

Examining the Nexus between Environmental Rights and Environmental Justice from Human Rights Perspective*

Sezai AĐLAYAN**

Abstract

Environmental rights have been specified as human rights in some human rights regimes, such as in the Inter-American Human Rights System and African Human Rights System over the last quarter. The concept of Environmental Justice (EJ) which arose in the US in the late 1970s and which focuses on the fair distribution of environmental burdens and benefits has been gaining importance depending on the recognition of environmental rights as human rights. It is therefore important that the recognition and adoption of environmental rights are concrete steps towards the maintenance of EJ which actually cares about human dignity from an environmental perspective.

Key words: Environmental Justice, Environmental Rights, Human Rights

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** Research Assistant at Ondokuz Mayıs University, Faculty of Law, International Law department, PhD Candidate at Karadeniz Technical University Law Faculty Public Law

Introduction

The combination of justice and the environment in one phrase gained currency at the end of the 1970s. The concept of EJ which aims at the fair distribution of environmental costs and benefits among people was first academically studied by Bullard in 1990.¹ According to Bullard, 'race' and 'class' are the main factors which cause environmental injustices.² People of colour and economically disadvantaged groups have been negatively affected by these environmental inequalities.³ The EJ movement which is behind the empowerment of the idea of EJ was therefore initiated by those who had been intentionally subjected to environmental inequalities in the US.⁴ In the wake of the movement and the idea of EJ, the environment was approached from a different angle. In contrast to the traditional definition, it was defined as a place 'where people live, work and play'.⁵ The concept of EJ then began to affect environmental policies and regulations by way of demonstrations and legal victories in the US and across the world.

The protection of the environment has started to be discussed as a matter of human rights. Indeed, the classical approach to human rights had not dealt with the preservation of the environment in the strict sense.⁶ However, after some important international conferences on the relation between the environment and human rights, such as the Stockholm Conference,⁷ the environment became recognised in the field of human rights. Following this, regional human rights regimes have attached an importance to the environment and some of them have adopted an environmental right in their treaties, such as the African human rights system and the Inter-American human rights system.⁸

This paper argues that the recognition of environmental rights as human rights has been beneficial to the maintenance of EJ. The adoptions of international conventions have played significant role in this contribution since the second half of the twentieth century. More importantly, the treaties of the Inter-American Human Rights System and the African Human Rights System set examples in this regard. The Aarhus Convention is also one of the leading conventions which grounds EJ in a more detailed way.

¹ Robert D Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (3rd edn, Westview Press 2000)

² Ibid

³ Ibid

⁴ Renee Skelton and Vernice Miller, 'The Environmental Justice Movement' (NRDC, 10 December 1996)

<<http://www.nrdc.org/ej/history/hej.asp>> accessed 30 August 2014

⁵ Marina D O Finger and Felipe B Zorzi, 'Environmental Justice' (2013) 1 UFRGS Model United Nations Journal 222

⁶ Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection' (2010) 1 Journal of Human Rights and the Environment 7

⁷ Declaration of the United Nations Conference on the Human Environment 1972

⁸ The African Charter on Human Rights and Peoples' Rights; Additional Protocol to the American Convention on Human Rights 1988

This paper consists of three sections. The first section will begin with the explanation of what EJ means then a brief historical information will be given. The second section will examine how environmental rights as human rights contribute to EJ by giving a place to different approaches as to environmental rights in the context of human rights. Legal arrangements will then be cited in order to show the developments of EJ. In the last section, EJ will be assessed in regional human rights systems. The Inter-American Human Rights System and the African Human Rights System which contain a provision about the environment in their status will be questioned that how much they are convenient for the protection of those that EJ care. As the third regional human rights mechanism, the European Human Rights System of which treaty is the European Convention of Human Rights which does not mention the environment in itself will be a topic of another discussion.

