to public participation, and access to justice.

Rio Declaration Principle 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided

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.

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- **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.

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- **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 African Minerals Governance 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.

STATUS OF TRANSPARENCY & ACCOUNTABILITY IN KENYA'S EXTRACTIVE SECTOR

Kenya has made considerable improvements across several individual requirements on Transparency and accountability. According to the draft Transparency and Accountability Framework and Action Plan for the Petroleum Sector in Kenya, there are six specific components of transparency policy and practice. These are: legal frameworks including Petroleum Contracts and Licenses; beneficial ownership; exploration and production data disclosure; revenue collection; revenue allocation and management; and social and environmental Contributions. This section reviews the progress made in the country so far on each of these components.

Considerable advances in the regulatory framework

The promulgation of the Constitution of Kenya 2010 coupled with the discovery of oil in the country in 2012 and renewed interest in mining activities in the country around the same time have resulted in considerable developments in the country's extractive sector regulatory environment. These

developments range from detailed and progressive treatment of land and natural resources in the Constitution to adoption of new Petroleum and mining laws as well as related laws, policies and regulations. These laws and policies have made considerable advances in promoting disclosure of information related to the rules for how the petroleum sector is managed, and procedures for awarding exploration and production rights. This section reviews these legislative and policy developments since 2010 in relation to how they address transparency and accountability in the extractive sector.

- **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. Notably, the Constitution provides for legally binding national values and principles of governance which 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.

Article 10(1)

The national values and principles of governance include - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

- **Vision 2030**

Vision 2030 is Kenya's long-term development blueprint. It aims at transforming Kenya into "a newly industrializing, middle income country that provides a high quality of life to all its citizens in a clean and secure environment" by the year 2030. Under Vision 2030, Kenya aims to have "transparent, accountable, ethical and results-oriented government institutions" by 2030. This involves pursuing strategies like: strengthening the legal framework for anti-corruption, ethics and integrity; promoting results-based management within the public service; encouraging public access to information and data; introducing civilian oversight around the key legal, justice and security institutions; and strengthening Parliament's legislative oversight capacity. Vision 2030 also reiterates that the government will intensify efforts to bring about an attitudinal change in public service that values transparency and accountability to the citizens of Kenya.

Vision 2030

The 2030 vision is "transparent, accountable, ethical and results-oriented Government institutions".

- **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.

Article 119 (2)

The Cabinet Secretary shall ensure access to information under this Act, including ensuring that mineral agreements and the status thereof is available in the official website of the Ministry for the time being responsible for mining.

- **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.

Article 111(1)

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- **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.

Article 12(1)

The Cabinet Secretary shall establish and maintain a central register of agreements relating to natural resources and other transactions which have been ratified as provided under this Act.

▪ **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.

Concerns over opaque petroleum and mining contracts and licenses

In policy and public statements, the government of Kenya is committed to ensuring transparency of petroleum and mining contracts and licenses. In fact, in its Open Government Partnership (OGP) National Action Plan III 2018-2020, the country committed to disclose contractual information relating to petroleum. This commitment is indeed supported by the Petroleum Act 2019, Mining Act 2016 and a host of related legislations and policies as discussed above. In public pronouncements, many companies operating in Kenya have expressed support for contract transparency. Officials from Base Titanium and Tullow Oil speaking at Jukwaa 2019 variously expressed their companies' support for the disclosure of their contracts in Kenya's oil & gas and mining activities. A few of contracts have been made public due to stock exchange disclosure requirements.

However, despite the advances in the regulatory framework, concerns still abound over opaqueness of petroleum and mining contracts and licenses, and discriminatory procedures for accessing the same. Most oil & gas and mining companies have to date not taken their cue to make public their production sharing contracts and licences. Only a few government officials know the details of contracts signed with foreign companies operating in the country. Such secrecy about contracts potentially undermines oversight and enforcement by regulators, parliaments and advocates of good governance. Indeed, it has caused worries and public suspicion particularly within the civil society and community quarters that that corruption could be deeply entrenched in the sector.

