

UPHOLDING ENVIRONMENTAL HUMAN RIGHTS THROUGH JUDICIAL INTERPRETATION OF PEACEFUL ENJOYMENT OF PROPERTY

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ABSTRACT

Just as the Universal Declaration of Human Rights of 1948 marked the beginning of contemporary international human rights law and the subsequent adoption of regional human rights instruments, so the Stockholm Declaration of 1972 marked the genesis of a rights-based approach to the protection of environment. Since then, human rights have become a legal weapon exerted in the strive to protect the environment and enhance access to environmental justice. Hence, it is not a mere theoretical discourse that environmental degradation affects the enjoyment of basic human rights. It has now become recognized that human rights such as the right to life and many others can only be enjoyed in a polluted free environment. It is against this background that this paper examines how the right to peaceful enjoyment of property as guaranteed in international and regional instruments on human rights has been construed to foster environmental protection. To achieve this, interpretations through decided cases are examined for a proper evaluation of judicial attitude and willingness in this respect.

Keywords: right, freedom, healthful, environment, cases.

MENEGAKKAN HAK ASASI MANUSIA PERSEKITARAN MELALUI INTERPRETASI KEHAKIMAN DALAM MENIKMATI HARTA SECARA AMAN

ABSTRAK

Sama seperti Perisytiharan Hak Asasi Manusia Sejagat 1948 yang menandakan permulaan undang-undang hak asasi manusia antarabangsa kontemporari dan penerapan instrumen hak asasi manusia

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serantau, begitu juga dengan Deklarasi Stockholm 1972 yang menandakan permulaan pendekatan berasaskan hak untuk perlindungan alam sekitar. Sejak itu, hak asasi manusia telah menjadi senjata perundangan yang digunakan dalam usaha untuk melindungi alam sekitar dan meningkatkan akses kepada keadilan alam sekitar. Oleh itu, kemerosotan persekitaran dan kesannya kepada hak asasi manusia bukan lagi menjadi perbincangan secara teori. Kini telah diakui bahawa hak untuk hidup dan banyak hak lain hanya dapat dinikmati dalam alam sekitar yang bebas dari pencemaran. Berdasarkan latar belakang inilah makalah ini meneliti bagaimana hak untuk menikmati harta secara aman seperti yang dijamin dalam instrumen antarabangsa dan serantau mengenai hak asasi manusia telah ditafsirkan untuk mendorong perlindungan alam sekitar. Untuk mencapai ini, tafsiran kes yang telah diputuskan diperiksa untuk penilaian yang tepat mengenai sikap kehakiman dan kesediaan dalam hal ini.

Kata kunci: hak, kebebasan, sihat, alam sekitar, kes-kes.

INTRODUCTION

Every human being depends on the environment in which we live. A protected, safe, healthful and sustainable environment is fundamental to the full realization and enjoyment of basic human rights, including the rights to life, food, health, and water. Without a healthful environment, it may be practically impossible to fulfill our aspirations or even live at a level proportionate with least standards of human dignity. The recognition of the links between human rights and environment has increased in the recent years. Similarly, international laws, domestic laws and judicial interpretations on the links between human rights and the environment have rapidly grown. Some states now include a right to a healthy environment in their constitutions.¹ This is premised on the contention that the inclusion of such provision in the constitution is that it raises the entire field of environmental matters as a fundamental value of society, to a level equivalent to other rights and enjoins priority over ordinary legislation. Judges at international and domestic levels have employed the instrument of

¹ See for example, the Constitution of Angola, Argentina, Belarus, Belgium, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Ecuador, Finland, Georgia, Ghana, Hungary, India, Mexico, Niger, Namibia, Portugal, Russia, Romania, Sao Tome, Saudi Arabia, Slovakia, Ukraine, Zambia.

interpretations to expand the scope of rights protected in the instruments on human rights to include the protection of environment. Various substantive rights such as the right to life, freedom of movement and right to equality have been employed to foster environmental protection. Therefore, it needs to be seen how the right to peaceful enjoyment of property and freedom from interference, which is the focus of this paper has been used to ensure the protection of environment. The examination of two foremost issues has been the purpose of discussion right through this paper. First is the degree of willingness of the court to adopt a wide-ranging interpretation of the examined right in the protection of environment. The other is whether the courts have a tendency to widen the traditional rules of human rights. In answering these questions, the paper looks into the approach of the courts through case law for a proper evaluation of the examined right in the protection of environment.

UNBLOCKING THE CONCEPT OF THE RIGHT TO A HEALTHFUL ENVIRONMENT

The issue of what constitute environmental rights has continued to be a subject of debate between human rights activists and environmentalists. The problem is not that of providing a working definition of the concept but one of agreeing to it. In addition, there has been a discrepancy as to whether the concepts of environmental rights are for the benefit of humankind only or include other ecological species. Therefore, a brief analysis of these two issues becomes paramount in order to ascertain which part of the environment should be accorded a right status.

Definitional Problems

Definitional problems are not unexpected in any effort to hypothesize the scope and content of environmental rights. The question however to ask is, should environment be accorded a right status? Or do environmental issues possess the necessary criterion to qualify as human rights? If this question is resolved positively the next question is, why definitional problems to environmental rights or does it even necessary to give environmental rights qualitative and substantive definitions?

With respect to the first, Alston has recommended a list of criteria probably appropriate to determining whether a claim meets the requirement of human right.² Alston argued that the proposed concept should among other things have a high level of consensus at international level and must be able of asserting enforceable rights.³ Another author has recommended two stages of analysis in their definition. That is, studying human rights on the origin of their source or on the premise of their nature and substance.⁴ The first has to do with the question from where do we get human right? The second is the question: what kind of an interest should be considered a human right? In this respect, it has been contended that for an interest to be accorded a human right, it must among other things, be of essential social importance, globally recognised, and be compatible with the existing human rights.⁵

There are indeed more in environmental issues than the requirements stated by Alston and other authors to accord it a right protection. Since 1972 when the first conference on environment was held at Stockholm, environmental issues has grown sporadically and

² Philip Alston, "Conjuring up New Human Rights: A Proposal for Quality Control" *Am. J. Int'l L.* 78, (1984): 607-621.