1. What Is Meant By Environmental Justice?

The term EJ as defined by the US Environmental Protection Agency (EPA) refers mainly to the environmental struggle between the North and South of the globe.⁹ According to the EPA, EJ means that everyone on earth irrespective of their ‘colour’, ‘race’, ‘income’ or ‘national origin’ has the right to ‘fair treatment’ and ‘meaningful involvement’ within the context of the enjoyment of environmental policies, practices of environmental laws, developments and implementations.¹⁰ The work of the United Church of Christ (UCC) and Bullard’s book on EJ were initial and valuable steps in clarifying the relations between race, class and toxic waste.¹¹ Bullard describes EJ as the fair distribution of environmental burdens and benefits.¹² However, there are a number of notions to be taken into consideration concerning EJ, such as environmental racism, environmental equality, environmental injustices, environmental discrimination and environmental segregation. Environmental racism (ER) is, for example, important according to Bullard in that it includes every kind of environmental policy, implementation or instruction which results in discrimination (with a good or bad grace) between people or communities on the basis of race or colour.¹³ He also

⁹ Carmen G Gonzalez, ‘Environmental Justice and International Environmental Law’ in Shawkat Alam and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013)

¹⁰ Robert D Bullard (n 1) 138

¹¹ Ronald G Burns and others, *Environmental Law, Crime, and Justice* (LFB Scholarly Publishing LLC 2008) 181

¹² Robert D Bullard (n 1)

¹³ Robert D Bullard, ‘Environmental Racism and ‘Invisible’ Communities’ (1994) 96 W. Va. L. Rev. 1037

maintains that EJ and ER are not the same notions and cannot be used for another.¹⁴ On the other hand, Kameri-Mbote and Cullet assert that the two notions have almost the same meaning in the context of the distribution of environmental burdens and benefits.¹⁵ Burns et al agree with Bullard, stating that EJ is broader than ER.¹⁶ Accordingly, an extensive definition of EJ comprising ‘distributive justice’, ‘procedural justice’, ‘corrective justice’ and ‘social justice’ was made by Kuehn.¹⁷ Despite the fact that everyone defines the notion in their own way, its meaning roughly amounts to the same thing and it will be considered as the fair distribution of environmental benefits and burdens throughout this work.

2. A Brief History of Environmental Justice

The primary examples of environmental injustices date back to the invasion of the American continent by Europeans.¹⁸ However, since there are no concrete works dealing with EJ problems that pertain to those years, the period after the second half of the twentieth century is good enough to assess the issue. Studies on EJ have been largely carried out by Bullard¹⁹ and other sociologists and lawyers in the areas where black communities live in the US, particularly in Houston, Dallas, Texas and Louisiana. Among these, Houston is the one with the largest Afro-American population in the South.²⁰ ‘Locally unwanted land uses’ (LULUs) and ‘toxic dumping’ had been located in these black and poor communities which have low resistance.²¹ Black people have therefore been faced with environmental as well as health problems since birth according to research conducted over the last forty years.²²

Having regard to the foregoing detrimental developments for black and poor communities, some positive legal steps have been taken for the maintenance of EJ across the nation. The Executive Order 12 898²³ (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) on EJ was signed by President Clinton as a result of the efforts of Dr.

¹⁴ Robert D Bullard, ‘Environmental Justice: It’s More Than Waste Facility Siting’ (1996) 77 *Social Science Quarterly* 493, 497

¹⁵ P Kameri-Mbote and P Cullet, ‘Environmental Justice and Sustainable Development’ (1996) IELRC 1/1996, 1 <<http://www.ielrc.org/content/w9601.pdf>> accessed 08 July 2014

¹⁶ Ronald G Burns and others (n 11) 181

¹⁷ Robert R Kuehn, ‘A Taxonomy of Environmental Justice’ (2000) 30 *ELR* 10681

¹⁸ Carmen G Gonzalez (n 9) 80

¹⁹ Robert D Bullard (n 1)

