Improving mineral governance through a fundamental rights approach to community participation: the African Charter of Human and People’s Rights as the legal basis

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Résumé

Cet article affirme que la participation communautaire dans la gestion des ressources minières est une exigence du développement durable et que, grâce à une approche fondée sur les droits fondamentaux, cette participation peut être plus effective. La communauté locale affectée par un projet minier ne doit pas seulement être impliquée dans le processus de prise de décision, mais son point de vue doit aussi compter dans le choix de l’option définitive à lever quant à savoir si oui ou non le projet devrait se réaliser et comment il devrait aborder les questions de développement au niveau local. Cette approche juridique peut être mise en œuvre au travers des dispositions de la Charte africaine des droits de l’homme et des peuples en vue de contribuer à l’amélioration de la gouvernance minière en apportant plus de transparence et de responsabilité. Plusieurs défis doivent être surmontés. La législation minière doit être mise en conformité avec le modèle de développement qui intègre les droits fondamentaux. Dans ce cadre, l’analphabétisme et l’ignorance des droits fondamentaux doivent être éradiqués au sein des communautés rurales et l’accès à la Cour africaine des droits de l’Homme doit être facilité aux victimes.

Keywords: Community participation; fundamental rights-based approach; governance; mineral resources; sustainable development; African Charter on Human and People’s rights.
Introduction

Africa’s vast endowment of mineral resources has continuously nourished and raised hope that the people living on this continent would experience rapid economic growth and attain development. From the pre-colonial period to the present day, Africa has been depicted as one of the richest continents in terms of its mineral resources (African Mining Vision 2050 (AMV 2009: 3).

Although the premise of mineral-led development does not find acceptance with all scholars (Auty 2002: 315-328; Sachs and Warner :1999), several studies have demonstrated that where there is appropriate governance, the exploitation of mineral resources can generate large revenues that are needed to significantly boost economic growth and reduce poverty (Jeschke 2010: 25; Lederman & Maloney 2007; Ferranti et al. 2002; World Bank 1992: 3-4). Countries like the United States, Canada and Australia are known for the role played by mineral resources in the transformation of their economies (Leveille 2009: 108-109; Power 2002). However, this has not been the case in Africa.

Despite its large mineral endowments, the continent is still immersed in a blatant contrast between its immense mineral wealth and the abject poverty in which the majority of its people live due to mal governance. This gives some credence to the resource curse theory according to which many resource-rich countries tend to perform more poorly in terms of sustainable economic growth than resource-poor countries (Kronenberg 2004: 399-426; Mikesell 1998: 191-199; Auty: 1993). In the midst of this tragedy, the situation of local communities living around and directly affected by mineral projects is particularly alarming. Instead of being beneficial, the expansion of mineral activities in developing countries drains and causes a damaging effect on local communities. Affected communities complain continuously that their communities do not enjoy the benefits of mineral exploitation and that they are deprived of considerable portions of their land to the benefit of large-scale mineral companies without fair compensation (land grabbing) (Kitula 2006: 409-410; De Echave 2004: 4).

Arguably, the exclusion of affected communities from the decision-making process is a major reason explaining why the mineral sector has failed to launch economic development at local level. Decisions on mineral projects have generally remained confined to the context of the classic bilateral model (state/mineral company) which actually failed to capture the interests of these communities. Mineral rich countries such as Sierra Leone, Guinea, Mali, Angola, Congo, Nigeria, Sudan and the Democratic Republic of Congo are unfortunately characterised by bad governance in the mineral sector as the government and a number of foreign countries. Several commercial deals are kept secret while local communities are excluded, marginalised or even chased out of their lands without any fair compensation or any compensation. The same binary model of mineral resources governance excluding local communities and disregarding their interests was implemented in Latin America (De Echave 2004: 4).
Community participation plays an important role. It is responsive to many concerns, namely, transparency in the management of revenues, the legitimacy of mineral agreements, environmental conservation and the realisation of socio-economic rights within affected communities. It is a tool that enables them to be partakers of their own development in a sustainable way.

For around a decade, there has been consensus on the relevance of community participation in the African mineral sector although its effective implementation often remains a simple statement of intent in many countries and its meaning highly contentious (Katy & Mamen 2011: 1).

