Right to a clean environment: Several answers, unending questions (1)

•Fagbohun

In this article, Lanre Fagbohun, Associate Professor, Faculty of Law, Lagos State University, Ojo, our guest columnist, traces man's relationship to the environment from pre-industrial revolution era when, according to him, man lived close to the earth, to post-industrial era, when everything changed, leading to the Stockholm Conference in 1972. The conference gave international recognition to man's right to a clean environment.

THE word "right" has several connotations both in meaning and classification. As a noun, and taken in a concrete sense, a 'right' has been defined as a power, privilege, faculty or demand, inherent in one person and incident upon another. As an adjective, the term "right" means just, morally correct, consonant with ethical principles or rules of positive law. It is the opposite of wrong, unjust, illegal.

In a narrower signification, it is an interest or title in an object of property, a just and legal claim to hold, use or enjoy it, or to convey or donate it as the person in whom it inheres may please. In the context of our discourse, our use of the word "right" is along the lines of our first definition.

If we go by the degradation that our environment has suffered over the years, and the extent to which this has negatively affected the quality of our life, it will be an idle hype for anyone to assert, that the existing safeguards of our right to a clean environment are adequate. As one commentator rightly puts it, in the developing world, environmental concerns are often perceived as a luxury. Without the problems of food shortages and poverty, economic inefficiencies, corruption, lack of basic social facilities and infrastructure, it is easy to be troubled by the more esoteric concerns of the environment. The more pressing issues of human life and death will necessarily take precedence.

No one will suggest that the individual has no rights in regard to the protection of the environment at present, rather, it is that those he possesses are grossly inadequate to enable him confront the challenges that development, economic growth, science and scientific research, technological advancement and capitalism have wrought on the environment. The irony is that man's exploitative attitude towards the earth and its natural resources, which no doubt have provided and continue to provide enormous benefits to humankind is what has concomitantly manifested awesome negative impacts.

If we return to the province of "right" it would be seen that before the rights of a citizen can be safeguarded, those rights must first be formulated. In the case of right to a clean environment, the formulation is what has proved to be the most difficult. In this regard, the pertinent question that have continue to gnaw at us are which way is the right to clean environment running? How far do we wish it to run? Are we satisfied with the way it is running? The consideration of these fundamental questions is beyond the province of any one discipline. Nevertheless, it is only when these questions have been answered that we shall be able to define the purpose, function and orbit of environmental law and environmental justice in the global environment that we have all found ourselves.

Prior to the industrial revolution, not much of importance was attached to the issue of right to a healthy environment. This to a large extent was because people lived close to the earth. This apparently prompted Rachel Carson to note in her famous classic titled Silent Spring that, "If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem".

As a result of the industrial revolution the scenario changed. The system of resource use became significantly inefficient, thus, giving rise to depletion of the natural resource base and large scale social inequities and imbalances in the natural system. In the search for solution some commentators have argued that the right to a clean environment is in the nature of "human rights". Some others, like the deep ecologists have argued that it is more in the realm of "universal" rights. A third group has posited that it would fall within the category of fundamental norms which go by the name of the doctrine of jus cogens.

For those who see the right to a clean environment as a human right, they trace its origin to the Stockholm Conference of 1972 where international recognition was first given to the concept of right to a healthy environment. That Conference adopted what later became known as the Stockholm Declaration with its 26 principles. Principle 1 of the Declaration linked environmental protection to human right norms in its assertion of man's fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

For two decades, the above approach which in line with the "indispensability theory" viewed environmental protection as a precondition to the enjoyment of internationally guaranteed human rights held sway. By 1992, and following the Conference of Rio de Janeiro on Environment and Development the paradigm shift of the subject of the environment in its relation to human rights started to view certain human rights such as right to life, health, water, food, development, shelter and housing, information and participation, work, culture, family life, equity, non-discrimination, property among others, as essential elements to achieving environmental protection.

To this first group, the recent event of March, 2008 when the United Nations Human Rights Council linked rights to the issues of Climate Change was a further shift in the paradigm. With that development, the right to a safe and healthy environment began to emerge as an independent substantive human right.

For the second group who view the right to a clean environment as a universal right, they argue that human rights are but one type of right, namely, those rights one holds by virtue of being a person. Not all rights held by human beings are human rights. For instance, contractual and constitutional rights are held by human beings, yet, they are not necessarily human rights. They are rights of persons without being "human rights". They therefore contend that while the right to a clean environment is an important right, it does not amount to a "human right". They conceive that since the right is concerned with the collective survival of all human beings, it certainly is more fundamentally important than individual human rights.

