

Citizen Enforcement of Environmental Regulation in Africa's Extractive Industries

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1. Introduction

African countries have conventionally responded to the socially irresponsible behaviour of resource extraction companies by enacting 'command-and-control' rules and regulations. The 'command-and-control' approach to regulation involves statutory prescription of behavioural norms for industry participants. This approach is premised on the belief that, because violations of the prescribed norms attract legal sanctions, companies will be incentivized to comply with the prescribed norms so as to avoid those sanctions. The problem, however, is that 'command-and-control' rules are for the most part ineffective in regulating the activities of extractive companies in Africa. The ineffectiveness of 'command-and-control' regulation in Africa is traceable to several factors including the incapacity and inefficiency of regulatory agencies; inadequate funding of regulatory agencies; corruption; lack of political will to enforce laws and regulations against extractive companies; lack of independence on the part of regulatory agencies; and the

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complicity of African governments in the social misbehaviour of extractive companies through state participation in mineral extraction projects.¹

In the recent past, however, some African governments appear to have recognized this apparent shortfall in regulatory enforcement. Hence, in the last few years, African governments have attempted to diversify the avenues and mechanisms for regulating extractive companies. This article examines the diversification of regulatory mechanisms through private citizen enforcement of regulatory laws in three African countries: Nigeria, South Africa and Zambia. Although occasional references are made to other African countries, I have chosen to focus on these three countries because of their common experience with regard to corporate social irresponsibility in their extractive sectors. The article argues that, while there are specific laws enabling citizen enforcement of regulatory provisions in these countries, certain structural and institutional obstacles including rampant poverty, high cost of litigation and state participation in resource exploitation prevent the full utilization of these statutory provisions by African citizens.

2. Statutory Provisions Enabling Citizen Enforcement of Environmental Regulation

As discussed below, a few African countries have enacted statutory provisions permitting citizens to enforce environmental regulations. Such statutory provisions are not unique to African countries. Some developed countries including the United States of America accord private citizens and non-governmental organizations (NGOs) the right to enforce environmental laws in circumstances where regulatory authorities are unwilling or unable to enforce such laws.² The empowerment of private citizens to enforce environmental laws is intended “to supplement government action, to make up the balance of necessary enforcement at times when under-funded or over-worked agencies could not ensure that all laws are complied with.”³

The incapacity of the public agencies charged with regulating the conduct of extractive companies in Africa makes a compelling case for the

¹ Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009) at 71-78 [Oshionebo, “Regulating”].

² See Will Reisinger, Trent A Dougherty & Nolan Moser, “Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?” (2010) 20:1 *Duke Environmental L & Policy* 1 at 2.

³ *Ibid* at 2.

diversification of regulatory enforcement.⁴ In this regard, a few countries in sub-Saharan Africa have enacted statutory and constitutional provisions enabling private enforcement of regulatory standards. In South Africa, a citizen's right to enforce regulatory rules is constitutionally protected through the Bill of Rights enshrined in the Constitution. Section 38 of the Constitution of the Republic of South Africa grants citizens "the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened". The Constitution casts a wide net with regard to the persons who may institute public interest litigation in South Africa. These persons include:

- (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.⁵

One of the rights guaranteed under the South African *Bill of Rights* is the right to a clean and healthy environment. In this regard, section 24 of the Constitution provides that:

Everyone has the right (1) to an environment that is not harmful to their health or well-being; and (2) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.⁶

In effect, these constitutional provisions allow South African citizens to enforce environmental laws provided they can establish that the alleged infringement directly impacts their right to a clean and healthy environment.

The legal standing of South African citizens to enforce environmental laws is equally apparent in the *National Environmental Management Act 1998* which provides that:

Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in

⁴ On the incapacity of regulatory agencies in Africa, see Africa Progress Panel, *Equity in Extractives: Stewarding Africa's natural Resources for All* (2013) at 96, online: <<http://www.africaprogresspanel.org/publications/policy-papers/africa-progress-report-2013/>> [Africa Progress Panel]. See also Engobo Emeseh et al, "Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?" (2010) 11 German LJ 230 at 245-46 [Emeseh et al, "Corporations"].

⁵ S. Afr. Const. 1996, s 38.

⁶ *Ibid*, s 24.

Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources –

- (a) in that person's or group of person's own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.⁷

In addition, South Africa's *National Environmental Management Act 1998* empowers private prosecution of environmental offences.⁸ Thus, South African citizens can institute proceedings against extractive companies for environmental offences where public regulatory agencies fail to institute such proceedings against companies.⁹

Similarly, Zambia has specifically empowered its citizens to enforce environmental provisions in the *Mines and Minerals Development Act 2015*¹⁰ and the *Environmental Management Act 2011*.¹¹ For example, section 87(7) of the *Mines and Minerals Development Act 2015* provides that:

A person, group of persons or a private or State organisation may bring a claim and seek redress in respect of the breach or threatened breach of any provision relating to damage to the environment, biological diversity, human and animal health or to socio-economic conditions –

- (a) in that person's or group of persons' interest;
- (b) in the interest of or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of, or on behalf of, a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment or biological diversity.¹²

Nigeria has yet to fully embrace a rights-based approach to natural resource governance. Generally speaking, statutory enactments governing Nigeria's resource sector do not vest a right on citizens to enforce

⁷ *National Environmental Management Act 107 of 1998*, s 32(1) (South Africa) [*Environmental Management Act* (South Africa)].

⁸ *Ibid*, s 33.

⁹ *Ibid*.

¹⁰ *Mines and Minerals Development Act of 2015*, s 87 (Zambia) [*Mines and Minerals Act* (Zambia)].

¹¹ *Environmental Management Act of 2011*, ss 108-110 (Zambia) [*Environmental Management Act* (Zambia)].