Against this background, this article reflects on community participation in the governance of the mineral sector in Africa. It champions a fundamental rights approach to community participation based on the African Charter on Human and People’s Rights and argues that such an approach can best help improve the quality of governance in the mineral sector and contribute to socio-economic development on the continent. It first explains community participation and its different conceptions. It then deals with community participation as a fundamental right and a channel to promote other peoples’ rights such as the right to development, the right to self-determination, and the right to freely dispose of their wealth and natural resources. It also examines the enforcement of the right to community participation under the African Charter and the challenges related thereto before ending with a brief conclusion.

Revisiting the concept of community participation

Pring and Siegele observe that the concept “participation” is rarely defined other than by simply meaning “implication” in the decision-making process and that its understanding may vary considerably according to different societies and cultures (Pring & Siegele 2005: 266).

Darial, Zacharia and Rajpal view the variety of existing definitions as underlying not only the risk of confusion in the understanding of the concept, but also the importance attached to the participatory approach these last years (Dayal R. et al. 1996: 75). Most definitions tend to focus on aims attached to participation and use them as an argument to advocate the establishment of a participatory mechanism, without explaining how it should function. In connection with legislative drafting, Du Plessis observes that laws and policies in different countries, even when they stress the need for participation, often fail to give an exposé of meaningful tools to effectively achieve community involvement in practice (Du Plessis, 2008: 7).

Definitions of community participation can be systematically classified into the three following categories: definitions based on the aims attached to participation, definitions uplifting a soft approach in terms of the considerations given to the views of affected communities and definitions promoting a binding approach. Definitions based on the aims emphasise the goals of participation (Dayal et al. 1996: 76, Mathbor GM. 2008: 8, Nkumika 1987: 20). Despite the relevance of definitions based on the aims, it is unfortunately their failure to mention which form or nature community participation must take in order to be effective and achieve its aims.
Soft approaches to the concept generally consider that the requirement of participation is fully complete with a simple consultation of people who are or will be affected by the project, eventhough no much consideration is given to their views in the outcome of the process. What matters more is to obtain the adhesion of affected communities in projects that other stakeholders assess to be “good and relevant”. Adejumobi describes this as a tendency to emphasise a participatory model in the discourse on community programmes and activities, but in a manner that does not significantly alter the existing power relations between stakeholders (Adejumobi 2008: 99).

Until now, few approaches have regarded community participation as a binding process with the view to guarantee its effectiveness in practice. A binding approach enables affected communities to oblige other stakeholders to give a proper consideration to their voices and opinions. This is the case of the fundamental rights-based approach which entails that affected communities possess some existing fundamental rights on which they can rely to control and influence the process of decision-making affecting them (Feldman : 2002, 53, Correa 2004: 5).

This approach obliges other stakeholders not only to consult affected communities, but also to consider the view of these communities in decision making in so far as the execution of the project is rationally depending upon their approval. Consequently, fundamental rights are perceived here as all rights that are relevant to support community participation and improve governance of mineral resources in Africa in respect of affected communities’ welfare. Of most, these fundamental rights are those contained in the African Charter.

**Community participation in mineral governance under the African Charter on Human and People’s Rights**

The African Charter remains the largest instrument protecting individual and collective fundamental rights on the continent, including the rights of local communities to enjoy their natural resources. It should provide for community participation and give content to democratic principles that would allow affected communities to ensure that their views are considered, and make other stakeholders accountable in respect of their interests and rights. This means that through the provisions of the African Charter, affected communities should be able to participate in decision-making and then use the opportunity to participate as a means through which they will enforce other fundamental rights in the pursuit of sustainable development.

**Community participation as a fundamental right**

Community participation is a right under the Africa Charter on Human and People’s Rights. Article 13 (1) of the African Charter provides that:

*Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*
This article was inspired by article 21 of UNDHR, which provides that “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives”.

Community participation is a right for local communities and at the same time a legal obligation and its implementation is therefore compulsory and not optional for other stakeholders. Local communities are entitled to the right to be involved in the decision-making process and enjoy a certain level of power that would help them advocate and secure their best interests.

In fact, the fundamental right in article 13 should make democracy alive in so much as peoples are offered the possibility to influence the outcome of the decision-making process. In democracy, the fundamental right to participate in government serves as a tool that allows people to be included in matters of public importance with a view to preventing any outcome that may threaten their best interests.