³ Alston, "Conjuring up New Human Rights: A Proposal for Quality Control", 615; Richard Bilder "Rethinking International Human Rights: Some Basic Questions" *Wis. L. Rev.* (1969): 171; Jacobs F.G. "The Extension of the European Convention on Human Rights to include Economic, Social and Cultural Rights" *Hum. Rts. Rev* 3, (1978): 166-178.

⁴ See Jack Donnelly, *The Concept of Human Rights*, (New York: St. Martin's Press, 1985) 1; Iveta Hodkova "Is There a Right to a Healthy Environment in the International Legal Order?" *Connecticut J. Int'l L.* 7 (1991): 65-80.

⁵ See generally, Gudmunder Alfredsson and Alexander Ovsiousk, "Human rights and the Environment" *Nordic J. Int'l L.* 60 (1990): 19-27; Jennifer Downs, "A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Rights" *Duke J. Comp. & Int'l L.* 3 (1993): 351-385. Paul W. Gornley, "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: the Expansion of human rights Norms" *Georgetown Int'l Env'l L. J.* 3 (1990): 85-116; Alexander Kiss, "An Introductory Note on a Right to Environment" in, *Environmental Change and the Environment: New Challenges and Dimensions*, ed. Brown Weiss (Tokyo: UN University Press, 1992), 199-204.

enjoy universal recognition and acceptance even more than any other aspect of international law which calls for its human rights approach. The universal aspiration is indeed evident in the preamble to the Stockholm Declaration.⁶ If the assertions that environmental degradation poses negative impact on the enjoyment of basic rights are true, then there is nothing inconsistent to bring environmental protection under the purview of human rights.⁷

It is therefore contended that looking at damages caused to the environment by human activities, the need to frame environmental issue under the scope of human rights became necessary in order to checkmate and control the activities of major actors involved in environmental destruction which have resultant effect on the enjoyment of basic human rights. It can be argued as well from another perspective that if matters such as the right to die (Euthanasia), abortion, and same-sex marriage with no universal agreement can be accorded a right protection in some jurisdictions, what becomes of environmental issues which has over the years gain a wide spread recognition and acceptance. In this respect, the case of environmental protection should not be an exception.

The next question is the problem of definition or put differently, does it even necessary to provide a working definition for environmental right or how possible is it to delimit the scope and content of environmental rights? A complete definition of environmental rights must be able to encompass all essential elements of what constitute the environment. The word environment is a difficult word to define. If environmental protection exists only to promote human goods, a qualitative definition of environmental rights in this respect would be limited to the advantage of mankind. However, if environmental protection exists both for the benefit of mankind and non-human species, any qualitative definition of environment should be wide enough to embrace both mankind and

⁶ See the Stockholm Declaration, 1972.

⁷ Akintunde Kabir Otubu, "Environmental Protection and Human Rights: An Overview of Current Trends" https://www.researchgate.net/publication/228184560_Environmental_Protection_and_Human_Rights_An_Overview_of_Current_Trends [accessed 18/09/2021].

non-human species.⁸ A cursory look at the existing literature suggests that the term environment suffers from indeterminacy as various phrasing have been utilized to depict the term. This indeterminacy raises the question of which part of the environment is to be protected.⁹

What connotes a satisfactory, decent, viable or healthy environment suffered from ambiguity and cultural relativism and lack the universal notion usually attached to be intrinsic in human rights.¹⁰ A survey of existing constitutional and human rights instruments reveals that series of adjectives are given to the word environment in order to delimit what are actually being protected. Various adjectives such as clean, healthy, viable, decent, ecologically balanced, satisfactory, sustainable environment, environment free from contamination or suitable for the development of the person are envisaged in various instruments.¹¹

Merrills on this note opined that there are no proper ways of ascertaining or depicting environmental rights.¹² This suggests that to say that there are no universal agreements as to what constitute environmental rights is not to say that there is no such concept. On this note, Alan Boyle argued that environmental rights are not capable of exact definition because domestic legal systems differ greatly in

⁸ Paul W. Gornley, "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of human rights Norms" *Georgetown Int'l Env'l L J.* 3 (1990): 85-116.

⁹ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, (Oxford: Oxford University Press, 2009), 268-270.

¹⁰ Alexander Kiss, "An Introductory Note on a Right to Environment" in *Environmental Change and the Environment: New Challenges and Dimensions*, ed. Brown Weiss, (Tokyo: UN University Press, 1992), 199-204.

¹¹ See for example, article 24 of the African Charter on Human Peoples' Rights; article 7(b) of the International Covenant on Economic, Social and Cultural Rights 1966; article 24 of the Convention on the Rights of the Child; article 2, 6, 7, and 15 of the ILO Convention Concerning Indigenous and Tribes Peoples in Independent.

¹² Merrills J.G., "Environmental Protection and Human Rights: Conceptual Aspects" in *Human Rights Approaches to Environmental Protection*, ed. Alan Boyle and Anderson (Clarendon Press: Oxford, 1996), 25-42.

the extent to which they give priority to environmental protection.¹³ He maintained that the concept of environmental rights can best be tackled in the milieu of particular societies and of their distinctive legal system.¹⁴ Robin Churchill sees environmental rights as general rights to a decent environment.¹⁵ He however, did not provide or attempt to provide an operational definition of what decent environment connotes.¹⁶ Douglass-Scott maintained that because of the difficult task that arises when trying to define the content and scope of environmental rights, it is preferable according to him, to discard such notion and concentrate on procedural or participatory rights which may help in future to figure out substantive environmental rights in its qualitative contexts.¹⁷ Redgwell's position was that delimiting the scope and content of environmental rights are needless so long that strategies designed to protect humans can also protect flora, fauna and other ecological species.¹⁸ Anderson view is sound, positive and persuasive when he said that the question of what environmental rights entail is basically no more than a jurisprudential discourse.¹⁹ According to him, the notion of human rights and the

¹³ Alan Boyle, "The role of International Human Rights Law in the Protection of the Environment" in *Human Rights Approaches to Environmental Protection*, Clarendon Press, ed. Alan Boyle and Anderson, (Oxford: 1996), 43-70.