Beneficial ownership

Beneficial ownership refers to public declaration of full identity including the names and addresses of the actual owners of companies. Beneficial ownership information can help deter tax evasion, corruption, money laundering, terrorist financing, transfer pricing and other illicit behavior involving one or more companies. In its Open Government Partnership (OGP) Action Plan 2018-2020, the country committed to publish a central public register of company beneficial ownership information operating in the Republic of Kenya. Indeed, disclosure of beneficial ownership is well anchored in Kenyan law. The Companies Act 2015 makes it mandatory for the Registrar of Companies to be furnished with a register of all beneficial owners of companies operating in Kenya. Furthermore, every company is required to keep a register of its members, including information relating to beneficial ownership. This is further strengthened by the Presidential Executive Order No. 2 of 2018 which requires all companies contracting with the government of Kenya to disclose details of beneficial owners online. Community and civil society actors in Kenya have been strongly advocating for a public registry on Beneficial Ownership. However, although the government currently collects this information, it does not publish it in an open and centrally accessible data base. This has increased barriers to information access and promoted use of tax havens and low tax jurisdictions in the ownership of petroleum and mining rights in Kenya. A 2016 report by Oxfam for instance details that majority of oil & gas companies have at least one subsidiary listed in a tax haven or low tax jurisdiction as part of their corporate structures.

Exploration and production data disclosure

Disclosure of exploration and production information - such as exploration appraisal activities; development and production data; and export data - is key not only to enabling stakeholders to understand the potential of the sector, but also to manage their expectations. The draft Transparency and Accountability Framework and Action Plan for the Petroleum Sector in Kenya 2019 details a raft of information sets that the Ministry of Petroleum and Mining will be required to disclose. At the exploration and appraisal stage, this information includes all exploration and appraisal activities carried out, description of petroleum blocks, exploration and appraisal period, government participation, exploration and appraisal work plans, exploration and appraisal costs, compensation costs, environmental and social impact reports, and waste management plans. With regard to development and production, the framework envisages the ministry regularly disclosing field development plans, state participation, production costs, production volumes, details on the composition of petroleum produced, and how production volumes and values disclosed have been calculated. The framework also details the kind of exports data that needs to be disclosed. This includes total export volumes and the value of exports, and information on how the export volumes and values disclosed have been computed.

If these disclosure requirements were to be effected the country would indeed go a long way in terms of transparency and accountability in the extractive sector. However, the practical situation on the ground doesn't quite reflect these requirements. For instance, just in June 2019, bureaucrats from the Ministry of Petroleum and Mining cited official secrecy and commercial confidentiality while declining to disclose details of the Heads of Terms (HoT) agreement reached with Tullow Oil and its joint-venture partners for development of the South Lokichar oil basin. The government has also been accused of being choosy with the details and the manner in which the sale of Kenya's first crude oil export under the Early Oil Pilot Scheme (EOPS) was carried out.

Revenue collection, allocation and management

Disclosure of revenue collection, allocation and management not only reduces opportunities for corruption but also allows citizens to understand how the country, government and citizens benefit from petroleum operations. Revenue collection information that should be made publicly available include the government's production entitlement; national state-owned company production entitlement; profit taxes; royalties; dividends; and bonuses. Others include license fees; rental fees; entry fees; and any other significant payments and material benefit to government. With regard to revenue allocation and management information include how petroleum revenues are distributed, what criteria is used and which authorities are charged with the management of such revenues.

The draft Transparency and Accountability Framework and Action Plan for the Petroleum Sector in Kenya requires the responsible Cabinet Secretary to disclose and make public all information regarding petroleum revenue sharing mechanisms, all considerations, criteria, formulas, procedures and procedures of allocation, as well as any discrepancies between amounts calculated to be transferred and amounts actually received. Further, the Cabinet secretary is to publicly disclose and make available comprehensive guidelines for revenue transfers at both the national level and sub-national level. These requirements are however yet to take effect and there are deep concerns that the government has adopted an attitude of non-disclosure of revenue collection, allocation and management. Although the government announced it collected USD12million from the country's first ever oil export, it fell short of specifying how much of the money would cover the costs of the Early Oil Pilot Scheme (EOPS) and how much EOPS would eventually cost taxpayers cumulatively. Moreover, to date the government is yet to public how proceeds of the sale were used, nor how such funds will be used in future. Moreover, despite legal provisions for sharing of revenue accruing from petroleum and mining with county governments and host communities, presently there is no framework for disbursement of revenue to county governments and communities. As such neither affected county government nor communities have so far received their share of mineral revenue.

Social and Environmental Contributions

Disclosure of information relating to social and environmental contributions is important in helping stakeholders to assess the social and economic impacts and outcomes of petroleum and mining operations. Such include information relating to local content development, compensations for affected communities, environmental safeguards, investments on local infrastructure and corporate social responsibility is important in helping stakeholders to assess the social and economic impacts and outcomes of petroleum and mining operations. Kenya has history of social and environmental investments mainly done through corporate social responsibility. These investments have however been largely ad hoc and based on willingness of the companies involved. Moreover, the budgets and priority projects are largely decided by the companies with minimal participation of the affected communities. To cure this, the Mining Act 2016 has a provision now requiring mining companies to sign a community development agreement (CDA) with the community where mining operations are to be carried out.