As stressed earlier, community participation is a right inspired by the right of every citizen to freely participate in the government of his country as enshrined in Article 13 of the African Charter. The rights in Article 13 of the Charter has been formulated as an individual right. This provision starts by the expression “every citizen”. However, the fundamental right in article 13 of the African Charter has been granted an extensive interpretation by the African Commission of Human Rights (Hereinafter the African Commission) to include the right of local communities to effective participation in the governance of their mineral resources. But in most cases, it has been in connection with matters concerning individuals rather than a group or community (Communication 246/02, 2008; Communication 251/02: 2005; Communication 97/93014: 2000). This right also extends to the right to participate in the governance of their mineral sectors since the African Commission does not make any difference between “government” and “governance” in Lawyers of Human Rights v. Swaziland (Communication 251/02 (2005).

Governance is not only concerned with structural aspects that include institutions and actors who exercise the power to decide within the state, but also with all steps taken and how they are coordinated to produce decisions on matters of public interest. Therefore, to reduce the understanding of the fundamental right to participate in the government simply to a right available only during an electoral process would be prejudicial to citizens as it would prevent them from getting involved in decision-making on non-electoral matters and from enjoying full packages of opportunities that democratic governance is supposed to offer in terms of participation. Accordingly, affected communities can indeed rely on the provisions of this article to claim a fundamental right to participate in the governance of mineral resources.

**Community participation as a channel to emphasise other fundamental rights**

Community participation can serve as a means through which affected communities can exercise other fundamental rights which are directly relevant for the realisation of sustainable developments objectives through the exploitation of mineral resources.
Although many rights are involved, particular attention is paid here to people’s rights to self-determination (Article 20), to freely dispose of wealth and natural resources (Article 21) and to socio-economic development (Article 22).

**The right to self-determination (article 20)**

The fundamental right to self-determination is naturally a people’s right in so much as it refers to a group of individuals holding the prerogative to decide upon their destiny. This fundamental right has been developed first of all in an international dimension, when colonised people sought to free themselves from the rulership of colonising countries.

According to Cassese, this fundamental right goes beyond choosing among what is on offer from one political or economic position only (Cassese 2009: 101). Put in the context of community participation in the mineral sector, this assertion would imply that the choice of affected communities should not be reduced to what are the suggestions from the government or other third parties (multinational companies or international donor agencies), but it should always be the result of their freedom to decide what is politically and economically appropriate for their own development. It does not necessarily imply a claim to secession, but rather consists of a demand for the exercising of some fundamental rights within the boundaries of an existing state, for instance the right to decide on the form of government and the identity of rulers, the right to exercise control over natural resources and the right of a community within the state to participate in decision making.

At this level, community participation as a means to exercise these fundamental rights becomes an expression of self-determination. The interaction between both concepts is well perceived in Bernhardt’s theory of “democratic self-determination”. This scholar put forward the “affectedness principle” according to which democratic self-determination is described as an ongoing process that requests that those affected by a decision should participate in its making (Bernhardt 2010: 6-7). Thus, an affected community as a distinct people within a country should be able to rely on this variant of self-determination to claim their fundamental right to participate in the governance of the mineral sector and ensure throughout the decision-making process that whatever is set up, matches the socio-economic objectives they seek to achieve within their community.

Of course, the government has the duty to intervene and prevent misuse of this fundamental right, particularly when it is used for illegitimate purposes. Indeed, what must be avoided is that leaders of communities living in mineral-rich areas of the country, manipulate members of their communities to use this fundamental right as an argument to free themselves from the central government authority and enjoy exclusive benefits from natural resources found there.
To avoid the pitfalls of either situation, the exercising by the central government of its prerogatives in the redistribution of revenues must strictly remain motivated by the necessity to maintain a balance between areas of the country that possess a lot of natural resources and those that are deprived or poorly endowed, while communities and their leaders living inside the country should not rely on self-determination as a pretext in refusing to share a portion of their mineral revenues nationally.

**The right to freely dispose of wealth and natural resources (article 21)**

If local communities were entitled to invoke sovereign control over the mineral industry, the implication would be that sovereignty could be conceived not only at the national level, but also at the local. For indigenous peoples, this possibility has already been acknowledged through the United Nations Declaration on the rights of indigenous peoples (2007), but the question remains open for other communities that are not regarded as indigenous.