²⁰ Robert D Bullard, ‘Environmental Justice For All: It’s the Right Thing To Do’ (1994) 9 *J. Env’tl. L. & Litig.* 281, 292

²¹ Robert D Bullard (n 1) 3

²² *Ibid* 98

²³ The President’s Executive Order 1994

Bullard and Benjamin F. Chavis.²⁴ The National Environmental Justice Advisory Council (NEJAC) is another significant establishment founded by the EPA in 1993.²⁵ The EPA Region IV Waste Division Summit²⁶ and the Office of Environmental Equity²⁷ were also vital developments performed by the EPA. Moreover, EJ laws and programs were adopted by many Southern States including Louisiana and Texas in the 1990s.²⁸

3. How Much Do Environmental Rights as Human Rights Contribute to Environmental Justice?

The question of recognition of the right to environment as a human right has been one of the debates concerning everyone one way or another and more importantly environmentalists, human rights defenders and scholars. What is important here is how much EJ reaps a benefit from the recognition of the right to environment as a human right. Is EJ directly affected by this recognition, or does the present position of the environment in the field of human rights adequately serve EJ? The answers to these questions will be sought and then the regional human rights regimes including the Inter-American system and the African system will be assessed in this section.

Traditionally, the rights which people enjoy are primarily divided into three generations called 'first generation', 'second generation' and 'third generation' rights. This was the idea of Karel Vasak,²⁹ the former Secretary-General of the International Institute of Human Rights. 'Civil and Political rights' are the first generation rights (negative rights) which require states' non-intervention³⁰ while the second generation rights called Social, Economic and Cultural rights necessitate states to take positive action to secure these rights.³¹ The third generation rights, including the right to 'development', 'ownership of the common heritage of mankind' and 'healthy and ecologically balanced environment', which is the main theme of this section, follow the path.³² Even though this classification has been generally approved, some do not agree with this. For instance, Shelton

²⁴ Robert D Bullard, (n 20) 289

²⁵ 'National Environmental Justice Advisory Council' (EPA) <<http://www.epa.gov/compliance/ej/nejac/>> accessed 9 July 2014

²⁶ Robert D Bullard (n 1) 152

²⁷ 'Basic Information' (EPA) <<http://www.epa.gov/environmentaljustice/basics/ejbackground.html>> accessed 9 July 2014

²⁸ Robert D Bullard (n 1) 120

²⁹ Karel Vasak, 'A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' [1977] the Unesco Courier 29-32

³⁰ Ibid

³¹ Ibid

³² Ibid

claims that the importance attached to the first and second generation rights is not at the same level in all countries and international law.³³ It is also not clear whether the rights in each generation really belong to their generations.³⁴ The relationship between the generation rights and their negative/positive state liabilities show inconsistency between theory and practice.³⁵ In a similar way, Boyle asserts that environmental rights cannot be confined into only one generation right because they are enjoyed by people by means of civil-political rights as well as economic-social rights.³⁶ This debate shows that the position of environmental rights is an ongoing issue. It would, therefore, be good to investigate the necessity of environmental rights by discussing the relations between the environment and human life from different perspectives.

The debate as to the preservation of the environment, whether it is important for the environment per se or for the protection of human beings, is the primary point which needs to be examined. On the one hand, the 'Biocentric approach' argues that the environment is an asset in itself and its existence and values cannot be diminished by mankind with the exception of meeting their basic needs.³⁷ Stone agrees with this approach by stressing the protection of the environment, and he criticises the idea which does not recognise the environment as a right holder.³⁸ On the other hand, the 'Anthropocentric approach' defends the argument that the environment is a provider of natural sources for the maintenance of human life.³⁹ The importance of protecting the environment for the sake of human beings at the present time as well as in the future was also expressed under principle 2 of the Stockholm Declaration.⁴⁰ However, as Shelton points out, to say that the protection of the environment is important for humanity does not result in an explicit clash because the utilization of the environment by mankind is the result of an inseparable link between human beings and nature.⁴¹ From this point of view, this inseparable link between human beings and the environment has initiated the discussion of environmental rights within the framework of human rights.