Accordingly, the Cabinet Secretary for Mining and Petroleum made the Mining (Community Development Agreement) Regulations, 2017. The purpose of the Regulations is to ensure benefits of mining are shared between the holder and affected communities; mining is consistent with the continuing economic, social and cultural viability of the community; mining significantly contributes to the improved economic, social and cultural wellbeing of the community; and there is accountability and transparency in mining related community development. The advent of CDAs has been lauded as a great step towards ensuring openness and accountability in mining-related social and environmental contributions. Despite these great advances, the Ministry of Petroleum and Mining is yet finalizing the guidelines required to develop and operationalize the CDAs. Moreover, the CS has to date not gazetted the Community Development Agreement Committees.

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 cites 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.

RECOMMENDATIONS

Legal Frameworks including Petroleum Contracts and Licences

- i. The government of Kenya through the Ministry of Petroleum and Mining should put adequate resources, political will and monitoring behind enacted legislation, to ensure full implementation, compliance and enforcement. This includes speedily finalizing all the requisite regulations and guidelines necessary for implementation of the laws. Examples include development of the Community Development Agreement Guidelines; developments of the Model Community Development Agreement; finalizing the Mining (Local Equity) Regulations; developing the Strategic Plan (2018 – 2022) for the mining sector; establishment of Community Development Agreement Committees; and development of the Compensation, Relocation and Resettlement Framework.
- ii. The civil society, community members and other stakeholders should push for full implementation of existing laws and undertake a comprehensive review of extractives-related laws and make recommendations for appropriate amendments where necessary.
- iii. The national and county governments need to make sure that affected communities are knowledgeable and aware of the laws in place that enshrine their rights so that they do not get unfairly exploited. This includes through providing simplified and user-friendly documents, and civic education programmes on the enacted laws and policies to explain the existing laws to people of all education levels and ensure that they know their rights, duties and responsibilities.
- iv. The Ministry of Petroleum and Mining needs to be more forthcoming and open with information regarding petroleum and mining contracts in accordance with Section 119 of the Mining Act 2016 which requires the Ministry to ensure that mineral agreements are available in its official website, and Section 119 of Petroleum (Exploration, Development and Production) 2019 which requires publication, of all petroleum agreements, records, annual accounts and reports of revenues, fees, taxes, royalties and other charges.

- v. Mining and oil & gas companies should be more forthcoming and open to sharing information on production sharing agreements, beneficial ownership, revenues paid government, social and environmental contributions and other extractive activities via adequate and relevant platforms. They should have mechanisms where community members can regularly be informed about their work, eg. Setting up information centers. They should disclose the accurate costs and expenses of their operations.
- vi. The government needs to make sure public participation and information dissemination to the communities is effective and adequate to manage communities' expectations. Further, organizations working with communities should continue to sensitize and build capacities of communities on their right to information and effective ways to seek information and use it to advance their interests in the extractive sector.
- vii. Civil society groups and citizens need to put more focus on tracking and auditing the costs mining companies put forward to make sure that companies are not overstating costs as has happened in other parts of the continent. The validity of these costs needs to be challenged if necessary as cases have been seen where companies inflated costs to the tune of millions in DRC and Uganda.
- viii. Civil society groups and communities needs to exert as much pressure to government as to companies to make both accountable, and not limit the duty of accountability to companies only.
- ix. Communities need to organize themselves to ensure collective decisions on what their priorities are. This will ensure that by the time the company is approaching the community, the community is already organized and is telling the company how it wants to be engaged with. This include knowing what community rights are including the right to information, so that they demand for the respect of these rights. They also need to be proactive in requesting for information.
- x. County governments need to allay the fears community members have of revenue allocated/disbursed to them disappearing through corruption.
- xi. Civil society needs to push to ensure that accurate and reliable information is available to be accessed by the citizenry, to enable meaningful, informed and effective citizen participation. This includes sensitizing duty bearers on their duty to ensure access to information.
- xii. The government should do audits of large companies coming to do large scale mining, to ascertain the personalities behind these companies to avoid conflict of interest of cartels
- xiii. A sustainable model should be set up to administer the funds on behalf of current and future generations.
- xiv. The Kenya government should sign up to the Extractives Industry Transparency Initiative (EITI) and other regional and international instruments on transparency and accountability.
- xv. The county government needs to regularly update community members about status of revenue, informing them how the disbursements will be made.