¹⁴ Boyle, "The role of International Human Rights Law in the Protection of the Environment", 182

¹⁵ Robin Churchill, "Environmental Rights in Existing Human rights Treaties" in *Human Rights Approaches to Environmental Protection*, ed. Alan Boyle and Anderson (Clarendon Press: Oxford, 1996), 89-108.

¹⁶ Churchill, "Environmental Rights in Existing Human rights Treaties", 110.

¹⁷ Douglass-Scott S., "Environmental Rights in the European Union: Participatory Democracy or democratic Deficit" in *Human Rights Approaches to Environmental Protection* ed. Alan Boyle and Anderson (Clarendon Press: Oxford, 1996), 109-128.

¹⁸ Catherine Redgwell, "Protecting Natural Heritage and Its Transmission to Future Generations" in *Standard-setting in UNESCO Vol I: Normative Action in Education, Science and Culture Essays in Commemoration of the Sixtieth Anniversary of UNESCO*, ed. A. A. Yusuf, (UNESCO Publishing: Martinus Nijhoff, 2007), 267-288.

¹⁹ Michael R. Anderson, "Human Rights Approaches to Environmental Protection: An Overview" in *Human Rights Approaches to*

environment has become widely acknowledged; therefore, defining its content and scope is uncalled for.²⁰ One found reasoning in the view Anderson. This is because the problem of defining the scope and content of environmental rights is not unexpected. First, failure to give environment a qualitative definition would not defeat the existence of such concept as many terms are bound to suffer from indeterminacy. Also, the issue of definition may not even be necessary because the concept of human rights itself is yet to receive a universal acceptable definition. On this note, it is better to adopt the alternative approach as suggested by Kiss and Shelton which is to disregard the anxiety of defining environmental rights in abstract terms but to let the courts discover their own constructions as they have done for several other human rights.²¹

It is very obvious from the above discussions that virtually all writers avoid the problem of defining the scope and content of environmental rights. This is not due to lack of ideas but because of the problems of indeterminacy, variability and relativity that the concept is bound to suffer or encounter. However, one thing is clear; there is to some extent a general acceptance of the concept of environmental rights, but the problem has always been agreeing to its qualitative contents. Therefore, it is better to assume given that human rights are subject to the adaptation of changes in time and of peculiar situation, the issue of what environmental rights depicts be left to time determinacy and interpretations as will continue to be provided by the court.

The Problem of Right Holder

If human rights in relation to the environment are to exist, the next question is identifying the rights-holders. That is, do environmental rights exist only for the benefit of mankind or extend to include other species? This indeed has generated an intense debate between environmentalists and human rights activists. Environmental concepts

Environmental Protection, ed. Alan Boyle and Anderson (Clarendon Press: Oxford, 1996), 11.

²⁰ Anderson, "Human Rights Approaches to Environmental Protection: An Overview", 13.

²¹ Kiss and Shelton, "Human Rights, Environmental Rights and the Right to the Environment" *Stanford JIL*, 28 (1991): 103.

are frequently classified into two cerebral camps. Those that are considered anthropocentric or “human centre” in thought and those regarded bio centric or “life centre.”²² This categorization has been termed in other vocabulary or slogan as “Shallow” ecology versus “deep” ecology or “*technocentrism*” versus “*ecocentrism*.”²³ Anthropocentric approach centre primarily on the adverse effects that environmental pollution and destruction have on humankind in which non-human nature are less regarded.²⁴ Critics of anthropocentrism are of the notion that other creatures are not to be seen as resources to be exploited for human purposes. A perception the critics argued is responsible for decades of environmental destruction.²⁵

In contrast to anthropocentrism, ecocentrism claims those mankind have an obligation to protect and conserve non-human natures.²⁶ Thus, it is the view of ecocentrism that humans are morally bound to safeguard and protect the environment as well as individual creatures and species towards ensuring their prudent use.²⁷ In this context, ecocentrics picture humankind and other components of the natural environment, both living and non-living as constituent of a single moral and ecological population.

²² Kiss and Shelton, Human Rights, Environmental Rights and the Right to the Environment, 106.

²³ See for example, Barry J., *Environment and Social Theory* (Routledge: London, 1999), 66; Dryzek J., *The Politics of the Earth*, (Oxford University Press: Oxford, 1997)77; Plater Z., “Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in which Everything is Connected to Everything Else” *Harvard Environmental Law Review*, 23 (1999): 359.

²⁴ Michael Anderson, Human Rights Approaches to Environmental Protection: An Overview in *Human Rights Approached to Environmental Protection*, (Clarendon Press: Oxford, 1996), 14.

²⁵ Baldock D., “The Status of Special Protection Areas for the Protection of Wild Birds” *JEJ* (1999): 39; Baldock D., “Environmental Sensitive Areas: Incrementalism or Reforms? *J of Rural Studies*, 6 (1990): 143.

²⁶ Nayar J. and Ong D.M., “Developing Countries, Development and the Conservation of Biological Diversity” in *International Law and the Conservation of Biological Diversity*, ed. Bowman M and Redgwell C (Kluwer: London,1998), 235-253.

²⁷ Nayar, “Developing Countries, Development and the Conservation of Biological Diversity”, 235.