¹² *Mines and Minerals Act* (Zambia), *supra* note 10, s 87(7).

environmental laws and regulations. This perhaps explains why Nigerians have long resorted to common law tort litigation in their private attempts to enforce environmental laws against oil and gas companies.¹³ However, tort litigation often offers little hope because of the difficulties involved in obtaining evidence to prove negligence on the part of oil and gas companies.¹⁴ Proof of negligence in oil-related litigation is particularly difficult because of the technical and scientific nature of oil activities.¹⁵ Hence, in the recent past, Nigerian citizens have increasingly relied on the Constitution to hold oil and gas companies accountable for their social irresponsibility.

The *Constitution of the Federal Republic of Nigeria 1999* does not expressly provide for environmental rights but it expresses the environmental objectives of Nigeria as the protection and improvement of the environment, including the safeguarding of water, air, land, forest and wild life.¹⁶ However, the Constitution vests a right on Nigerians to enforce the fundamental human rights provided for in the Constitution, including the right to life; right to dignity of human person; right to personal liberty; right to fair hearing; right to private and family life; right to freedom of thought, conscience and religion; right to freedom of expression; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination; and right to own property.¹⁷ Interestingly, some of the human rights provisions in the Nigerian Constitution can be enforced against private entities including extractive companies because, as the Supreme Court of Nigeria held in *Attorney General of Ondo State v Attorney General of the Federation and 35 Others*,¹⁸ the provisions of the Constitution are not confined to governments but also apply to private persons, companies and private organizations. Thus, where the activities of an extractive company violate any of the fundamental human rights guaranteed under the Nigerian Constitution, the victim can sue the company to remedy the wrong.¹⁹

In addition to these constitutional provisions, the human rights

¹³ See Jędrzej G Frynas, "Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria" (1999) 43:2 J Afr L 121.

¹⁴ See Patrick D Okonmah, "Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41 J Afr L 43.

¹⁵ Frynas, *supra* note 13 at 124.

¹⁶ *Constitution of the Federal Republic of Nigeria 1999*, s 20.

¹⁷ *Ibid*, ss 33-43.

¹⁸ [2002] 9 N.W.L.R. 222, 6 S.C. (Part 1) 1 (Nigeria).

¹⁹ See *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd*, [2005] A.H.R.L.R. 151 (Nigeria) [*Gbemre v Shell*].

provisions enshrined in the *African Charter on Human and Peoples' Rights*²⁰ (African Charter) apply in African countries that have ratified the Charter. Nigeria has ratified and domesticated the African Charter through the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*.²¹ This Act provides that the African Charter has “force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.”²² The African Charter guarantees a number of rights including the right to life (Article 4); right to “enjoy the best attainable state of physical and mental health” (Article 16); and the right to a clean and satisfactory environment (Article 24). The ratification of the African Charter enables Nigerian citizens to enforce the provisions of the Charter in both domestic courts and international tribunals such as the African Court on Human and Peoples' Rights²³ and the Court of Justice of the Economic Community of West African States (“Court of Justice of ECOWAS”).²⁴

3. Utility of Statutory Provisions on Citizen Enforcement of Regulatory Rules

It is practically impossible for regulatory agencies to detect and punish every violation of regulatory standards. It is equally the case that, sometimes, regulatory agencies may choose not to enforce regulation against erring companies so as to conserve scarce resources. At other times, regulators may prioritize their enforcement targets by focusing their enforcement efforts on major infractions while ignoring minor infractions. Further, as discussed below, because many African states participate directly in resource exploitation, regulatory agencies often elect not to enforce regulations against

²⁰ African Commission on Human and Peoples' Rights, *Africa Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, online: <<http://www.achpr.org/instruments/achpr/>>.

²¹ *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, (1990) Cap. 10 (Nigeria).

²² *Ibid.*

²³ This court was established by the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, online: <<http://www.achpr.org/instruments/court-establishment/>>.

²⁴ The Court of Justice of the Economic Community of West African States was created by member states of the Economic Community of West African States on May 28, 1975. See *Economic Community of West African States: Revised Treaty*, online: <<http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>>.

TNCs engaged in joint venture projects with African governments. In all of these instances, a void is unwittingly created in the regulatory process. Citizen suits help to fill this void because they complement and, in some cases, supplement regulatory enforcement by state agencies.

This is particularly the case where state agencies lack the expertise “and financial resources to pursue all the enforcement cases that they might desire.”²⁵ The complementary value of citizen suits is apparent in Africa where regulatory agencies lack the capacity and resources to enforce regulation. In fact, lack of institutional capacity is at the heart of many of the ills plaguing Africa’s natural resource sector, including the social irresponsibility of extractive companies.²⁶ In this context capacity means the ability, expertise and resources to regulate companies operating in the extractive sector. The incapacity of regulatory agencies in Africa is compounded by the lack of financial and technical resources.²⁷ In Nigeria for example, the National Oil Spills Detection and Response Agency (NOSDRA), an agency responsible for investigating oil spills, reportedly relies on oil and gas companies to provide scientific expertise and diagnostic equipment for its investigations.²⁸ Regulatory agencies in Africa also often lack the political will to enforce regulations against extractive companies due primarily to the fact that these companies are considered by African governments as vital to their national economies.²⁹

Moreover, regulatory agencies are sometimes captured by the very entities they are supposed to be regulating, thus creating a void in regulatory enforcement. Public interest litigation could ameliorate the regulatory void arising from the capture of regulatory agencies by industry participants. Regulatory capture occurs where a regulatory agency becomes a tool of the companies and entities they are supposed to regulate and where the agency is “governed by the commercial interests of the parties it regulates, rather than

²⁵ Frank B Cross, “Rethinking Environmental Citizen Suits” (1989) 8 *Temple Environmental L & Technology J* 55 at 56.