³³ Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991-2) 28 *Stan. J. Int'l L.* 103, 122

³⁴ *Ibid* 123

³⁵ *Ibid* 123

³⁶ Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 *Fordham Environmental Law Review* 471

³⁷ Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilized Resource' (2008) 24 *S. Afr. J. on Hum. Rts.* 29, 30-31

³⁸ Christopher Stone, 'Should Trees Have Standing? – Toward Legal Rights For Natural Objects' (1972) 45 *Southern California Law Review* 450

³⁹ Loretta Feris (n 37) 32

⁴⁰ The UN Declaration 1972 (n 7) art2

⁴¹ Dinah Shelton (n 33) 109

Starting from the interdependency between the environment and human life, the recognition of an environmental right as a human right seems to be an essential development. ‘Healthful’, ‘safe’, ‘natural’, ‘decent’, ‘pure’, ‘clean’, ‘ecologically-balanced’ are the common notions used for this environmental right.⁴² The fact that human rights have been initiated by environmental activists⁴³ does support the recognition of an environmental right as well. In fact, the preservation of a ‘healthy environment’ is a precondition of the utilization of fundamental human rights as stressed by Picolotti.⁴⁴ In this sense, Fitzmaurice mentions three different schools one of which is against environmental rights whereas the others support the idea of the environment as a human right.⁴⁵ The one which is in favour of the environment is of the opinion that the right to environment is one of the fundamental human rights and the existence of other human rights is dependent on the recognition of this environmental right while the other school accepts that environmental right can only be derived from other existing human rights.⁴⁶ For instance, Sax expresses the fundamental criteria for the formulation of an environmental right by making a reference to democratic values.⁴⁷ First, the public should be informed about the decision-making process.⁴⁸ Second, everyone should be seen as equally important.⁴⁹ Last, the protection of the earth and future generations from impoverishment should be valued.⁵⁰

Nevertheless, the opponents of the recognition of an environmental right as distinguished from the existing human rights argue that the enforcement of an environmental right as a human right is not possible because of the far-reaching nature of environmental rights in a judicial context.⁵¹ Environmental degradation like climate change is a universal problem which cannot be confined by borders, human rights law is, however, defective in its extra-territorial applications.⁵² The fact that environmental rights unlike other basic human rights such as freedom of expression do not have any

⁴² Melissa Thorne, ‘Establishing Environment As a Human Right’ (1990-1) 19 Denv. J. Int’l L. & Pol’y 301, 309

⁴³ Kerri Woods, *Human Rights and Environmental Sustainability* (Edward Elgar Publishing 2010) 3

⁴⁴ Romina Picolotti and Jorge D Taillant (eds), *Linking Human Rights and the Environment* (The University of Arizona Press 2003) 48; see also Richard P Hiskes, ‘Environmental Human Rights and Intergenerational Justice’ (2006) 7 Human Rights Review 81, 82

⁴⁵ Malgosia Fitzmaurice, ‘The Right of the Child to a Clean Environment’ (1998-9) 23 S.III. U. L. J. 611,612

⁴⁶ Ibid 612,613

⁴⁷ Joseph L Sax, ‘The Search for Environmental Rights’ (1990-1) 6 J. Land Use & Env’tl. L. 93

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Philippe Cullet, ‘Definition of An Environmental Right in A Human Rights Context’ (1995) 13 Netherlands Quarterly of Human Rights 25, 34-5

⁵² Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 The European Journal of International Law 613

‘historical experience’ which can be used as a guide⁵³ is another criticism against them. Moreover, the occurrence of a clash in some cases between environmental rights and the right to property makes the situation difficult in a human rights context.⁵⁴ Due to these reasons, the recognition of an environmental right has not yet been realised. However, legal attempts towards recognising an environmental right in an international context have created the infrastructure of this right.