Predicated on the above, they conclude that the right to a clean environment is best viewed as a survival need, and thus, a "universal" right. Plainly, to speak of a universal right is to speak of a universal duty. As part of the universe, all humans have a right to a clean environment, but to say they have this right is to also impose on all humans the duty of respecting the environment in a holistic and interconnected manner i.e. with its constituents of peoples animals and plants.

Of course, the immediate obstacle to realizing the above is that it would re-open not only the debate between anthropocentrists on the one hand and ecocentrists on the other hand, it would also bring into view the theory of animal rights pursuant to which some would argue that since the concept of rights extend from human beings to animals and plants, animals have the full rights of humans and it is therefore impermissible for man to kill or eat them.

For those who consider the right to a clean environment as a norm from which no degradation is permitted, their position is that the right is so basic that nations should not be at liberty not to observe it. In this regard, they contend that if the prohibition on the aggressive use of force, the principle of non-discrimination on grounds of race, and the rule against the slave trade, piracy, and genocide are all international norms that are considered to be jus cogens, then, there is conceivably no reason why the norms of good environmental behaviour so basic and fundamental to the future of the planet should be categorized in such a way that nations can do as they please about following them.

By Article 53 of the Vienna Convention on the Law of Treaties, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. A peremptory norm is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. While there is no agreement among publicists about which principles fall within the category of fundamental norms, there is a general consensus that such a category exists.

Article 64 of the same Vienna Convention provides that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". The implication of this is that there exists both flexibility and scope for dynamic development of principles to meet changing circumstances. Consequently, the advocate of the right to clean environment as a fundamental norm argue that the doctrine of jus cogens is capable of wider development in this direction. The painful fact is, striking as these arguments are, there is as yet no authoritative exposition or application of the doctrine of jus cogens to the challenges that an unclean environment poses for the very survival of the human race.

If we leave eloquence and passion, what becomes clear is that at present the unending theoretical debate about the nature of a right to clean environment is running more in the direction of being recognized as a human right. While we may wish it to run more as a fundamental norm of international law, this apparently is not the reality on ground.

This takes us to the point of whether we are satisfied with the way it is running. At the global level, this would appear to be so. For instance, the environment is mentioned directly in Article 12 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the right to health. The steps to be taken by the State Parties to the Covenant to achieve the full realization of the right to health shall include those necessary for the improvement of all aspects of environmental and industrial hygiene.

The ICESCR is not alone. Other treaties of potential global application that have linked the right to a healthy and clean environment to human right are the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on substances that Deplete the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1992 Framework Convention on Climate Change and the 1992 Convention on Biological Diversity.

International tribunals have not been left behind in ensuring that the world benefit from a link between environment and human rights. In 1989, for example, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities received two complaint from the US based Sierra Club Legal Defence Fund on the right to health and the right to a healthy environment. One of the cases relate to the Yasuni National Park in Ecuador. The complaint challenged a proposal by a US oil company to build an access road in Yasuni National Park. The plan of the road was such that it would divide the territory of the indigenous Huaorani Indians and in the process damage their culture and way of life. The report claimed that the road construction would violate among other rights, the right to self-determination and the rights to life and health.

In the course of the proceedings, a representative of Friends of the Earth and the Sierra Club Legal Defence Fund made a statement to the Sub-Commission urging its members to pay attention to the issue of human rights and the environment. In response, the Sub-Commission adopted a draft decision on the subject and appointed a Special Rapporteur to study the relation between the environment and human rights. In the final report of the Special Rapporteur she recognized that the right to health includes protection from national hazards and freedom from pollution, including the right to adequate sanitation. She explained that the term "healthy environment" has been generally interpreted to mean that the environment must be healthy in itself (ecological balance) as well as healthful, which requires that it is conducive to healthy living.

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Legal Diary

Book presentation
Juris Consultus, Faculty of Law, Obafemi Awolowo University, Ile-Ife in collaboration with the law firm of Olujimi and Akeredolu presents: 'Nigerian Law of Evidence" book reading in honour of Oluwarotimi Odunayo Akeredolu (SAN).
Date: July 29, 2008
Time: 11am
Venue: Virgo Hall, All Seasons Plaza, 24 Lateef Jakande Road Agidingbi, Ikeja, Lagos.

NBA Conference
The Nigerian Bar Association (NBA) Annual General/Delegates Conference comes up in Abuja .
Date: August 23-29
Time: 9am daily
Venue: International Conference Centre, Abuja
Topic:- "How Federalism accommodates diversity and strengthens the Constitution".