By the 1960s and 70s, as scientists knowledge of the sources and effects of environmental degradation was becoming more complicated, there was indeed growing and rising demands among scientists, scholars and activists concerning the planet's capacity to curtail the debris of human economic activity and indeed, to sustain human life.²⁸ This concern prompted a debate as to whether rights can be extended to non-human species or remained exclusively for human benefits.²⁹ Therefore, the question whether environmental rights exist only for the benefit of humankind or include non-human nature can be drawn by brief examination of legal framework on environmental law.

Looking at the present progress, it does appear that the materialization of a true ecocentric spotlight on sustainable development in which the natural ecosystems of the environment and species have not been disregarded. For instance, the Stockholm Declaration places a great emphasis on the necessity to protect the natural eco-system for the benefit of living generations and generations to come. It saddled humankind with the responsibility to manage and safeguard the heritage of wildlife and its habitat.³⁰ The World Charter for Nature adopted ten years after the Stockholm Conference requires in its principle that the eco-system and organisms as well as the land, marine and atmosphere resources used by mankind should be administered to attain sustainable and favourable output and not in a way as to imperil the uprightness of other eco-system that co-exists with man.³¹

Furthermore, the Convention on International Trade in Endangered Species also prescribes regulations with regard to trade in

²⁸ Alan Boyle, The role of international Human Rights law in the protection of the Environment in *Human Rights Approached to Environmental Protection*, (Clarendon Press: Oxford, 1996), 51.

²⁹ Schoenbaum Thomas J. "International Trade in Living Modified Organism: The New Regimes" *ICLQ*, 49, no 4 (2000): 856-867; Pathak, "The Human Rights System As a Conceptual Framework for Environmental Law," in *Environmental Change and International Law*, ed. Brown Weiss, (Tokyo, 1992), 223-224, See also Stone, "Should Trees Have Standing? Revisited: How far will law and morals reach? A Pluralist Perspective," *S Cal. L.R* 59 (1985): 1.

³⁰ See the preamble to the Stockholm Declaration 1972.

³¹ See article 2, 3 and 4 of the World Charter for Nature 1982.

specified species of both plant and animal life. It places certain restrictions in regulating trading in plant and animal species through a permit system.³² The Biodiversity Convention which was concluded at the 1992 Rio Earth Summit explicitly addressed the need for the conservation and protection of the total variety of life found on earth, and further expands the scope of the International Convention on Trade in Endangered Species to include other species as a whole.³³ In addition, the Convention on Wetlands of international Importance Especially Water Fowls Habitat simply called the Ramsar Convention was the first global multilateral convention to regulate the conservation of a particular type of habitat namely, wetlands as opposed to the conventions on wildlife protection.³⁴ It regulates both the protection of wetlands areas and wild life.³⁵

It should be noted that although international environmental law as a whole has been criticized by environmentalists as anthropocentric in focus, looking at the arrays of conventions examined above, contemporary international law does recognize fundamental values of the environment and other ecological units. It has been noted that under the existing legal order, these values are incorporated with a belief that human beings cannot exist without conserving it. A change in perception attributed to wildlife from human hunting to human responsibility to preserve such species from extinction has been one of the most noteworthy recent developments in wildlife law. This swing in perception is perhaps greatly manifested by the shift in focus from viewpoint of resources for human consumption to resource exists for human protection.

In summary, the question whether environmental rights extend to other species or exclusively for human benefit is not a question of yes or no, but rather question of more or less. It is very obvious that environmental rights as envisaged in the modern-day environmental law is not for the benefit of man alone but also incorporates other species whose maintenance and conservation largely depend on human being and this is evidence from the specific conventions

³² See generally the provision of article II of the Convention on International Trade in Endangered Species 1973.

³³ See article 6, 7 and 8 of the Biodiversity Convention 1992.

³⁴ See article 1 of the Ramsar Convention 1971.

³⁵ Article 1 of the Ramsar Convention 1971.

examined above. Therefore, there is a corresponding duty imposed on man to ensure the continued existence of such species.

THE RIGHT TO PEACEFUL ENJOYMENT OF PROPERTY AND FREEDOM FROM INTERFERENCE

The right to property comprises of a “bundle” of rights that may embrace distinctive rights such as the right to acquire something, to possess it, to control the way it is used, to enjoy the benefits of its use, to prohibit others from it, and to transfer it to others. In the framework of environmental protection, the primarily functional glue in this bundle is the common law long-protected right to use and enjoy one’s property and to be free of interferences with it.³⁶ The right to use and enjoy one’s property has imposed an important obligation not to interfere with others’ rights to use and enjoy their property. This obligation has been a foundation of common law since medieval times. Today, the rule has retained its importance in the quest for environmental protection. Although over the years different theories of property rights have come in and out of fashion, it is not within the scope of this paper to venture into the theoretical discourse of property rights. Of choosy interest is the courts’ constant application of this right when deciding environmental disputes.

The question here is: do property rights opposed to the protection of environment? The answer is a big no. Not only do property rights not opposed to the protection of environment but it has proven to be one of the best weapons to guarantee the protection of environment. After all, no one can be a better protector of environment than he who owns it.³⁷ The right to property and freedom from interference fall within the class of civil and political rights and it has been invoked for the protection of environment. The right to property implies that an occupier is entitled to non-interference by the government and corporate bodies. The more orthodox right to

³⁶ Rhoda Howard-Hassmann, “Reconsidering the Right to Own Property” *Journal of Human Rights* 12(2), (2013), 1-6.