Arguably, it would be unfair to restrain this prerogative only to indigenous peoples. It is a principle of international law that all peoples, both at national or local levels, are to be treated equal. Thus, if indigenous peoples have a right over natural resources, the concept of “equality” imposes also that such recognition be given to other local communities. The African Commission has applied the concept of “people” to local communities living within a country, provided only that they have enough distinctive features to be identified as a people (See *Centre for Minority Rights Development v Kenya* (Communication 276/03 (2003), hereinafter the *Endorois* case, para. 162), especially when the African Commission does not make any difference between indigenous people and other communities. In the *Katangese* case, for instance, the African Commission did not look at the internal composition of the people, asserting that whether they consist of one or more ethnic groups was of no relevance (para. 3). In the *Endorois* case, the African Commission ruled that “a people inhabiting a specific region within a state could also claim under article 21 of the African Charter” (paras. 255, 267). The same approach was adopted by the Working Group on Indigenous People established by the African Commission in 2000 with the mandate to study the implication of the African Charter for the indigenous people’s well-being and make appropriate recommendations thereto. In its final report to the Commission, this working group held the view that:


Therefore, the main requirement for the application of article 21 as for all other people’s rights in the African Charter, seems to be simply that the affected community must be regarded as a ‘people’, no matter it being indigenous or not. Now, whether the people’s right in article 21 has to be formally called sovereignty or not does not really matter.
What is critical is that because it is a fundamental right that is bestowed upon affected communities at a local level, they must enjoy a certain level of power that enables them to protect their vital interests. Thus far, the African Commission has received up to 13 cases alleging a violation of article 21 of the African Charter, but it is only in few communications that the infringement was established.

The first case where the Commission found a violation was the one of Ogonis submitted in 1996. In this case, the military government of Nigeria was accused of having infringed on people’s rights in the Niger Delta through activities of the state oil company, the Nigerian National Petroleum Company (NNPC), where it was part of the shareholders together with Shell Petroleum Development Corporation (SPDC).

In respect of article 21, the complainants contended that a violation had occurred because the Nigerian government failed to monitor the NNPC’s operation and had paved the way to the exploitation of oil reserves in Ogoniland, and also because the Ogonis were not part of the decisional process that led to this exploitation. The African Commission upheld these contentions in the following terms:

*The destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of article 21* (para. 55).

The other case is the one involving the Endorois community in Kenya. In this communication, the complainants alleged that the government of Kenya had infringed on the African Charter by forcibly removing the Endorois from their ancestral lands, without proper prior consultation and adequate and effective compensation (para. 2). In respect of article 21, the complainants alleged that the forced eviction had prevented the Endorois community from access to vital resources and that the mineral concessions that had been granted in the land did not give them a share in the exploitation, and as such they constituted an infringement (paras. 120-121). The African Commission found that because the Endorois had never received adequate compensation or restitution of their land, the respondent state had violated article 21.

From these African Commission cases, there are interesting conclusions to be drawn for this study. Firstly, these cases demonstrate that the fundamental right contained in article 21 can be exercised both at the national level and the local one. Secondly, they reveal that the application of this article to a local community simply requires that this community can be regarded as a “people”, even if it is not an indigenous one.

Thirdly, another conclusion that emerged especially from the Endorois case is that the exercise by a local community of prerogatives flowing from article 21 is not absolute, but conditioned by a necessary relationship with the livelihood of this community. Drawing on an example from the Inter-American Court, the African Commission has embraced the view that affected communities enjoy prerogatives attached to article 21 only in so far as the exploitation of the mineral resources affects their livelihood and that in such a case the state is compelled to consult them (para. 266).
But in practice, simply because mineral activities always have an environmental impact, it is quite obvious that affected communities are always likely to be in a position to exercise their prerogatives contained in article 21 and make the implementation of any project or policy dependent upon their consent. Fourthly, article 21 constitutes the legal base upon which affected communities are entitled to claim material benefits in the course of mineral resources exploitation. This may include benefits like the construction of necessary infrastructure for the community and the retrocession of mineral royalties.

Whenever an affected community can establish that they enjoy no benefits, a breach of article 21 will occur. In the *Ogonis* case, the African Commission made the following observation:

*Furthermore, in all their dealings with the oil consortia, the government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland. The destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21* (para. 55).