²⁶ Africa Progress Panel, *supra* note 4 at 96.

²⁷ *Ibid* at 61.

²⁸ Anna Maitland & Megan Chapman, “Oil Spills in the Niger Delta: Proposals for an Effective Non-Judicial Grievance Mechanism” (2014) *Justice and Empower Initiative Nigeria* at 9, online: <<http://bit.ly/2uB2a15>> [Maitland & Chapman].

²⁹ See Engobo Emeseh, “Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria” (2006) 24 *J Energy & Natural Resources L* 574 at 606 [Emeseh, “Limitations”]; Emeseh et al, “Corporations”, *supra* note 4 at 246.

the public interest.”³⁰ As this author has argued elsewhere, transnational corporation (TNCs) in Africa’s extractive sector appear to have captured regulatory agencies, and hence, for the most part, these agencies either refuse to enforce regulation against TNCs or make regulatory choices that suit the interests of the TNCs.³¹

Regulatory capture is particularly apparent in Nigeria where, as mentioned previously, the NOSDRA relies on oil and gas companies to provide scientific expertise and diagnostic equipment for its own investigations.³² The NOSDRA’s reliance on oil and gas companies for scientific expertise and equipment not only allows these companies to dictate the terms of oil spill investigations in Nigeria, including where and when the investigation will occur, but also makes it difficult for the NOSDRA to act as an unbiased and independent regulator.³³

Aside from the complementary attributes citizen suits bring, the involvement of citizens in the enforcement of regulation in Africa could lessen the burden on regulatory agencies and free up scarce resources which could then be devoted to other areas of need.³⁴ For example, the cost and expense involved in public interest litigation are borne by citizen plaintiffs and, where such litigation is successfully concluded, the regulatory agency which ought ordinarily to institute the suit is spared the financial and material resources that it would have spent prosecuting the case.

Citizen suits could set regulatory precedents for both regulators and companies where there is successful litigation regarding statutory provisions on corporate conduct. Unlike regulatory agencies which are vested with statutory power to compel compliance with regulatory provisions, private citizens must invoke the judicial system and obtain an order of a competent court in order to compel companies to comply with regulations. Such suits enable citizens to seek judicial clarification and interpretation of regulatory provisions. In the process of interpretation, courts often set behavioural standards for companies and governments. In this sense, private citizen suits are mechanisms for standard-setting in the extractive sector. Litigation by

³⁰ Tracy Cohen, “Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation” (2003) 47(1) J Afr L 65 at 73.

³¹ Evaristus Oshionebo, “Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria’s Oil and Gas Industry” (2007) 15:1 African J Intl & Comparative L 107 at 109-10 [Oshionebo, “Transnational Corporations”].

³² Maitland & Chapman, *supra* note 28 at 9.

³³ *Ibid* at 9.

³⁴ Oshionebo, “Regulating”, *supra* note 1 at 217.

private citizens against governments and extractive companies could even ratchet up standards in the extractive sector.

This appears to be the case in countries such as Nigeria where section 33(1) of the Constitution, which guarantees the right to life, has been creatively utilized by citizens to enforce environmental standards against oil and gas companies. In *Gbemre v. Shell*,³⁵ for example, a private citizen, suing on behalf of his local community, alleged that Shell violated his constitutional right to life by engaging in incessant gas flaring activities which, in turn, adversely impacted the quality of the environment. The court held that the right to life guaranteed under the Nigerian Constitution includes the right to a clean and pollution-free environment and that Shell acted in breach of the Constitution by polluting the environment through its gas-flaring activities. Although the Nigerian Constitution does not expressly recognize environmental rights, the court drew an immutable link between the right to life and the quality of the environment by interpreting section 33(1) of the Constitution broadly. The court expanded the scope of the right to life to include a right to a clean environment, thus setting a new environmental standard in Nigeria.

In South Africa, citizen suits have equally helped to shape and set the parameters for public participation in environmental regulation, as illustrated by the case of *EarthLife Africa (Cape Town) v Director General, Department of Environmental Affairs and Tourism and Another*.³⁶ In this case, EarthLife Africa, an environmental NGO, sought to invalidate the authorization by the Director-General of the Department of Environmental Affairs and Tourism (DEAT) for the construction of a nuclear reactor. Relying on the Environmental Impact Assessment Regulations, which provide that all interested parties shall be “given the opportunity to participate in all the relevant procedures contemplated in these regulations”, the Plaintiffs alleged that the process leading to the authorization was flawed because the DEAT did not afford the Plaintiffs an opportunity to comment on the final Environmental Impact Report prior to granting the authorization. The Western Cape High Court held that the DEAT’s approach was “fundamentally unsound” and continued as follows:

The regulations provide for full participation in ‘all the relevant procedures contemplated in these regulations’. The respondents seek to limit such participation to the ‘investigation phase’ of the process (as contemplated by regs 5, 6 and 7). After

³⁵ *Gbemre v Shell*, *supra* note 19.

³⁶ 2005 (3) SA 156 (S. Afr.) [*EarthLife Africa*].

submission of the EIR, however, the ‘adjudicative phase’ of the process commences, involving the DG’s consideration and evaluation, not only of the EIR, but also – more broadly – of all other facts and circumstances that may be relevant to his decision. There is nothing in the Act (ECA) or the regulations that expressly excludes public participation or application of the audi rule during this ‘second stage’ of the process. In line with settled authority, therefore, it follows that procedural fairness demands application of the audi rule also at this stage.³⁷

This decision is significant not only because it nullified the authorization for the construction of the nuclear reactor but also because it delineated the parameters for public participation in environmental decision-making in South Africa. More specifically, the decision established the principle that, in South Africa, public participation is required right up to the stage of the final decision on the matter in question.