³⁷ Namita Wahi, “The Fundamental Right to Property in the Indian Constitution” <https://cprindia.org/sites/default/files/chapters/The%20Fundamental%20Right%20to%20Property%20in%20the%20Indian%20Constitution.pdf> [accessed 18/09/2021].

property is stated in article 17 of the Universal Declaration³⁸ which provides that “everyone has the right to own property” and that “no one shall be arbitrarily deprived of his property.” Article 8 of the European Convention provides that: “everyone has the right to respect for his private and family life and his home.”³⁹ The American Convention on Human Rights also contains similar provisions in its article 11(2) and 21 respectively. article 21 states that: “everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.”⁴⁰ The African Charter also states in its article 14 that: “the right to property shall be guaranteed.”⁴¹ The Nigerian Constitution also provides in section 37 that: “the privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communication is hereby guaranteed and protected.”⁴²

It is very clear that the right to property in the regional conventions is more muted than the expression of the Universal Declaration. They do not speak of ownership but instead of “use” and “enjoyment.”⁴³ Therefore, the right to property and non-interference incorporates two major aspects. First is the right to peaceful possession of property. Secondly, it subjects the dispossession of property to some specific conditions.⁴⁴ The first which is the right to peaceful possession of property has a close relationship with the environment. In a practical sense, property forms part of the environment.⁴⁵ This is because the property to which this right relates

³⁸ See the Universal Declaration of Human Rights 1948.

³⁹ See the European Convention on Human Rights 1950.

⁴⁰ American Convention on Human Rights 1969.

⁴¹ See the African Charter on Human and Peoples Rights 1981.

⁴² See the Constitution of Federal Republic of Nigeria 1999[as amended in 2011].

⁴³ Jona Razzaque, “Human Rights and the Environment: the national experience in South Asia and Africa” <http://www2.ohchr.org/english/issues/environment/envIRON/bp.4htm> [accessed 25/03/2020].

⁴⁴ Maria Tereza Leopardi Melloa, “PROPERTY” RIGHTS AND THE WAYS OF PROTECTING ENTITLEMENTS: AN INTERDISCIPLINARY APPROACH” *Journal of Contemporary Economics*, 20(3), (2016), 430-457.

⁴⁵ Pathak R.S., “The Human Rights System as a Conceptual Framework for Environmental Law” in *Environmental Change and International*

is either land and home, or water which forms part of the environment. Where the violation of the right to property occurs in a place that is individually owned, damage to the environment is perhaps damage to the property.⁴⁶ Thus, environmental damage or nuisance is seen as an interference with the user's enjoyment of the property. To this extent, the right to property can be invoked by an individual whose home or property is affected or likely to be affected by various forms of pollution or other environmental degradation, provided that responsibility can be attributed to the state. This does not mean that the state must always be the polluter.⁴⁷ The right can be invoked against corporate bodies engaging in various activities likely to cause environmental harms and damages. It is on this premise that courts have found a violation of this right without necessarily creating a new right. This has been done through expansive interpretation of the right to property in light of environmental protection. Hence, the dictate of time demands that this right be interpreted in a wider sense to include the protection of environment since there is no provision in international or regional human rights instruments that limit their application to the period when they are being made. Commenting on the need to expand the existing human rights provisions to encompass environmental protection, Nukhet Yilma argued that existing human rights provisions contained in both the regional and the global documents are of immense significance in the quest to ensure the

Law: New Challenges and Dimensions, ed. Brown Weiss (UN University Press: Tokyo, 1992), 205-243; Shutkin W.A., "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" *Virginia j. of Int'l L.*, 31, no 3 (1991): 479-511 at 504.

⁴⁶ Dinal Shelton, "Human Rights, Health & Environmental Protection: Linkages in Law and Practice" A Background Paper Presented at the World Health Organization, 2002, 6-7 & 23; Dias Clarence J., "Human Rights, Development, and Environmental in *The Universal declaration of Human Rights: Fifty Years and Beyond*, ed. Daniel Y., Stamatopoulou E., and Dias C.J. (Bayeord Publishing: New York, 1999), 395-401.

⁴⁷ Alenxandre Kiss, "International Human Rights Laws and Environmental Protection". <http://archive.unuredunupress/unupbooks/uu25ee/uu25ee0k.htm#environmentalissues> [accessed 25/03/2020]; Robert K. Hitchcock, "International Human Rights, the Environment, and Indigenous Peoples" *colo.j. Int'l Env'tl. L. & Policy* 5 (1994): 66.

protection of environment because they could be employed in a wider perspective to incorporate issues bothering on environment.⁴⁸

This line of reasoning has led to the emergence of new concepts such as, the right to survive as a species, the right to livelihood, the right to quality of life and the right to dignity.⁴⁹ Thus environmental protection through the instrumentality of the right to property would enjoy more flavours if construed from a wider perspective to include anything capable of preventing its enjoyment, which in this case includes environmental pollution. The inventive expansion of property rights to ecological resources could help address numerous environmental problems. Predominantly in the case of natural resources, property rights are a feasible and established means of enhancing sustainability when compared to the accessible political alternatives. Similarly, there is growing and feasible evidence that a failure to respect and protect property rights may dent environmental stewardship, especially on private land. This is important in a country where bulk of land is individually owned. The evidence becomes more glaring in a situation where the local people depend upon their land or resources within their reach for survival and as a means of fulfilling their basic human rights. For instance, in Nigeria, the people of Niger Delta are pronominally farmers and fishermen and as such, they heavily rely on their land and water as source of income and survival.⁵⁰ Therefore, any threat to these resources is a threat to property rights, which provide them means of sustenance. This is because many of the conflicts in the Niger Delta are associated with activities of the multinational companies engaging in oil exploration and the activities have always been destruction of their farms and lands and as such constitute a violation to their right

⁴⁸ Nukhet Yilma, "The European Court of Human Rights and the Right to Environment" *Ankara Law Review*, 4, no1, (2007): 1-24.

⁴⁹ Pushpinder Kaur, "Environmental Protection in India: Judicial Activism and Beyond" <http://www.airwebworld.com/articles/index.php?article=1421> [accessed 25/03/2020]; Rabindra Kr. Pathak, "Emergence of Environmental Jurisprudence in India: A case of judicial courage and craft" <http://www.airwebworld.com/articles/index.php?article=1382> [accessed 25/03/2020].