To draw this conclusion that article 21 was violated, the African Commission has brought forward two elements. These are the non-involvement of *Ogonis* in the decision-making and their non-sharing of material benefits in the course of the exploitation. If a relationship between these two elements can be attempted, one can logically assume that the participation of affected communities in the decision-making process is a means through which these latter communities can make sure that they obtain some material benefits to which they are entitled pursuant to article 21.

**The right to development (article 22)**

It is relevant to recall that the late Senegalese jurist M’Baye was one of the first scholars to express the idea of a right to development in his 1972 inaugural lecture at the International Institute for Human Rights (M’Baye 1972: 503, 505).

However, while M’Baye’s understanding of this right implies both an individual dimension and a collective one, the formulation of article 22 seems to look at this right only from the latter perspective (Ouguergouz :2003 299. As for other people’s rights, the question whether an affected community can rely on the people’s right to development as entrenched in article 22 is determined by the extent to which the African Commission has approached the concept “people”. As observed previously, the Commission has embraced an extensive conception including communities living within a country. Therefore, it is clear that affected communities may rely on article 22 to secure their right to development in connection with mineral policy and projects having a direct impact on their livelihood.

Affected communities are entitled to exercise their prerogative attached to the provision of article 22 only in respect of the development plan designed at the local level. But even in this case, the central government must use its margin of autonomy to make sure that the plans made locally do not encroach upon development objectives defined nationally.
For instance, in respect of benefits generated by the mineral industry and as all areas of a country are not always endowed with the same quantity of resources, the central government must ensure that tension does not arise between communities by implementing a national policy of fair redistribution (Obi 2010: 229). It is not because an affected community is entitled to exercise its fundamental right in respect of mineral projects affecting its livelihood, that benefits must accrue only to that community and generate an island of development. Community participation rests on the principle that development objectives defined at local level must fit in the general development process of the country.

In other words, the exercise of the fundamental right to development at local level must be done in a compatible way with its exercise at the national level.

The African Commission has had the opportunity to decide on the fundamental rights’ development entrenched in article 22. In the Endorois case, the complainant alleged that the failure of the Kenyan government to involve Endorois in the development process and ensure the continued improvement of their well-being amounted to a violation of article 22 (para. 125). The African Commission upheld this contention and found that the respondent state had failed to create conditions favourable for Endorois’ development inter alia by excluding them from the decision-making process regarding the mineral project undertaken in their land and not providing them with adequate compensation for the loss of their land (paras. 283 & 298).

In Sudan Human Rights Organisations and Centre on Housing Rights and Evictions (COHRE) v. Sudan (Communication 279/03-296/05 (2009), hereinafter the Sudanese case), the African Commission had to deal with an alleged violation of article 22 in that the complainant contended that attacks and forced displacement against communities living in the Darfur region of Sudan denied them the opportunity to engage in economic activities (Communication 279/03-296/05, para. 224). The African Commission ruled that this right had been effectively violated and urged the Sudanese government to rehabilitate economic and social infrastructure such as education, health, water and agricultural services in order to facilitate the return of the displaced people (paras. 228 and 229).

What can be learned from this jurisprudence is the principle developed by the African Commission that, be it at the national or local levels, whenever an activity threatens the well-being of the people, it automatically violates article 22. Therefore, because the respect and fulfilment of fundamental rights are part of the people’s well-being, there is no way the mineral industry can contribute to the achievement of development of affected communities while degrading their well-being through violation of fundamental rights.

To perceive how community participation contributes to the fulfilment of the fundamental right to development in article 22, one needs to look at the reasoning made by the African Commission in respect of the right to freedom of choice. In the Endorois case, the African Commission embraced the view that “freedom of choice” is part of the right to development and that a ‘lack of choice’ contradicts the guarantees of the right (paras. 277-279). This assertion simply implies that in the development process, people have the right to choose which development model is right for them.
Implicitly, the possibility to express this choice requires that the beneficiaries of the development foreseen participate and determine the suitability of any project which impacts on the development process. In the *Ogoni* case, though article 22 was not involved, the African Commission rebuked the Nigerian government as well for not involving the *Ogonis* in the decisions affecting the development of Ogoniland (para 55). Therefore, it is clear that the African Commission sees participation as a way to guarantee that the right to development and all commitments that it requires are respected in the implementation of any policy or project relevant thereto.