The standards-setting potential of citizen suits is equally apparent at the continental level where African citizens have utilized the African Charter to compel African governments to enhance the implementation and enforcement of regulation in the extractive sector. This is exemplified by cases such as *SERAC & CESR v Nigeria*³⁸ and *SERAP v Federal Republic of Nigeria*,³⁹ both of which were instituted by NGOs. In *SERAC & CESR v Nigeria*,⁴⁰ the African Commission on Human and Peoples’ Rights (“African Commission”) held that Nigeria acted in violation of Articles 16 and 24 of the African Charter because it failed to take reasonable regulatory steps to prevent the state oil company, the Nigerian National Petroleum Corporation (NNPC), and Shell Petroleum Development Corporation (Shell) from polluting and degrading the environment as a result of their oil and gas operations.⁴¹ In particular, the African Commission held that Nigeria’s failure to regulate the NNPC and Shell deprived local communities of the right to health and the right to a clean and healthy environment.⁴² Equally significant is the case of

³⁷ *Ibid* at para 89.

³⁸ *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*, [2001] A.H.R.L.R. 60, Communication 155/96 (Nigeria), online: <<http://achpr.org/communications/decision/155.96/>> [SERAC & CESR v Nigeria].

³⁹ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* [2012] ECW/CCJ/JUD/18/12 (Court of Justice of the Economic Community of West African States), online:

<http://www.courtecawas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf> [SERAP v Nigeria].

⁴⁰ *SERAC & CESR v Nigeria*, *supra* note 38.

⁴¹ *Ibid* at para 50-54.

⁴² *Ibid* at para 52-54.

*SERAP v Federal Republic of Nigeria*⁴³ where the Court of Justice of ECOWAS held that the failure on the part of the Nigerian government to effectively regulate the environmental activities of oil and gas companies amounted to a violation of Article 24 of the African Charter, which guarantees a right to a satisfactory environment favourable to human development.⁴⁴

Perhaps more significantly, the decisions in *SERAC & CESR v Nigeria* and *SERAP v Federal Republic of Nigeria* set important standards for regulating the operations of extractive companies in Africa. In *SERAC & CESR v Nigeria*, the African Commission held that Article 24 of the African Charter imposes an obligation on African governments “to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”⁴⁵ According to the African Commission, governments desirous of complying with Article 24 of the African Charter must take several steps including:

... ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.⁴⁶

The African Commission emphasized that African “[g]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties.”⁴⁷

Similarly, in *SERAP v Federal Republic of Nigeria*⁴⁸ the Court of Justice of ECOWAS established important regulatory standards for the governments of West African countries with regard to their regulatory obligations under Article 24 of the African Charter. The court held that Article 24 of the African Charter imposes “an obligation of attitude and an obligation of result” on African governments.⁴⁹ The court held further that:

⁴³ *SERAP v Nigeria*, *supra* note 39.

⁴⁴ *Ibid* at paras 100-112.

⁴⁵ *SERAC & CESR v Nigeria*, *supra* note 38 at para 52.

⁴⁶ *Ibid* at para 53.

⁴⁷ *Ibid* at para 57.

⁴⁸ *SERAP v Nigeria*, *supra* note 39.

⁴⁹ *Ibid* at para 100.

Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results.⁵⁰

According to the court, the mere enactment of legislation and the mere creation and funding of regulatory agencies by governments do not necessarily mean that the governments have complied with their regulatory obligations under Article 24 of the African Charter. Even where governments take such positive steps they “may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered.”⁵¹

Furthermore, because statutory and constitutional provisions regarding citizen enforcement of regulation allow citizens to sue regulatory agencies for their actions or inaction, citizen suits could enjoin these agencies from taking actions which are inimical to the interests of citizens. In *EarthLife Africa*,⁵² for example, an environmental NGO successfully sued to enjoin a regulatory agency in South Africa from authorizing the construction of a nuclear reactor unless the agency followed established legal standards. In this regard, citizen suits could potentially awaken the consciousness of regulatory agencies and perhaps prompt them to act to protect public interest.

In addition, citizen suits could act as stimulus for the enhancement of regulation either through amendments to extant laws or through enactment of new statutes. For example, it has been reported that the African Commission’s decision in *SERAC & CESR v Nigeria* prompted the Nigerian government to take several regulatory steps including the establishment of the NOSDRA and the revision and amendment of environmental laws and regulation to better monitor and control the operations of oil and gas

⁵⁰ *Ibid* at para 101.

⁵¹ *Ibid* at para 105.

⁵² *Earthlife Africa, supra* note 36.

companies.⁵³ Relatedly, citizen suits could shame governments and extractive companies into enforcement of, and compliance with, regulatory standards. As discussed above, failure by governments to regulate the activities of extractive companies amounts to a breach of the governments' obligation to protect human rights under the African Charter. Thus, a judicial pronouncement to the effect that an African government has breached its Charter obligations potentially stains the international reputation of the government and could attract international condemnation and criticism. The desire to avoid such unpleasant consequences will likely incentivize any responsible government to act proactively in the future to ensure that it regulates the conduct of extractive companies operating in its jurisdiction. Likewise, private citizen suits against extractive companies could prompt these companies to settle their disputes with local host communities and through that process the concerns of local communities could be addressed to the satisfaction of both parties.

Additionally, statutory and constitutional provisions permitting citizen enforcement of regulation empower activist groups in Africa to participate in the regulatory process. In South Africa, it has been observed that citizen litigation promotes participatory democracy because it enables "economically powerless or otherwise marginalized members of society to insist that those in power pay attention to their needs."⁵⁴ The participation of activist groups in the regulatory process is particularly significant in Africa because, for the most part, regulatory agencies in Africa lack both the capacity and the political will to regulate extractive companies. As mentioned previously, the incapacity of regulatory agencies creates a void in the regulatory process; citizen enforcement of regulatory rules could help to fill this void.