⁵⁰ See Amnesty International, Nigeria: *Petroleum, Pollution and Poverty in the Niger Delta*, Amnesty International Publications, United Kingdom, 2009, 14-17.

to property enjoyment.⁵¹ On this premise, property rights can be invoked by an individual or community whose homes or properties are affected or likely to be affected by various forms of pollution or other environmental degradation.

JUDICIAL DECISIONS

When it comes to the jurisprudence of the right to peaceful enjoyment of property and the freedom from interference, the regional human rights courts and commissions have played a momentous role in the respect. Hence, this paper seeks to rely on the decisions from these jurisdictions in the evaluation of such right. In the European Court of Human Rights, the complainants for the evaluated cases founded their actions in a number of Articles of the European Convention on Human Rights. However, Article 8 of the Convention is mostly used as a basis for court's judgments. For ease of clarity and presentation of argument and to really appreciate and understand the judgments of the Court that are examined below, it is necessary to reproduce the provisions of the Convention. Article 8 of the Convention states that:

Everyone has the right to respect for private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of other.

The main examples of interference with rights that provide a legal basis for the protection of environment are:

- i. Rejection of a planning permit for the construction of an industrial warehouse. Aim: Protection of a "green-belt". Claim: Breach of the right to property⁵²;

⁵¹ UNDP "Niger Delta Human Development Report" UNDP, 2006, 87-88.

⁵² *Pine Walley Developments Ltd and Others v. Ireland*, No. 12742/87, (Eur. Ct. H. R. 1991).

ii. Restriction on fishing with certain equipment, in certain areas and in certain times. Aim: Safeguarding future fish stocks. Claim: Breach of the right to property⁵³;

iii. Denial of a permit to keep the estate more than two years. Aim: Promotion of agriculture. Claim: Breach of the right to property⁵⁴;

iv. Denial of an exploitation permit for gravel. Aim: Restoration of the relevant area. Claim: Breach of the right to property⁵⁵; and

v. Refusal of a planning permit to place a gypsy caravan, requiring the discontinuance of the unauthorized use of caravans and removing of them from where they placed. Aim: Protection of the rural character of the relevant site, and the visual aesthetic of the countryside. Claim: Breach of the right to privacy.⁵⁶

In Europe, earlier decisions were based on the premise that if it can be established that the activities that have affected citizen's right to freedom from interference were for the purpose of economic well-being of the country, then no action would be entertained for the violation of the right to the enjoyment of property. This line of thought informed the European Commission on Human Rights decision in *S v France*,⁵⁷ *Rayner v United Kingdom*,⁵⁸ *Vearncombe v United Kingdom and Federal Republic of Germany*⁵⁹ and *G and E v Norway*.⁶⁰ In the case of *Arrondalle v United Kingdom*⁶¹, the applicant complained that noise from Gatwick Airport and a nearby motor way violated her rights under Article 8 of the European

⁵³ *Posti and Rahko v. Finland*, no. 27824/95 (Eur. Ct. H. R 2002); *see also* *Alatulkila and Others v. Finland*, Nr. 33538/96 (Eur. Ct. H. R 2005) (dealing with restriction of fishing).

⁵⁴ *Hakansson and Sturesson v. Sweden*, Nr. 11855/85 (Eur. Ct. H. R 1990).

⁵⁵ *Fredin v. Sweden*, Nr. 12033/86 (Eur. Ct. H.R. 1991).

⁵⁶ *Coster v. the United Kingdom*, Nr. 24876/94 (Eur. Ct. H.R. 2001); *Buckley v. the United Kingdom*, Nr. 20348/95 (Eur. Ct. H.R. 1995).

⁵⁷ Application 13728/88, 65 D & R [1990], 250.

⁵⁸ Application 9310/81, 47 D & R [1986], 5, 1-14.

⁵⁹ Application 12816/87, 59 D & R [1989], 186.

⁶⁰ Joined Application 9278/81 and 9415/81, 35 D & R [1984], 30.

⁶¹ Application No. 7889/77, Report of 13 May 1983, 26 DR.

Convention on Human Rights. The application was declared admissible by the commission but the matter was eventually resolved by means of a friendly settlement. Similarly, in *Baggs v United Kingdom*,⁶² the applicant also complained that the noise from Heathrow Airport violated his right under Article 8 of the European Convention. The case though admitted by the commission as one that can be instituted under the said provision was resolved by means of friendly settlement. It therefore follows that the two cases do not offer any guidance or precedence as to whether noise pollution could amount to a violation of Article 8 because the commission was never given the privilege to make its pronouncement on the question. However, the case of *Lopez-Ostra v Spain*⁶³ sets a standard as to the need to balance economic well-being of the community with the citizens' right to the enjoyment of their property, privacy, homes and family life. In this case, the applicant suffered serious health problems from the fumes from a tannery waste treatment plant, which had begun operating only a few meters away from her home. Her attempt to obtain compensation from the Spanish courts was completely unsuccessful. The European Court of Human Rights held that there had been a breach of Article 8 of the European Convention on Human Rights. The court stated that the Spanish authorities did not succeed in striking a fair balance between the interest of the local municipality's economic well-being and the applicant's effective enjoyment of her right in respect of her home and private and family life. The Court held that uncontrolled pollution of the environment may greatly impact the wellbeing of the people in a way to prevent them from enjoying the right to their private homes while at the same time threatening their very existence.

Subsequent decisions follow similar trends through reliance on Article 8 of the Convention. For instance, in the case of *Moreno Gomez v Spain*,⁶⁴ the noise coming from activities of the pubs and clubs were alleged to be seriously disturbing thereby made sleeping to be very difficult. The report from an expert confirmed that the noise levels were intolerable and undesirable. Evidence was given that all activities that created excessive noise have been banned from the council within the area but surprisingly, the same council gave license

⁶² Application 9310/81, 44 D & R [1985], 13.