What is particularly relevant to observe is that the African Commission has rejected the conception of participation which would amount to a simple consultation, emphasising rather the imperative that for participation to be effective and fruitful, it must generate the free, prior and informed consent of the people (the *Endorois* case, paras. 281-291). Thus, because the freedom to choose is part of the right to development, effective community participation contributes somehow to the fulfillment of this fundamental right. However, it is through effective community participation that affected communities may express their choices in the mineral resources governance and canalise benefits coming from there towards the achievement of development objectives set at the local level.

**Enforcing community participation under the institutional framework of the African Charter**

There are two institutional levels at which the rights enshrined in the African Charter can be enforced. These are the African Commission and the African Court. Accordingly, to analyse how community participation may take place in the mineral sector under provisions of the African Charter requires a critical look at arrangements made in respect of each of these enforcement machineries.

**Enforcement by the African Commission**

Before a case is taken to the African Commission, a number of conditions that need to be fulfilled are set in article 56 of the African Charter. According to Article 56 of the African Charter and Rules 113 to 118 of the Rules of Procedures, a communication:

- must indicate the name of its authors;
- be compatible with the AU Constitutive Act and the African Charter;
- not be written in disparaging or insulting language directed against the respondent states, its institutions or the AU;
- not be based exclusively on news discriminated through the mass media, be sent after the exhaustion of local remedies, if any and unless it is obvious that the procedure is unduly prolonged’;
- be submitted within a reasonable period and not deal with cases which have been settled by states parties involved in accordance with the principles of the UN Charter, the AU Charter or the provisions of the African Charter.
These requirements are cumulative and should all be adequately fulfilled for a communication to be admissible. What is particularly interesting at this level is the way the African Commission has approached the requirement of local remedies exhaustion. This specific condition is the one that actually makes national courts the first judicial instance where provisions of fundamental rights are to be enforced. A review of the application of the rule by the African Commission reveals that this institution has in practice adopted a very kind interpretation of article 56 (5) which in many cases has led it to admit communications on the pretext that local remedies where either inexistent or unavailable or ineffective. The flexibility of the African Commission in applying this provision comes from the observation that at times it has admitted communications where there was no clear indication that the complainant had tried to use local remedies or even where they had failed to do so but yet the commission admitted the case.

In the *Ogoni* case, the Commission declared the case admissible whereas the communication did not contain any information on any actions taken before national court (the *Ogoni* case, para 40). The argument of the African Commission has been that when the respondent state does not provide a substantive response when the complaint of violations is brought to its attention by the Commission itself, this institution must decide on the merit of the facts.

In *Kevin Mgwannga Gunme et al v. Cameroon*, the African Commission did not provide any explanation on its decision to admit the case despite the failure of the complainant to resort to national court *Kevin Mgwannga Gunme et al. v Cameroon* (Communication 266/03 (2009), paras 81-87). In this case, it seems that the African Commission had tacitly adhered to the claimant’s argument that there is no remedy in national law for self-determination. Moreover, the African Commission has demonstrated another measure of its flexibility by asserting that the exhaustion of local remedies is not necessary where there are massive violations of fundamental rights. If it can be assumed that the violation of an affected community’s fundamental rights includes the mass of the people living within this community, the conclusion should be that the exhaustion of local remedies rule should be never applied in this case. However, this theoretical deduction would be challenged by the fact that in practice the African Commission had explicitly looked at this requirement in the *Endorois* case (para. 59).

The flexibility developed by the African Commission is really a positive element for the advancement of fundamental rights because the context in which the judicial system functions in many African countries is one where the executive put pressure upon judges, trying to compel them by all means to deliver unfair decisions. Therefore, wherever the national judicial system appears powerless and ineffective to secure fundamental rights, the rule of local remedies exhaustion is of no use. For affected communities, this is a good approach, in so far as the long delay that the process to obtain a remedy from national courts may occasion, is likely to prolong the threat or even the violation of fundamental rights that an ongoing mineral operation can cause. There is a need for expeditious justice when it comes to the protection of fundamental rights, especially when it involves a group of people. However, despite flexibility in admissibility, the African Charter enforcement machinery still presents some limitations in terms of accessibility to victims of fundamental rights.
Enforcement by the African Court


As for non-profit organisations and individuals, following a comprehensive reading of articles 5 (3) and 34 (6) of the 1998 Protocol, they are entitled to bring a case directly before the Court only if the matter involves a state that has formally acknowledged competence of the Court to this end. This is an unjustified limitation because access to effective remedies remains illusory for victims of fundamental rights violations whenever such a declaration is not made.