In this sense, citizen enforcement of regulation could potentially help to restrain the financial power of extractive companies, which they often use to extract investment terms that are inimical to the interests of host countries.⁵⁵ Many TNCs operating in the extractive sector are financially more powerful than host African governments. In reality, the economic power of these TNCs

⁵³ Barisere R Konne, "Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland" (2014) 47 *Cornell Intl LJ* 181 at 190.

⁵⁴ Marius Pieterse, "Health, Social Movements, and Rights-based Litigation in South Africa" (2008) 35:3 *JL & Soc'y* 364 at 379.

⁵⁵ Joseph E Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities" (2008) 23 *Am U Intl L Rev* 451 at 477.

often dwarfs the power of host African countries.⁵⁶ Thus, it is often the case that extractive TNCs use their power and influence to dissuade African governments from regulating their operations so as to enhance their profits.⁵⁷ The fear that citizens of host countries could sue to enforce regulatory laws could potentially discourage TNCs from leveraging their power and influence to diminish enforcement of regulation by host African governments.

4. Impediments to Citizen Enforcement of Regulation

Although citizen enforcement of regulatory rules has produced positive results with regard to the regulation of extractive companies in Africa, it is doubtful whether such positive outcomes can be sustained due to the multiple impediments and hurdles that stand in the way of citizens desirous of enforcing regulatory laws against extractive companies. First, many African states participate directly in the exploitation of natural resources through contractual arrangements such as joint venture agreements, production sharing agreements and equity participation. For example, the Nigerian National Petroleum Corporation, a state-owned company, is engaged in joint ventures with major oil and gas companies operating in Nigeria.⁵⁸ Similarly, the Ghana National Petroleum Corporation (GNPC) is statutorily authorized to “hold an initial participating carried interest of at least fifteen per cent” in the exploration and development of petroleum and it has the option to acquire an additional participating interest in petroleum operations.⁵⁹ Consequently, the GNPC has entered into joint venture agreements with several oil and gas companies including Tullow; Sabre Oil and Gas; and Kosmos Energy.⁶⁰

In the hard rock mining sector, countries such as Botswana, Ghana, Guinea, Namibia, South Africa, and Zambia actively participate in the production of minerals. The government of Botswana owns a significant

⁵⁶ Beth Stephens, “The Amoral of Profit: Transnational Corporations and Human Rights” (2002) 20 BJIL 45 at 57.

⁵⁷ Oshionebo, “Regulating”, *supra* note 1 at 110.

⁵⁸ Nigerian National Petroleum Corporation, Media Release, “Joint Venture Activities” (3 August 2017), online: <<http://nnpcgroup.com/NNPCBusiness/UpstreamVentures/JointVentureActivities.aspx>>.

⁵⁹ *Petroleum (Exploration and Production) Act of 2016*, s 10(14) (Ghana).

⁶⁰ See *Petroleum Agreement among Government of the Republic of Ghana, Ghana National Petroleum Corporation and Tullow Ghana Limited, Sabre Oil and Gas Limited, Kosmos Energy Ghana HC in Respect of the Deepwater Tano Contract Area*, 10 March 2006, online: <<http://bit.ly/2vAcuno>>.

equity interest in several diamond mining companies, including a 50 per cent stake in Debswana Diamond Company Limited,⁶¹ while the government of Namibia owns a mining company called Epangelo as well as a 50% stake in Namdeb, a diamond mining company.⁶² The government of Ghana is statutorily empowered to “acquire a ten percent free carried interest” in mining ventures in Ghana.⁶³ The government of Ghana may in fact increase its participation in any mining venture with the consent of the holder of the mining lease.⁶⁴ Similarly, the government of Guinea engages in mining activities “on its own behalf, either directly or through the Public Limited Company responsible for management of the mining patrimony acting alone or in association with third parties in the mining sector.”⁶⁵ South Africa holds interests in mining projects through state-owned companies including Alexko; the African Exploration, Mining and Financing Corporation; and Industrial Development Corporation.⁶⁶ In Zambia, the government has power to acquire mining rights over an identified area which “shall be reserved for government investment and shall not be subject to an application for the acquisition of a mining right by any person.”⁶⁷ Mining rights so acquired by the Zambian government are vested in an investment company owned by the government.⁶⁸

State participation in resource projects could have unintended deleterious or chilling effects on citizen enforcement of regulatory rules in Africa. Given the direct involvement of African states in the exploitation of natural resources, private citizens could be fearful that litigation against companies involved in joint-venture projects with their government could trigger reprisals by the government. Reprisals could include arrest and detention of citizens and the filing of frivolous charges (sometimes referred to as Strategic Lawsuits against Public Participation) by government prosecutors

⁶¹ UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New York & Geneva: United Nations, 2007) at 138-39, online: <http://unctad.org/en/docs/wir2007_en.pdf>.

⁶² World Bank, *Overview of State Ownership in the Global Minerals Industry: Long Term Trends and Future* (2011) at 17, online: <<http://siteresources.worldbank.org/INTOGMC/Resources/GlobalMiningIndustry-Overview.pdf>> [World Bank].

⁶³ *Minerals and Mining Act of 2006*, s 43(1) (Ghana).

⁶⁴ *Ibid*, s 43(2).

⁶⁵ *Amended 2011 Mining Code*, art 16 (Guinea), online: <<http://bit.ly/2vAt93>>.

⁶⁶ World Bank, *supra* note 62 at 17.