4. Legalisation of Environmental Justice

The creation of legal treaties and declarations has strengthened the position of the environment in the realm of human rights. The very first signal with regard to the recognition of the environment as a part of human rights was given in the United Nations General Assembly Resolution which pointed to the risk of technological developments on people’s fundamental rights in 1968.⁵⁵ A concrete step towards declaring the environment as a human right was then taken in the Stockholm Conference. Principle 1 of the Declaration, for example, lays emphasis on the importance of the environment for the welfare of peoples.⁵⁶ In 1988, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Economic and Social Council Commission on Human Rights investigated environmentally harmful products, toxic and wastes, and issued a resolution in this regard.⁵⁷ Similarly, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal signed in 1989 is another important development, the purpose of which is to preserve the environment and human beings.⁵⁸ It is therefore important to note that the environment has become more crucial and recognised as being a human right at an international level.

The legal arrangements for the empowerment of the environment as a human right have made a major contribution to EJ. The first principle of the Stockholm Declaration⁵⁹ underlines the elimination of environmental discrimination and similar treatments which is the main point of EJ in environmental policies. Besides this, the content of the Resolution adopted by the UN Sub-Commission⁶⁰ in 1988 which serves the environment as a human right is directly related to EJ because this Resolution like EJ aims at the prevention of the harmful effects of toxic waste on

⁵³ Joseph L Sax (n 47) 94

⁵⁴ Dinah Shelton (n 33) 137

⁵⁵ Melissa Thorne (n 42) 303; See also UNGA Res 2389 (3 December 1968)

⁵⁶ The UN Declaration (n 7) Principle 1

⁵⁷ Dinah Shelton (n 33) 129

⁵⁸ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989

⁵⁹ The UN Declaration (n 7) Principle 1

⁶⁰ Dinah Shelton (n33) 109

people's lives. The Basel Convention⁶¹ also makes a mention of the requirement of due diligence in terms of hazardous wastes which need to be eradicated for the preservation of EJ. As can be clearly seen, the attempts to make the environment a human right represent an effort to realise what the EJ defenders have also been trying to do.

In the case of the right to environment being recognised as a human right, it would provide benefits theoretically and practically.⁶² It could also prevent people being exposed to pollution.⁶³ Depledge and Carlarne claim that global warming caused by greenhouse gas emissions which are the result of human activities affect nearly 150,000 people each year.⁶⁴ For example, 30,000 premature deaths were seen in Europe in 2003 because of air pollution and the natural consequences of heat waves.⁶⁵ They further argue that in addition to the existence of the right to health and the right to protection of human beings from natural disasters like 'climate change' and 'loss of biodiversity' as well as man-caused disasters such as 'chemical and radiation pollution' and irresponsible agricultural measures, the right to a healthy environment must be recognised in order to uphold these existing rights.⁶⁶ When the right to health or in a similar way the right to life is taken into consideration in the existing instruments of human rights, it is necessary to recognise the right to a healthy environment as a combined right for guaranteeing health and life.

To conclude, in conjunction with the recognition of an environmental right, the maintenance of EJ will ideally progress in the way that everyone will share environmental benefits together with environmental burdens. Since the right to environment will be preventing or reducing the side effects of the above-mentioned manmade disasters, people and communities with low resistance will be able to find opportunities to protect themselves. Similarly, children or babies as one of the target groups of EJ will be relatively less affected by environmental pollution contrary to the specific examples given in the previous paragraph. Therefore, it could be said that the recognition of the right to health or a decent environment will without doubt positively affect the allocation of environmental benefits and burdens as proposed by EJ. However, because there is no substantive environmental right which is recognised as a human right in an international context, procedural rights play an essential role in the protection of the environment and human life as well. In this

⁶¹ Basel Convention (n58)

⁶² Michael H Depledge and Cinnamon P Carlarne, 'Environmental Rights and Wrongs' (2008) 42 *Environmental Science and Technology* 990, 992

⁶³ Aaron Lercher, 'Are There Any Environmental Rights?' (2007) 16 *Environmental Values* 355

⁶⁴ Depledge and Carlarne (n 62) 993

⁶⁵ *Ibid*

⁶⁶ *Ibid*

regard, the Aarhus Convention is an outstanding development which will be discussed under the following heading.

