LAW & ENVIRONMENT

Coastal erosion, pushing the frontiers of remedies (2)

Dr Lanre Fagbohun, associate professor, Faculty of Law, Lagos State University, our guest coloumnist, takes a critical look at the causes and effects of coastal erosion on national development. He proposes a workable legal framework for protecting the environment against the danger and possible hazards of coastal erosion.

•Fagbohun

BACK to the legal framework, we must admit that our world is a political territory and notwithstanding the rhetoric of "global guardianship in the maintenance of the global commons", the reality of it is that the boundaries that mark the different territories exist. This in view, the territorial sovereignty each nation enjoys is co-extensive with its geographical boundaries, extends upward through its air traffic space and, in the case of the many nations with coastal borders, extends across an Exclusive Economic Zone (EEZ) running 200 nautical miles seaward. The implication of this on efforts to use the law in defending the environment is that there are constraints in the way a country's internal behaviour to his environment can be influenced.

In the words of Christopher Stone, if the outside world wishes to influence a country's internal behaviour to constrain deforestation for example – its recourse is limited. International organizations can try to persuade a developing country's leader of the long term benefits of scale and pace of development which is environmentally disruptive... However, as long as a nation is chewing up only its own inside, it is not, in the eyes of international law, doing anything it can be sued over". Consequently, every nation can within its sovereign territory exercise its own authority on its environment.

For obvious reasons, we cannot in this article discuss all municipal laws touching and concerning the coastal zone. Rather, our scope will be limited to some of those laws dealing with the authority under which human activities that can result in coastal erosion are presently being carried out.

For Nigeria, the appropriate starting point is the 1999 Constitution. Under Section 20 it is provided that the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. There is no specific reference in the Constitution to the powers of the federal, state and local governments to make laws with respect to coastal erosion. The Constitution however listed several powers which when subjected to certain basic principles of interpretation are likely to confer substantial Federal authority with respect to management of the coastal area.

In relation to human activities that may result in coastal erosion, reference can be made to the exclusive powers of the Federal Government to legislate in respect of fishing and fisheries, maritime shipping and navigation, and water from such source as may be declared by the National Assembly to be sources affecting more than one state. In all these and other cases, federal law prevails over state law in the event of conflict.

Against the above background, it is proposed to discuss some of the relevant laws that have been made pursuant to the above powers.

Navigable Waterways (Declaration) Act

Under this law, certain rivers, creeks, lakes, lagoons and intra-coastal waterways specified under the Act were declared Federal navigable waterways. The primary purpose of the law was to ensure that no person, firm, state or corporation can obstruct a declared waterway, take sand, gravel or stone from any declared waterway, erect permanent structures within the right of way, or divert water from a declared waterway without the consent of the Inland Waterways Department and the approval of the Minister.

Consequently, the management direction and control of the navigable waterways were vested in the Minister.

Laudable as the provisions of this Act would seem to be, past practice suggests certain weak links. First, while we can profess a characteristic such as structured policy co-ordination as likely to lead to effectiveness, the major bane of policies in Nigeria has always been political instability. Second, laws of this nature are half-hearted measures in the protection of the environment because the primary focus and orientation most times of those implementing them is how to use the laws to generate money and aid economic growth. From time to time, permits are given to those who can afford it at the expense of the environment.

The above in view, not only must we seek a stable polity that will afford us stable policies, we must further develop educational programmes that will sensitize functionaries who hold our 'commons in trust of the environmental and ecological imperatives of their roles.

River Basins Development Authority

Pursuant to Section 1 of the above Act, the Federal Government established eleven River Basin Development Authorities. One of their functions among others is to undertake comprehensive development of both surface and underground water resources for multi-purpose use with particular emphasis on the provision of irrigation infrastructure, the control of floods and erosion, and for water-shed management. The observation earlier made in respect of the Navigable Waterways (Declaration) Act also holds good here. In addition, our lack of adequate scientific and technological knowledge have resulted in our inability to formulate the kind of environmental measures above envisaged.

Environmental Impact Assessment Act

Viewed against the backdrop that the usual causes of artificial coastal erosion (as against natural coastal erosion) are those human activities which alter the natural topography or vegetation of the coastal area, perhaps the most prolific legislation in the management of the problem is the Environmental Impact Assessment Act.

As defined by the U.K. Department of the Environment, an EIA "is essentially a technique for drawing together, in a systematic way, expert qualitative assessment of a project's environmental effects, and presenting the results in a way which enables the importance of the predicted effects, and the scope for modifying or mitigating them to be properly evaluated by the relevant decision-making body before a decision is given. Environmental assessment techniques can help both developers and public authorities with environmental responsibilities to identify likely effects at an early stage, and thus to improve the quality project planning and decision-making.