⁶⁷ *Mines and Minerals Act* (Zambia), *supra* note 10, s 17(1), (2).

⁶⁸ *Ibid*, s 17(3).

against citizen advocates.⁶⁹ In addition, judges could be fearful of such reprisals by the government because, in many African states, judges need to be in the good books of the government to ensure career progression or advancement. Until very recently, Nigerian judges were reluctant to adjudicate matters involving the government and oil and gas companies⁷⁰ and injunctions were rarely granted against oil and gas companies engaged in joint venture projects with the Nigerian government.⁷¹ While the justification offered by Nigerian judges for their refusal to grant injunctions against oil and gas companies was that such injunctions would cause a stoppage of trade and possibly lead to loss of employment,⁷² it is equally clear that Nigerian judges were desirous of protecting the economic interests of the government in oil and gas projects.⁷³ Judicial decisions that protect the economic interests of the government would obviously endear the judge(s) to the government, thus ensuring career progression for the judge(s).

Secondly, the ability of private citizens to enforce regulatory rules in Africa is impeded by widespread illiteracy and poverty. Natural resource extraction projects are often located in remote and rural communities which are mainly inhabited by poor and illiterate people. Rural communities in Africa also lack the scientific knowledge to determine whether their environmental rights have been violated by extractive companies. Thus, these communities may not be aware that they could seek redress in the law courts.

Thirdly, unlike host communities which are predominantly poor and ignorant, companies operating in Africa's extractive sector are financially, economically and technologically powerful. These companies often have more power than host African governments and are thus able to hire the services of the best lawyers and scientists to defend suits instituted against the companies.⁷⁴ Given the enormous financial resources possessed by extractive companies, it is not surprising that lawyers representing these companies often intentionally engage in 'long-winded litigation that essentially wears out

⁶⁹ See Svitlana Kravchenko, "Citizen Enforcement of Environmental Law in Eastern Europe" (2004) 10 *Widener L Rev* 475 at 487-92.

⁷⁰ Frynas, *supra* note 13 at 144.

⁷¹ *Ibid* at 122-23.

⁷² *Ibid* at 122 (citing the case of *Irou v Shell-BP*, Unreported Suit No. W/89/71).

⁷³ See Emeseh, "Limitations", *supra* note 29 at 603 (asserting that the Nigerian judiciary prioritized the economic interests of the government over the protection of the environment). See also Frynas, *supra* note 13 at 122-23 (asserting that "the economic interests of the oil industry appeared to be more important to the judge than the course of justice.")

⁷⁴ Emeseh, "Limitations", *supra* note 29 at 604.

the weaker opponent.”⁷⁵ These lawyers often file frivolous motions and interlocutory appeals aimed at prolonging the litigation process.⁷⁶

Fourthly, the ill-effects of extractive activities could take several years to manifest and even where host communities subsequently become aware of the infringement of their rights, it may be too late for them to sue for legal redress as their cause(s) of action could become statute-barred under a Statute of Limitations. Jędrzej Frynas puts it best when he argues that

... a legal claim may become statute barred because of the latency period. The full effects of oil operations are not always immediately apparent. Damage such as long-term soil degradation requires a latency period for its development. The injury may not be immediately visible or may go undiscovered for a period of time. Conducting proper scientific studies may take many years to assess changes in vegetation or soil fertility, some of which can only be observed in the long-term. Because of the long latency period, potential litigants may not always have enough time to file a suit within the statutory period of limitation.⁷⁷

Zambia has attempted to ameliorate this problem by providing that the right of citizens to bring an action with regard to harm caused by mining or mineral processing operations lapses

... after a reasonable period from the date on which the affected person or the community could reasonably be expected to have learned of the harm or damage, taking due account of -

- (a) the time the harm or damage may take to manifest itself; and
- (b) the time that it may take to correlate the harm with the mining or mineral processing operations, having regard to the situation or circumstance of the person or community affected.⁷⁸

Generally speaking, ‘reasonable period’ is determined on an objective basis. However, the determination of ‘reasonable period’ under Zambia’s *Mines and Minerals Development Act, 2015* also connotes a certain degree of subjectivity to the extent that the Act requires consideration of the specific “situation or circumstance of the person or community affected.”⁷⁹ For example, the illiteracy or ignorance of a community adversely affected by mining operations would have to be taken into account in determining the period within which the community could reasonably be expected to have learned of the harm or damage.

⁷⁵ *Ibid* at 603-4.

⁷⁶ Maitland & Chapman, *supra* note 28 at 7.

⁷⁷ Frynas, *supra* note 13 at 129-30.

⁷⁸ *Mines and Minerals Act (Zambia)*, *supra* note 10, s 87(6).

⁷⁹ *Ibid*, s 87(6)(b).

The Zambian provision is laudable because it ensures that citizens are not prevented from seeking legal redress for mining-related environmental harms on the basis of civil procedure rules enshrined in the Statute of Limitations. African countries desirous of empowering their citizens to participate in the regulatory process would do well to emulate the Zambian provision.