4.1. The Importance of the Aarhus Convention for Environmental Rights and Environmental Justice

The Aarhus Convention officially known as the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁶⁷ was adopted by the UN Economic Commission for Europe in Denmark in 1998.⁶⁸ Forty-six states and the European Union have ratified the Convention.⁶⁹ The Aarhus Convention as a multilateral environmental treaty is generally accepted as the most progressive one for environmental issues in international law,⁷⁰ and is therefore important in many ways.

One significant point with regard to the Convention is that it has strengthened the nexus between the protection of the environment and human rights by expanding Principle 10 of the Rio Declaration, and more importantly, it recognizes ‘the right to a healthy environment’.⁷¹ The first Article of the Convention explicitly mentions ‘the right to live in a healthy environment’ for present and future generations, and it requires party states to secure the three main pillars of the Convention namely ‘the right to access to information’, ‘public participation in decision making’ and ‘access to justice’.⁷² The Convention together with the evolution of the IEL has played an important role in the development of procedural rights⁷³ and this is a crucial step due to the absence of substantively recognised environmental rights. It is thus important to analyse each pillar of the Convention with regard to its contribution to environmental rights as well as EJ.

In the first place, access to information as already cited in the title of the Convention is an indispensable requirement for the protection of the environment and the maintenance of EJ. Articles 4 and 5 of the Convention allow the public to get environmental information which may prevent the

⁶⁷ The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998

⁶⁸ ‘Introduction’ (UNECE) <<http://www.unece.org/env/pp/introduction.html>> accessed 12 August 2014

⁶⁹ ‘Parties to the Convention and Their Dates of Ratification’ (UNECE) <<http://www.unece.org/env/pp/aarhus/map.html>> accessed 28 August 2014

⁷⁰ Mathew Hall, *Victims of Environmental Harm Rights, Recognition and Redress under National and International Law* (Routledge 2013) 84

⁷¹ Sueli Giorgetta, ‘The Right to a Health Environment, Human Rights and Sustainable Development’ (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 173

⁷² Aarhus convention (n 67) art 1

⁷³ Amedeo Postiglione, ‘Human Rights and The Environment’ (2010) 14 *The International Journal of Human Rights* 524, 521

occurrence of potential damages.⁷⁴ These Articles also require party states to take adequate measures for accessing environmental information. Free access to information might, however, be seen as a threat in terms of the confidentiality of states in some instances, yet, despite this, the Convention has been good at striking a balance between the confidentiality of states and the right to access to information through the Compliance Committee as remarked by Krämer.⁷⁵ The opportunity to know a risk before it occurs is a vital development for the protection of human life as a part of environmental human rights. Furthermore, when the disproportionate situation of black people, the have-nots and indigenous people compared to the whites in the South of the US are considered, it is clear that access to environmental information is important for EJ. If those people had such a right to access to environmental information they would be able to prevent the dumping of hazardous waste. Therefore, access to information is one of the supportive instruments for environmental rights and EJ.

Secondly, public participation in the decision-making process makes decisions meaningful and enforceable, and hence contributes to environmental rights and EJ. The provisions supporting public participation in decision-making are encountered in Article 6, 7 and 8 of the Convention.⁷⁶ Public participation can be ensured, for example, by means of public hearings.⁷⁷ The decisions taken in a society where the public is excluded from the decision-making process on environmental policies cannot be permanent. This phenomenon is clearly seen in EJ cases in the US. Due to the fact that the opinions of the people in the concerned areas in the US were not taken into account when locating LULUs and energy plants, those buildings could not be completed. Accordingly, the existence of the right to public participation in decision-making is crucial for preventing the same undesirable situations from taking place, and naturally it serves environmental rights and EJ.

