

Extractive Laws in Africa: What is the state of these laws? Why are our laws a problem? Why and on what should we call for reforms?

Yao Graham's speaking notes at 2018 Alternative Mining Indaba

1. Greetings to all. Gratitude to organisers for invitation to make a presentation at the 2018 AMI. My topic is Extractive Laws in Africa: What is the state of these laws? Why are our laws a problem? Why and on what should we call for reforms?

2. The importance of this topic is obvious. We are all gathered here because of the importance of minerals in the economies of many Africa countries, including of the four biggest economies – Nigeria, South Africa, Angola and Egypt. Also because Africa's mining sector are dominated by foreign capital who export most of the profits they earn whilst leaving the negative social and environmental effects on the continent to be borne by the people, who in law are the beneficial owners of these resources. Another dimension is that over the past twenty or so years there has been a consensus that the use of power on the continent should be based on legality. All our countries bar a few have constitutions which pronounce on the sovereignty of the people and the accountability of power holders and the rule of law. So the question obviously arise how come with so much being made of legality and rule of law there are so many questions about how our minerals are managed by governments?

3. Approach Will not deal with the topic in the sequence in which the questions have been posed. I shall deal with the three questions in relation to each of the legal issues I'll identify and then at the end return to and summarise the changes that need to be made. In thinking about the presentation that seemed the simplest way to make a clear presentation.

4. What is the state of these laws and why are our laws a problem? I structure the discussions along the power/decision or governance chain in relation to the exploitation of minerals. It important even as we discuss the laws to qualify this discussion by recognising that laws the efficacy or weaknesses of laws cannot be understood outside the character of the state and the power relations in any society. We can all point to instances on our countries where

popular struggles have produced legislative victories but the effects of these changes were blunted because those opposed had a greater capacity to fight their corner over a longer period and they are supported by institutional arrangements and the hegemony of particular ideas.

5.

- a. The overarching legal framework for minerals across Africa is the fact of public ownership. This is variously expressed in constitutions and laws across the continent – minerals are vested in the president in trust for the people, minerals are owned by the state, etc. the main point being that the citizens are the collective beneficial owners of the minerals resources which is managed on their behalf by the state as a trustee. This collective ownership obviously has an intergenerational dimension – minerals belong to the living and the unborn generations of citizens.
- b. The international law side of this is the right of peoples and nations to permanent sovereignty over their natural wealth and resources which newly independent countries fought for and got a resolution adopted at the UN General Assembly in 1962 as part of marking a break from the colonial era. According to that resolution the permanent sovereignty ‘must be exercised in the interest of their national development and of the well being of the people of the State concerned’.

6. Let me make a bold claim that many of the things wrong with our laws flow from or represent a dimension of the betrayal/abuse or perversion of the State’s trustee role over the minerals of which we citizens are the beneficial owners. Across Africa in reality the collective ownership of minerals and the trustee role of the State/governments has been emptied of content with de facto and de jure ownership taken by the whoever is in power. Many of the concerns we all have about the governance of minerals in Africa can be recast through the prism of the logic of citizens ownership and the responsibilities of the State/governments as trustees.

7. SAPs, elite capture/corruption and perversion of ownership in reversion to colonial regime in policy and legal regime.

8. What should citizens' ownership of minerals mean?
- a. **In the words of the resolution on the right to permanent sovereignty the management of the minerals should be for the well being of the people of the state concerned, people here has an intergenerational dimension which means that exploitation should be such that the present and future generations benefit. There is also the dimension of the accountability of the trustee to the beneficiary.**
 - b. **Accountability and transparency are rightly issues of great concern for mining activists. However the concern has been limited and flawed. Why?** It has tended to focus on accountability and transparency in relation to the regimes of mineral exploitation that our governments have adopted. There is a more fundamental accountability question which we tend not to pose often enough – How do the choices being made by the trustee advance the inter-generational interests of the citizens who own the wasting resource. Ownership points to a radical re-conception of state accountability for the management of mineral resources.
 - c. Whose interests informs the development vision or lack thereof which animates mineral exploitation in our countries? The secrecy which excludes the owners. FIFA approach.
 - d. Law currently define large scale extraction by foreign investors in exchange for revenue. In many countries these law operated for years with only an implicit policy which assumed that the revenue and the terms defined for sharing it were the best options for exploiting the non-renewal resource. We know that the minerals which have tended to be exploited are those of interests foreign investors rather than those with the greatest development value in terms of minimal externalities and also the greatest potential linkages to dynamising economic and social expansion and welfare. The contemporary interest in the building of mineral based linkages and economic diversification is a recognition of the flaws of the operative law and practice.

e. Defects of revenue regime

- i. Revenue as primary benefit
- ii. Open external spending
- iii. Fiscal terms for exploitation exposed by boom still not fixed
- iv. Revenue as income for expenditure rather than transmuted capital
- v. Benefit sharing for affected communities (development rather than transfers)

f. Use of power of eminent domain to the detriment of the citizen owner. Citizen owner should at the very least not be made worse off by the development of assets of which he/she is part owner.

- i. De facto expropriation in favour of foreign investor and left to negotiate compensation with investor
- ii. Discrimination against citizens in the status of their property and the institutional support investors get for the advancement of their private property compared to the neglect that the citizen owner gets.
- iii. Poor or no planning for life after disruption – laws allow shabby treatment – derisory compensation of inadequate alternative livelihood or resettlement
 - 1. Should be state responsibility
- iv. The flaws in the ESIA process and the absence of FPIC (link to ownership)
 - 1. Inadequate information, non-participatory processes, language of process
 - 2. Responsibility of mining firm which really should be state responsibility paid for by firm and state mining fund.

g. The absence of comprehensive cost benefit analysis of land use and economic activity options as opposed to assumption that mining should go ahead and its impacts managed.

- i. No priority of ecological hotspots and human settlements
 - ii. Low standards of environmental management
- h. ASM treatment in law and support
 - i. Labour regime
 - i. -extensive outsourcing
 - ii. Non ratification of ILO 176 Health and Safety in mines
- j. Accountability regime

9. Steps to be taken

- a. Policy on mineral exploitation for national development – SD context for law
- b. Linkages important part of any mineral exploitation discussions
Accountability framework -minerals and development policy framework providing for intergenerational benefit with linkages development as central concern.
 - i. Obligation to publish information and periodic report of ongoing processes.
- c. Revenue steps
 - i. Retreat from First come first served approach to awarding mining contracts
 - ii. Need to collect more geological information to inform award of concessions
 - iii. Reform revenue law to be sensitive to mining price cycles so revenue collection can be optimised
 - iv. Inter generational use of revenue
 - v. Fiscal coordination/harmonisation among Africa countries to end race to the bottom

- d. Decision to mine and project preparation
 - i. Comprehensive cost benefit analysis needed before the decision
 - ii. Reform (ESIA information and process) and include FPIC
 - iii. Legal responsibility of state for compensation
- e. Ecological standards set to protect hot spots

- f. ASM-laws institutions and support
- g. Labour ratify and deal with outsourcing
- h. Linkages building (regional integration)
- i. Local enterprise promotion and active role for the state as investor

10.Importance of reform official initiatives and need to engage with them

e.g. Africa Mining Vision agenda offers a framework for challenging and transforming management of minerals. Not perfect to provides basis for forward movement and raising questions

11. Build solidarity and share experiences and information about struggles