Aside from general statutes of limitations, the statutes establishing state-owned companies in Africa may bar litigation against these companies in certain instances. For example, the statute establishing the Nigerian National Petroleum Corporation provides that

... no suit against the Corporation, a member of the Board or any employee of the Corporation for any act done in pursuance or execution of any enactment or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such enactment or law, duties or authority, shall lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of damage or injury, within twelve months next after the ceasing thereof.⁸⁰

Following this provision, any suit instituted against the NNPC outside of the statutory period of twelve months is improper and statute-barred. Given the scientific and complex nature of oil and gas activities, it could be difficult for host communities to detect violations of their environmental rights within twelve months. Besides, violations may not manifest within the 12 month limitation period because, as noted above, oil-related damage may require a latency period.⁸¹ Thus, host communities may not be able to sue to enforce their rights within the limitation period. The NNPC has successfully invoked this limitation period in a number of cases including the case of *Eboigbe v NNPC*,⁸² wherein the plaintiffs claimed that, because they were illiterates, they were not aware that pipelines constructed by the NNPC on their farmlands violated their legal rights. The suit was filed several years after the alleged violation, prompting the Supreme Court of Nigeria to hold that the action was statute-barred. The twelve months limitation period essentially insulates the NNPC against civil actions and explains “why little litigation has arisen against the NNPC for damage arising from oil operations” in Nigeria.⁸³ This observation is significant given that, as noted earlier, state-owned companies

⁸⁰ *Nigerian National Petroleum Corporation Act*, (1990) Cap. 320, s 12(1).

⁸¹ Frynas, *supra* note 13 at 129-30.

⁸² [1994] 5 N.W.L.R. (Part 347) 649 (Nigeria).

⁸³ Frynas, *supra* note 13 at 129.

such as the NNPC are often involved in joint venture activities with extractive companies.

Fifthly, public interest litigation can only truly be said to complement the regulatory efforts of public agencies if the judiciary is independent of the executive arm of government. In many African countries the judiciary is hardly independent and, as noted earlier, judges rely on the government for career advancement and progression. Furthermore, there could be reprisals against judges whose decisions are perceived as 'anti-government' and such reprisals could manifest in very subtle forms such as transfer of judges to inhospitable jurisdictions; denial of promotion or elevation to higher courts; and withholding of funds to the judiciary altogether.

Sixthly, the cost of litigation in Africa is prohibitively high, thus very few Africans can afford the expense involved in public interest litigation. Many African citizens are either ignorant of their rights or, where they are aware of their rights, are too poor to afford the expenses involved in enforcing their rights. In addition, the litigation process in many African countries involves inordinately long delays which not only add to the cost of litigation but could also cause citizens to be disinterested in bringing their legal claims to court for adjudication.⁸⁴ In these circumstances the right conferred on private citizens to enforce regulatory rules could become meaningless.

Relatedly, the fear that costs could be awarded against unsuccessful litigants could dissuade citizens from enforcing regulatory rules against extractive companies. A simple way to ensure that citizens are not dissuaded from seeking judicial enforcement of regulatory rules is to prohibit courts from awarding costs against private citizens and NGOs involved in public interest litigation. Zambia has adopted this position by statutorily prohibiting the award of costs against private persons involved in public interest litigation, even in instances where the action instituted by such private litigants proves unsuccessful.⁸⁵ To that end, the *Mines and Minerals Development Act 2015* provides that costs shall not be awarded against private citizens suing to enforce the environmental, health and safety standards under the Act "if the action was instituted reasonably out of concern for the public interest or the interest of protecting human health, biological diversity

⁸⁴ Emeka P Amechi, "Strengthening Environmental Public Interest Litigation through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development" (2015) 23:3 *African J Intl & Comparative L* 383 at 387 [Amechi].

⁸⁵ *Mines and Minerals Act* (Zambia), *supra* note 10, s 87(8).

and in general, the environment.”⁸⁶ Similarly, South African courts are enjoined not to award costs against private citizens who fail to secure the relief sought in respect of any breach or threatened breach of the provisions of the *National Environmental Management Act, 1998* “if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.”⁸⁷

Finally, although NGOs are actively engaged in public interest litigation in Africa and often help private citizens enforce their rights, the legal regimes in some African countries hinder the ability of NGOs and private individuals to initiate public interest litigation. In Nigeria, for example, there is the doctrine of *locus standi* which is often invoked by Nigerian courts as the basis for striking out public interest suits instituted by NGOs. *Locus standi* simply means the legal capacity or standing to institute proceedings in a court of law.⁸⁸ In the Nigerian context, the doctrine of *locus standi* holds that, to be entitled to the standing to institute an action, a plaintiff must establish that they are directly affected by the act complained of and that they have a peculiar or personal right which has been infringed or which faces a real likelihood or threat of being infringed.⁸⁹ Thus, in Nigeria, a general interest common to the public at large does not accord any particular citizen or group of persons the standing to sue to protect the interest.⁹⁰

The debilitating impact of the doctrine of *locus standi* on public interest litigation in Nigeria is apparent in *Oronto Douglas v Shell Development Company Limited and Others*,⁹¹ a case in which a private citizen sought to compel Shell to conduct an environmental impact assessment in relation to an oil project as required under the *Environmental Impact Assessment Act*. The court struck out the action on the grounds that the plaintiff had no standing to institute

⁸⁶ *Ibid.* See also *Environmental Management Act 2011 (Zambia)*, *supra* note 11, s 110(4).

⁸⁷ *Environmental Management Act (South Africa)*, *supra* note 7, s 32(2).

⁸⁸ Peter AO Oluyede, *Constitutional Law in Nigeria*, 1st Ed. (Ibadan: Evans Brothers Ltd, 1992) at 369 [Oluyede].

⁸⁹ See *Adesanya v President of Nigeria*, [1981] A.N.L.R. 1; (1981) 2 N.C.L.R. 358 [*Adesanya v Nigeria*]; *Olawoyin v Attorney General of Northern Region*, [1961], 1 A.N.L.R. 269 [*Olawoyin v AG Northern Region*]. For a detailed discussion of the doctrine of *locus standi* in Nigeria, see Tunde I Ogowewo, “Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria” (2000) 26 *Brook J Intl L* 527.

⁹⁰ See *Adesanya v Nigeria*, *Olawoyin v AG Northern Region*, *ibid.*; Oluyede, *supra* note 88 at 370.