Finally, access to justice as a third pillar of the Convention is certainly of vital importance for environmental rights and EJ. The Convention mentions access to justice under Article 9, which allows people to review the procedure before a judicial body as to whether their request for information is carefully considered or not.⁷⁸ In this way, the disadvantaged people who are the target groups of EJ can seek how much the information given reflects the reality. Thus, it would be ascertained whether or not there is ‘institutional discrimination’ as asserted by Bullard in environmental matters.

⁷⁴ Aarhus convention (n 67) art 4 art 5

⁷⁵ Ludwig Krämer, ‘Transnational Access to Environmental Information’ (2012) 1Transnational Environmental Law 95

⁷⁶ Aarhus convention (n 67) art 6 art 7 art 8

⁷⁷ Ibid

⁷⁸ Aarhus convention (n 67) art 9

5. Environmental Rights and Environmental Justice In Regional Human Rights Systems

5.1. Environmental Rights and Environmental Justice in the Inter-American Human Rights System

The preservation of human rights in the continent is under the control of the Organization of American States (OAS) with 35 member states.⁷⁹ The Inter-American system consists of two main institutions, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR), and two treaties called the 1948 American Declaration on the Rights and Duties of Man (the American Declaration) and the 1969 American Convention on Human Rights (ACHR).⁸⁰

The right to environment had not been included either in the American Declaration or in the ACHR when they were first adopted. However, the ‘Right to a Healthy Environment’ was subsequently adopted in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights (the San Salvador protocol).⁸¹ Before the adoption of this protocol, the IACHR and the IACtHR were dealing with environmental matters by referring to ‘the right to life’ and ‘the preservation of health and well-being’.⁸² For example, the case of *Yanomami*⁸³ played an essential role in the recognition of the right to a healthy environment in the San Salvador Protocol.⁸⁴ This case is related to the protection of the lifestyle and culture of the Yanomami indigenous community in their fight against the construction of a highway and mining project on Yanomami land.⁸⁵ The case of *Maya Indigenous Community*,⁸⁶ which was decided by the Commission after the adoption of the San Salvador Protocol, was another important case which shows the relevance of the Inter-American system in terms of indigenous people. Therefore, the case law has shown the positive approach of the Inter-American system towards environmental rights of disadvantaged groups.

The recognition of the right to a healthy environment in the Inter-American system enables EJ to be achieved. As discussed in the beginning of this section, the recognition of an environmental right is

⁷⁹ Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2013) 2

⁸⁰ H Steiner and others, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008) 1020

⁸¹ The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights 1988 art 11

⁸² Sueli Giorgetta (n 71) 178

⁸³ *Yanomami v Brazil* case 7615 Inter-Am CHR Report No 12/85

⁸⁴ Sueli Giorgetta (n 71) 178

⁸⁵ *Yanomami* (n 83)

⁸⁶ *Maya Indigenous Community of the Toledo District v Belize* [2004] IACHR Case 12.053 Report No 40/04

the primary concern for the maintenance of EJ because those who suffer from environmental injustices need such a legal foundation to support their allegations. The Yanomami community can be accepted as one of the targets of EJ. The IACHR thus concluded the case in accordance with the main aim of the EJ which proposes the fair distribution of environmental burdens and benefits. It is, therefore, important to note that positive developments can be seen in the Convention as well as in the case law of the Inter-American system for environmental rights and EJ.