⁶³ [1994] 20 Eur. Ct. H.R. 277

⁶⁴ [2004] ECHR 633 (16 November 2004)

to a new club in the area where the applicant resided. It was on that basis that the applicant lodged a claim against the council before the national court. The court held after considering all facts of the case that Article 8 of the European Convention dealing with protection of home and private life has been violated on the ground that the authorities had permitted and thus responsible for the continual infringement of the local laws relating to unnecessary noise. The Court further observed that the authorities had continually refused to abide by the stipulated regulations dealing with the control of sound and noise by granting permission for bars and clubs with the resident area and as such violated with impunity the rights protected by Article 8. Also, in the case of *Taşkin and Others v Turkey*,⁶⁵ there had been a court decision invalidating a permit granted to operate a gold mine within a particular area considering the technique involves in the process but the authorities refused to abide by the decision of the court and went ahead to grant further permit. In an application brought by the applicant, the court held that the applicant's right to private and family life had been violated under Articles 6 and 8 of the European Convention. In the case of *Fadeyeva v Russia*,⁶⁶ the applicants were exposed to fumes and pollution arising from enormous steel works close to their residence. Although the authorities had provided temporary housing for all the inhabitants within a particular zone away from where the steel works is taking place, the applicants had obtained a court order ordering that they be re-housed outside the zone. However, this order was never carried out, and all efforts by the applicants to enforce the order proved abortive. In a subsequent application to the court for the enforcement of their rights, it was held that there had been a violation of Article 8 (right to private, family life, and no interference by a public authority). *The European Court of Human Rights in the case of Tatar v Romania*,⁶⁷ unanimously held that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, on the failure of the Romanian authorities to respect and protect the right of the applicants residing within the locality of a gold mine, to enjoy a healthy and safe environment. Similarly, in the case of *Leon and Agnieszka Kania v*

⁶⁵ [2004] ECHR 621 (10 November 2004).

⁶⁶ [2005] ECHR 376 (9 June 2005).

⁶⁷ Application no. 67021/01. (27.01.2009).

Poland,⁶⁸ two Polish nationals were the applicants that filed a claim before the European Court of Human Rights (ECtHR) against the Republic of Poland. They complained about the inability of the administrative authority to take proper action against activities of the craftsmen's cooperative operating very close to their home. Their claim was premised on the fact that excessive noise produced from the cooperative is unbearable and have subjected them to serious health challenges. On 21 July 2009, the European Court held that the applicants have been denied proper fair hearing considering the failure of the administrative authority to hear their argument and acted forthwith. With regard to the applicants' right for private and family life, the Court held that although there is no express provision in the Convention to a clean and quiet environment, Article 8 of the Convention may be employed. The court gave an elaborate interpretation to include the same against an individual or the state for failure to prevent pollution when the law actually imposed one. Nevertheless, the Court came to the conclusion that it has not been proved that the noise levels envisaged in the present case are so severe as to reach the level complained in this case. Therefore, the Court held that the evidence adduced has not shown the violation of Article 8 of the Convention.

The European Court, in reaching its decision had to evaluate the general interest, represented in the governmental interference by the Defendant State, and individual rights protected under Articles 8 of the Convention. The Court further evaluated whether the defendant had maintained a fair balance or had exceeded the discretion permitted. Consequently, the Court purposefully considered the rule of *legality*, *legitimate purpose*, and *proportionality* to weigh the conflicting interest. The Court finally concluded that there had been a violation of the applicant's rights, and ruled in favour of the applicants. Thus, the Court took sagacious and solid approach when assessing the effect of interference with the claim of the applicants' rights. Obviously, the Court did not consider the simple existence of the *relevant reasons* to be sufficient but rather whether the selected means or reasons were *decisively needed* to accomplish the genuine governmental purpose desired. Deciding in favour of the applicants, the Court based its decisions on the premise that the key basis put forward by the States, the protection of the economic well-being of

⁶⁸ *Application no 12605/03 (21.07.2009)*.

the country, cannot be well thought-out to be satisfactory and enough to justify the first paragraphs of Article 8 of the Convention. On this note, the defendants' States were held not to have strike a fair balance between the competing interests.

The Inter-American Commission of Human Rights has taken a similar approach in cases relating to logging, oil extraction and mining on land that belongs to the indigenous peoples. The right to enjoyment of property have play significant role in this regard. For instance, in the case of *Awas Tingni Mayagana (Sumo) Indigenous Community v Nicaragua*⁶⁹, the petitioner had challenged protested government-sponsored logging of timber on indigenous forest lands in Nicaragua. The government granted the logging concession without consulting the Awas Tingni community, despite having agreed previously to do so. The community alleged violation of the rights was relating to cultural, property and participation in government. In 1998, the Commission found in favour of the community and submitted the case to the Inter-American Court on August 31, 2001. The court issued its judgment declaring that the right to property guaranteed under article 21 of the American Convention on Human Rights has been violated. It unanimously held that the state must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanism for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses and customs. By this decision, the court has interpreted the right to property in a broader sense to ensure the protection of indigenous properties, which the community depend upon for subsistence. Similar decision was held by the Commission in the case of *Maya Indigenous Community of the Toledo District v Belize*⁷⁰ where the Commission emphasized on the need to strike a balance between development project and the rights of indigenous people to the enjoyment of their indigenous properties. The Commission states that:

This Commission similarly acknowledges the importance of economic development for the prosperity of the populations of this Hemisphere. As proclaimed in the Inter-American Democratic

⁶⁹ Mayagna (Sumo) Awas Tingni Cmty. V. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

⁷⁰ [2004] Case 12.053, Report No. 40/40, IACHR, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727.

Charter, '[t]he promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy of the states of the Hemisphere.' At the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.).

The above expositions of Inter-American Commission decisions show the readiness to interpret the language of human rights guaranteed in the international human rights instruments to include the positive right to a clean and healthy environment. This approach is a clear manifestation of changing circumstances that warrant the interpretation of protected rights both in international, regional and national human rights instruments beyond their traditional foundation.