⁹¹ [1997] Unreported, Suit No. FHC/CS/573/93 (Nigeria).

the action given that the plaintiff's personal rights were not infringed.⁹² Equally disturbing is the decision in *Amos v Shell Petroleum Development Company of Nigeria Limited*⁹³ where the court invoked the doctrine of *locus standi* to deny the plaintiff's access to justice. In this case, the defendants constructed a dam on a creek resulting in the flooding of the plaintiffs' farmlands. The court held that the plaintiffs lacked standing to institute the action because, under Nigerian law, the creek was a public waterway. Thus, the Attorney-General was the appropriate party to institute an action in regard to the creek. The strictness of the doctrine of *locus standi* in Nigeria has compelled a Nigerian academic to conclude that "the *locus standi* rule effectively precludes access to court by public-spirited citizens and environmental NGOs seeking the enforcement of environmental regulations."⁹⁴

The procedural hurdle of *locus standi* is designed in part to ensure that 'strike suits' are eliminated from the judicial system. 'Strike suits' are suits instituted against companies for the primary purpose of coercing the companies into monetary settlement.⁹⁵ In effect, 'strike suits' are frivolous suits that are often motivated by a desire to extract monetary compensation from companies. While it is arguable whether the empowerment of private citizens to enforce regulatory provisions could promote 'strike suits' against extractive companies, the reality is that, even in countries such as South Africa where citizens are empowered to enforce regulations, there is no evidence of a floodgate with regard to citizen litigation.⁹⁶ 'Strike suits' are unlikely to emerge in Africa not only because of the prohibitive cost of litigation which impedes access to the courts,⁹⁷ but also because, in most

⁹² It should be noted the Court of Appeal set aside the trial decision on the grounds that the trial judge committed an error by deciding the issue of *locus standi* without examining the statement of claim and without allowing the plaintiff to adduce evidence in support of the statement of claim. See *Oronto Douglas v Shell Development Company Limited and Others*, [1999] 2 N.W.L.R. (Part 591) 466 (Nigeria).

⁹³ [1974] 4 E.C.S.L.R. 486 (Nigeria).

⁹⁴ Amechi, *supra* note 84 at 391. See also Emeseh, "Limitations", *supra* note 29 at 603. Emeseh asserts that the strictness of the doctrine of *locus standi* in Nigeria "has stifled the development of public interest litigation in the country."

⁹⁵ See Michael B Dunn, "Pleading Scienter after the Private Securities Litigation Reform Act: Or, a Textualist Revenge" (1998) 84 Cornell L Rev 193 at 195.

⁹⁶ Tumai Murombo, "Strengthening *Locus Standi* in Public Interest Environmental Litigation: Has Leadership Moved from the United States to South Africa?" (2010) 6:2 L Environment & Development J 163 at 171.

⁹⁷ *Ibid* at 171.

instances, the statutes empowering private citizens to enforce regulations do not provide for monetary compensation even where a court finds a company in breach of statutory provisions. Thus, successful private litigants are not entitled to monetary compensation under these statutes. Rather, the remedies granted by the courts are non-pecuniary and restorative in nature.

That being said, there are specific instances where a statute may enable award of damages in public interest litigation. For example, damages could be awarded where a plaintiff proves that, although the action was instituted to protect public interest, they suffered adverse impacts as a result of the actions of the defendant. This appears to be the situation envisaged under Zambia's *Environmental Management Act 2011*, which provides that the court may award damages to a plaintiff in order to compensate the plaintiff for any loss that they may have suffered or to remedy any adverse effect caused by the defendant's act or omission.⁹⁸ Private citizens may also be entitled to damages where the action of a company "constitutes an infringement of a constitutionally entrenched fundamental right".⁹⁹ The Constitutional Court of South Africa appears to support this view when it held in *Fose v Minister of Safety and Security*¹⁰⁰ that a "loss occasioned by the breach of a right vested in the claimant by the Supreme law" ought to be compensable by damages. This is because section 38 of the Constitution of South Africa, which enables citizens to enforce environmental rights, vests discretion in courts to grant "appropriate relief" to litigants. 'Appropriate relief' would of course include monetary damages. While it is conceptually possible for citizens to recover damages for breach of constitutional rights in South Africa, such damages may not be awarded in public-interest litigation unless the claimant is able to establish that the injury or loss they suffered as a result of the breach is distinct from the injury or loss sustained by the public at large. It is equally doubtful whether South African courts would grant monetary damages where there are alternative remedies to rectify the breach in question.¹⁰¹

⁹⁸ *Environmental Management Act* (Zambia), *supra* note 11, s 110(1), (3).

⁹⁹ Elmarie van der Schyff, "South Africa: Public Trust Theory as the basis for Resource Corruption Litigation" (Open Society Foundations, August 2016), online: <http://www.opensocietyfoundations.org/sites/default/files/legal-remedies-6-schyff-20160802_0.pdf> [van der Schyff].

¹⁰⁰ 1997 (3) SA 786 (CC) (S. Afr.).

¹⁰¹ van der Schyff, *supra* note 99.

5. Conclusion

This article examines statutory and constitutional provisions enabling private citizens to enforce regulatory provisions against companies in Africa's extractive sector. It situates the utility of these provisions within the broader context of the empowerment of African citizens to participate in the regulatory process. It notes, however, that the utilization of these statutory provisions is hindered by a number of factors including state participation in resource extraction; widespread poverty and ignorance on the part of African citizens; and the prohibitive cost of litigation across the continent. These obstacles notwithstanding, it is imperative for African governments to diversify the mechanisms and avenues for regulating the activities of extractive companies given the incapacity of regulatory agencies in Africa. Such diversification can be achieved by empowering private citizens, local communities and NGOs to enforce statutory provisions, particularly those relating to the environment.