5.2. Environmental Rights and Environmental Justice in the African Human Rights System

The African human rights system is one of the three regional human rights regimes and also the latest one to be established under the African Union (AU)⁸⁷ which was founded by the Constitutive Act in the Lome Summit in 2000.⁸⁸ The African Charter on Human and People's Rights (also known as the Banjul Charter, hereinafter the ACHPR) aims at the preservation and the promotion of human rights in the Continent.⁸⁹ The ACHPR is the first single regional instrument which incorporates different human rights classes in a single treaty.⁹⁰ Furthermore, the African Commission on Human and Peoples' Rights established in 1987 and African Court on Human and Peoples' Rights founded in 1998 are the institutions of the system which are responsible for the interpretation and monitoring of the Charter.⁹¹

The African human rights system is prominent because it substantively protects the environment as a human right. The ACHPR is the first regional convention which directly mentions an environmental right as the 'Right to a General Satisfactory Environment' under Article 24.⁹² The case of *Ogoniland*⁹³ is a clear indication of the success of the African human rights system in this context. This case is related to the oil production attempts of the Nigerian Government in the Ogoni area in which indigenous people lived. The African Commission held that the Federal Republic of Nigeria violated Article 24 of the ACHPR and some other fundamental rights including the 'right to

⁸⁷ 'African Human Rights System' (International Justice Resource Center) <<http://www.ijrcenter.org/regional/african/>> accessed 15 August 2014; The African Union is the new form of Organisation of African Unity (OAU)

⁸⁸ Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 306

⁸⁹ 'African Charter on Human and Peoples' Rights' (African Commission on Human and Peoples' Rights, 2014) <<http://www.achpr.org/instruments/achpr/>> accessed 15 August 2014

⁹⁰ Eghosa O Ekhaton, 'Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of NGOS in Nigeria' (2014) 22 Afr. J. Int'l L. & Comp. L. 63, 67

⁹¹ Ibid

⁹² Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2010) 625; See also the African Charter on Human and Peoples' Rights Art 24

⁹³ 155/96, *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria*, 15th Activity Report of the Acomm HPR (2001-2002)

life' and 'freedom from discrimination'.⁹⁴ It shows that the protection of the environment in the African Human Rights system is realised by its special provision and also by basic existing human rights provisions.

The existence of an environmental right in the ACHPR and its implementation make the African system effective, especially for those who seek EJ. The *Ogoniland* shows that the African Commission has safeguarded the rights of minorities, which is important for EJ. For instance, the Commission expressed the need for positive obligation⁹⁵ by referring to the fact that the Nigerian Government had demolished the habitat of the Ogoni people.⁹⁶ The Commission has also mentioned the lack of access to information, which is one of the procedural environmental rights, and independent environmental assessment before the construction of hazardous activities on the land.⁹⁷ This official discrimination exhibited by the Nigerian government has shown Bullard to be correct because he described this situation as 'institutional discrimination'. Consequently, indigenous people who are relatively more vulnerable than a homogenous community are protected by the African system in accordance with the aims of EJ.

Conclusion

The perception as to the protection of the environment has shown an alteration together with the developments in human rights for the last four decades. The environment has had a new definition and been discussed in different contexts since then. EJ is one of the examples of these developments taken place during this period. EJ which aims at the fair distribution of environmental burdens and benefits among people became an important topic of the environment-related issues by EJ movements seen in the US in the late 1970's. Some other internationally vital developments like the UN Conference on the Human Environment has provided a basis for EJ.

⁹⁴ Ibid

⁹⁵ SERAC v NIGERIA [57]

⁹⁶ Ibid [62]

⁹⁷ Ibid [53]

That the environment has started to be discussed as human rights has forced some human rights mechanism to recognise the environment as human rights. The Inter-American Human Rights System and the African Human Rights System are the ones accepting this rights in their treaties. They had particularly referred to the protection of people such as indigeneous groups who EJ cares about. The cases which were mentioned in the previous sections also show the fact that the recognition of environment as human rights benefits for the maintenance of EJ. It is seen that the recognition of environment rights as a human rights is the first step towards the sustainability of EJ and naturally those who are negatively affected by environmental inequalities.

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