The African Commission on Human Rights, which has the mandate to promote and protect the right protected in the African Charter on Human and Peoples' Rights, has also adopted a like approach in the protection of environment. Unlike the European Court of Human Rights that has grown sporadically over the years in its approach to the protection of environment through the instrumentality of human rights, the African Commission is still developing. The sole and emerging case to be examined here is the case of *Social and Economic Rights Action Center and the Center for Economic, and Social Rights v Federal Republic of Nigeria*.⁷¹ The fact of this case was as follows: In March 1996, two NGOs, Social and Economic Rights Action Centre (SERAC) based in Nigeria and the Centre for Economic and Social Rights (CESR) in New York brought a complaint on behalf of the people of Niger Delta especially the Ogoni People in whose area Nigeria exploit vast of its oil resources. The complaint alleged series of violations of basic rights of the people of the region protected under the Charter and the Nigeria Constitution. The complainants in their communication alleged that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means and that the government has

⁷¹ Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria*.

participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. The applicants added that the destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.

It could be observed that the focus of these complaints was based on environmental impacts of oil exploitation in the Niger Delta with its concomitant violations of human rights. The extent of these violations has denied people access to means of fulfilling their basic human rights because the natural environment, which serves as the resources base and means of livelihood to the people has marginally been altered. The allegations were based on various provisions in the Charter including Article 14, which deals with the right to property. After considering the complaints, the African Commission stated that Article 14 is closely related to the protection of environment and safety of the people. It was held that the pollution and degradation of the land and water of the people of Niger Delta by the oil companies operating in the region, which serve as their resource base for survival, amount to a violation of the right of the people to property as guaranteed in Article 14 of the Charter. The commission noted and held:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

The decision of the Commission in this case was a landmark decision because it represents the turning point where the provision of the Charter was interpreted broadly to incorporate the protection of environment. This decision pointed to the indivisibility of human rights and environmental pollution. The Commission through wisdom and creativity has been able to find a violation of the right to property through interpretation of the enabling provisions beyond their traditional connotation. This case serves as an eye opener to the people of Niger Delta and Nigerians as whole on the role and potency

of human rights in the protection of environment and enhancement of environmental justice to curb the regime of impunity of environmental degradation in Nigeria. The case was a realization that the Nigerians can seek remedies against activities of international corporations beyond the Nigeria soil.

EVALUATION OF THE COURTS' JUDGMENTS

Progressively, courts all over the world are more and more being asked to examine the connection between the pollution of environment and the enjoyment of protected rights. In some circumstances, the allegations have not been based upon a specific right to a safe and sound environment, instead upon right to life, property, healthy, information, family and home life. The above courts' decisions can depict true pictures of willingness and readiness of the court to interpret rights in the international human rights instruments to include the protection of environment. Today, courts through its tendency to expand the existing rights in the international human rights instruments have step up from the traditional approach to an expansive approach in light of present situation. Traditionally, the right to property falls within the category of civil and political rights. Civil and political rights protect individuals against the intervention of state. This perception leads to the notion that civil and political rights imposed negative obligations on state. That is, obligation not to interfere with the enjoyment of individuals or collective property. However, a careful look at the above decisions show that the courts have expanded the traditional approach beyond mere non-intervention to include a positive obligation on state to prevent violations of the right to property from a third party. It is against this background that courts have found government at various levels to have violated this right for failure to comply with their positive obligations. The courts in the above cases based their reasoning on the fact that theoretically, human beings, under this formulation, have the right to a decent and clean environment. This observation also corresponds with the traditional notion of human rights, which above all aspire to protect human beings. The non-human species within the traditional approach are only being protected through their connections with human beings. Hence, only human beings are entitled to the full enjoyment of human rights under the classical theory of human rights. This perception leads to another

traditional social notion that environmental goods, other than human species, primarily possess instrumental value, which denotes that they only exist for human benefit, and do not possess inherent value in themselves. It is on this premises that the idea of right to environment has been criticized to be anthropocentric in nature. That is, to be human-centered. However, the above decisions when deeply accessed have shown that their implication goes beyond human benefit to include the protection of non-human nature. Thus, the protection in this respect serves two major purposes. First is for individual complainant and the other is for the environment itself. On this note, it is submitted from empirical perspective that if the claim that environmental pollution affects the enjoyment of basic human rights is true, then there is nothing inconsistency bringing environmental claim within the umbrella of the right to property. When a claim is instituted under a right to property, this permits the court to find a violation of this right without the necessity of creating a new right as such. What the courts have done currently are to define the right before it in the context of the fact of the case. Consequently, the court may find a threat to peaceful enjoyment of property on the facts before it and set a standard of environmental quality in defining the right litigated.

CONCLUSION

The degradation of the environment is noticeably being perceived from a universal perspective. The whole world has come to acknowledge the fact that environmental damages are increasingly endangering the quality of the environment. Since pollution does not value political borders, activities in one country have momentous consequences in other countries or even the whole universe. The gamut of this paper is the examination of a human rights approach to environmental protection. One thing that has materialized all through this paper is that great practical expansion will be necessary if a human approach to environmental protection was to be successful. It has been demonstrated in this paper that there are numerous relations between the protection of the right to peaceful enjoyment of property without interference and the environment. Owing to the momentous intersect in their objectives, an attempt to protect the environment and human rights are jointly strengthened. This is among the rationale for the curiosity that culminated the idea of a rights-based approach to the

protection of the environment. There is no doubt that the court is making a considerable contribution to the concept of environmental protection due to the wider interpretation of protected rights such as the right to life. This is more so that there is no provision in the international human rights instruments that limit their application to the time when they are made. As a concluding word, it needs to be mentioned that the increase in the environmental awareness in societies would be a decisive factor in the acceleration of all steps to be adopted by the court. However, the growing of severe negative impacts of environmental problem will increase such awareness, and it would be expected of the court to follow a more teleological interpretation reflecting these new concerns as the daily facts are required.