Though it is true that in a roundabout way, individual plaintiffs and non-profit organisations may successfully obtain effective ruling from the Court using the channel of the African Commission, this route is dependent on the Commission’s discretion; thus occasioning further delay to the enforcement process. As for the previous decision to opt for a commission instead of a court, the reason for this restricted choice presumably sprung from a desire to accommodate states that still feel uncomfortable with the settlement of fundamental rights issues by a regional court.

Access to the African Court would provide individuals with a much needed alternative to judicially enforce their rights. Thus, the restrictive approach to the locus standi is antithetical to the pressing demand for a more effective system, and more so to the very fact that individuals rather than governments are the main bearers of the fundamental rights in the African Charter. In fact, statistics reveal that except for one inter-state dispute, all cases brought before the African Commission involved individuals, communities and non-profit organisations as complainants.

There is potential in the African Commission to play a relevant role in the enforcement of the fundamental rights-based approach to community participation in the mineral sector despite the fact that its decisions are not binding. Its flexibility concerning admission of cases and the locus standi, the ability to request periodical reports from member states, the establishment of a working group dealing with extractive industries, environment and fundamental rights violations and the excessive of its promotional mandate are some of the tools and avenues that this body may use to promote and protect the fundamental rights of affected communities in the mineral sector. As to the African Court, the authority to deliver binding decisions is a considerable advancement for the protection of fundamental rights on the continent.
Overcoming challenges under the fundamental rights-based approach

There are several factors that are likely to prevent full participation of the local communities in the governance of the mineral resources under the African Charter. These factors include updating of the mineral legislation, capacity building of local communities, and access to the African Court.

Necessity to update the mineral legislation and effectively implement its provisions

Article 1 of the African Charter provides that:

> The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Except for countries where treaties require prior adoption in the form of statutes by the parliament, one can really wonder what the relevance of such a provision is for fundamental rights law-making wherever the Charter can be applied directly.

An attempt to answer this question should lead to the observation that the inclusion of this provision in the African Charter is actually consecutive to the principle that implementation of fundamental rights is first of all states’ responsibility (Lopes and Quénéivet 2008: 211-212).

Despite the existence of a treaty or convention, each state should take the responsibility to organise its legal system to such an extent to comply with its international obligations. Viljoen explains it by contending that in order to meet the rationale of its adoption, a treaty needs to be felt at the national level and that for such a purpose, effective legal and other mechanisms must be organised in the domestic system to make it effective (Viljoen 2009: 300). Since this article is about the governance of the mineral sector, it is urgent that the legislative framework organising this sector be in line with fundamental rights entrenched in the African Charter in order to facilitate community participation in the mineral project.

A major concern at present is how the mineral legislation deals with environmental issues, specifically in the process of granting exploitation permits and also in the process of mine closure in respect of land restitution. For instance, in 2011 the United Nations Environment Program (UNEP) found that in over 40 locations tested in the Ogoniland of Nigeria, the soil was polluted with hydrocarbons up to a depth of 5 metres, that all the water was polluted, that the levels of benzene in approximately 90% of the locations, was more than 900 times above accepted World Health Organisation standards and that it could take 35 years to clean up the Ogoni land and water systems with an estimated one billion US dollars to begin the clean up (Sibaud 2012: 2004). Unfortunately, no significant efforts to redress the situation have been made by the Nigerian government and the mineral companies. Therefore, the mineral legislation should be updated in order to embrace a fundamental rights based approach.
One reason for a specific update of mineral legislation is that when mineral companies want to invest in a country, beside the attractiveness of the country’s geological potential, the very first thing that captures their attention is the investment regime established in the mineral code (Otto 1998: 811). This is particularly true when the fiscal regime is defined in the mineral code or Act. In the context of the South African mineral law, it was observed that though the mineral sector can be somehow affected by any existing legislation or policy, it is more directly impacted by legal instruments specifically addressing mineral matters. Another reason comes from Langton’s observation that mineral legislation plays a key role as a tool through which interests of all stakeholders involved in the mineral project may be brought to balance (Langton 2012: 2-3). The possibility for mineral legislation to fulfil this function is obvious because it is naturally supposed to lay down the foundation on which mineral agreements should be concluded. It should define the legal structure and process through which negotiations should be conducted until the agreement is signed (Godden & Tehan 2012: 11). As such, it can be deduced that it represents a strategic tool through which the effectiveness of community participation can be reinforced.

**Empowering affected communities through capacity building**

Capacity building is often perceived as a process of helping peoples to help themselves (Alaerts 1999, 85-88, Eade 1997: 2). The concept can be understood here as the process through which members of an affected community, taken individually or collectively, are provided with the capacity to address community’s problems in respect of a mineral project and determine their own values and priorities in the achievement of sustainable development goals throughout this project (Alaerts 1999: 2-3).

This approach implies that members should be equipped with the necessary knowledge to identify and address matters that affect their community in the context of mineral activities and that the whole community should be able to reach an agreement on values and objectives to be prioritised in the realisation of development projects. This challenge of capacity building is so critical that Aburge and Akabza contend that one reason why many affected communities in Africa end up with poor compensation is their insufficient ability to negotiate directly with the mineral company (Aburge & Akabza 1998: 117).

**Access to the African Court as a challenge**

Access to the African court is one of the challenges in relation to the protection of the fundamental rights of individuals and groups all over the continent. This issue takes a particular importance in the mineral governance considering the observation by environmental justice organizations that successful resistance movements able to stop land grabbing projects have argued in terms of fundamental rights and indigenous territorial rights (Grain 2014: 6). This makes enforcement of the African Charter provisions protecting such rights at the level of the African Court a critical step in the strategy to guarantee the local community’s ability to stop non-beneficial and devastating projects.
Indeed, the fundamental right to equality enshrined in article 3 of the African Charter loses its meaning by the simple fact that some Africans will enjoy access to the Court and some others not. In practice, this is a serious impediment to the effectiveness of the fundamental rights-based approach to community participation in so far as affected communities will almost be deprived of the possibility to compel their governments through a binding decision, the discretion to approach the court being vested in this case in the African Commission.

It has been contended that the principle of non-discrimination is a cross-cutting theme of access to justice in the international law context where the possibility of adjudication seeks *inter alia* to prevent or repair any harmful actions to fundamental rights (Pring and Siegele 271). Therefore, the issue of access to the African Court needs to be seriously discussed by the AU and reforms should be allowed to let individuals, groups and NGOs have direct access in order to banish this discriminatory selection. As long as this limitation of access to the African Court will be carried on, it will seriously undermine the potential of this institution to secure affected communities participation.

Actually, the restriction is inconsistent with the letter and the spirit of the African Charter, especially its article 7 of the Charter which provides the fundamental right for individual (and implicitly groups) to have his/her cause heard by an impartial court and tribunal within a reasonable time.

**Conclusion**

This article contends the marginalisation or the exclusion of local communities by the state and the mineral companies across the continent is a critical issue in the current state of mineral governance in Africa. It has demonstrated that good governance in the mineral sector would require the participation of local communities to ensure that mineral projects are consistent with fundamental rights.

As observed all over this study, either participation is non-existent or it is so insignificant and powerless that it hardly leads to the fulfillment of affected communities’ aspirations. There is a pressing need to ensure that mechanisms are in place and work to guarantee that the people’s profound aspirations are reflected in the final stage of the decision-making process of any mineral project. It is in this respect that this paper suggests a fundamental right approach to community participation in line with the African Charter on Human and People’s Right as a key strategy. It argues that community participation as a right to be enjoyed by local communities and also as a channel for the enjoyment of peoples’ rights (such as the right to development, the right to self-determination and the right to enjoy their wealth and natural resources) can be enforced before the African Commission and the African Court. Unfortunately, the existing mineral legislation in many African countries does not provide for the participation of local communities. The affected communities lack the capacity to engage with the state and companies involved in the exploitation of their natural resources.
On the other hand, many African States parties to the Protocol establishing the African Court on Human and Peoples’ Rights have so far failed to make the declaration allowing their citizens and non-governmental organisations to champion their rights before the African Court directly. An approach grounded on the African Charter for Human and Peoples’ Rights as championed in this paper would help improve the quality of governance in the mineral sector and ensure that people enjoy their natural resources.

References