Appropriately employed, EIA is a key integrative element in environmental protection policy. It is not to be regarded as a procedure for preventing actions with significant environmental impact from being implemented, rather, the aim is to ensure that actions are authorised in the full knowledge of their environmental consequences.

Regrettably, the aim of EIA are not being achieved in Nigeria. As has been noted, developing countries (like Nigeria) are not in the true sense of it having the benefit of EIA. The reasons for these are many and may be briefly highlighted as follows:

• there is a lack of trained human resources and of financial resources and this often leads to the preparation of inadequate and irrelevant EIA reports;

• the organizations responsible for EIA are frequently lacking in status and political clout and working in a culture where absence of information sharing considerably reduces their influence;

• the top-down nature of EIA requirements in many developing countries is such that it frequently applies only to grant-aided projects. In other instances, they are put in place purely to satisfy the development assistance requirement of donor agencies;

• the over-long and descriptive EIA reports are most times too technical for public participation. The result of this, together with the lack of a culture of participation and low levels of literacy is that the requisite feedback knowledge is never there. In the absence of this 'consultation and participation' the EIA is meaningless;

• the result of the several loopholes in statutes by virtue of which mandatory EIA processes can be evaded is that many activities which have the potential to cause environmental damage go through unconsidered;

• most EIA are simply motivated to justify a decision (usually to develop) which has been made and are only concerned with remedial measures. Rarely do they consider alternative courses of action at an early stage of the project planning cycle in order to choose the most environmentally favourable.

Various means of addressing the above difficulties have also been suggested

• there should be a focus on capacity building and training to create local centres of EIA expertise. The personnel should also be adequately motivated;

• efforts should be made to employ methodologies appropriate to conditions in developing countries to ensure that the reports are not too academic, bureaucratic mechanistic and voluminous;

• data retrieval and management systems should be improved while inter-ministerial and/or inter-institutional relationship should be harmonized such that they stop seeing one another as rivals;

• local participation in the EIA process should be effectively encouraged;

• finally, the review stage of the EIA process should be properly incorporated.

Water Resources Act

This is another very important instrument in the protection of the waters of Nigeria. Pursuant to Section 1 (1) of the Act, the right to the use and control of all surface and groundwater and of all water in any water-course affecting more than one state as described in the schedule to the Act together with the bed and banks thereof, are vested in the federal government for the following purposes:

• promoting the optimum planning, developing and use of Nigeria's water resources;

• ensuring the co-ordination of such activities as are likely to influence the quality, quantity, distribution, use and management of water;

• ensuring the application of appropriate standards and techniques for the investigation, use, control, protection, management and administration of water resources; and

• facilitating technical assistance and rehabilitation for water supplies.

By virtue of Section 3, acquisition for rights to use or take water are to be in accordance with the provision of the Act and the regulations made pursuant thereto.

Merely looking at the purpose of the Water Resources Act as above outlined under Section 1 (1), we can conclude that all interest are represented. A closer and more critical look at Section 1 (1) would reveal, however, that issues relating to development as a motif has been given priority over environmental objective which is placed a distant third. This is anything but innocent.

Furthermore, it is observable that nowhere in the Water Resources Act was direct provision made for local public officials to play roles in the identification of critical environmental problems arising from or that may arise from the grant of license under the Act. The effect of this is that vigilance and proper monitoring cannot be assured. In this regard, other than the vague reference under Section 5 (vi) to "co-ordination of all detailed planning for the investigation, use" etc, it is worth noting that the proceedings in relation to administration of the Act is not in any way made open to the public. There is thus, no way by which ordinary citizens can become active agents of change in the promotion of an environmentally planned development. This clearly is one of the vital elements of genuine environmental reforms.

The coastal states have their sovereign rights and jurisdiction preserved for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the sea-bed, and subsoil and the super adjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water current and winds. They are however enjoined in their enjoyment of these rights to have due regard to the rights and duties of other states'

At the global level, international law is not activated until something a nation or foreign national does sweeps across her boundaries to create damaging effects in another country. In those circumstances, there is a consensus, at least it is universally verbalized that the injured neighbour has grounds for diplomatic and legal redress. Such invasion of another's territory can occur for instance where a coastal state alters he own shoreline to protect her property. The resolution of disputes of this nature is beyond any single nation's ordinary motivation and competence. It practically necessitate a multi-national co-ordinated effort.

An international instrument that has proved useful in this regard is the United Nations Convention on the Law of the Seas. As an international statement of general principles and obligations negotiated in detail by a large and representative number of delegates, it must be taken to reflect the consensus of states on how their relationships should be construed from time to time.

For coastal states, one of the key elements aimed at protecting their rights is that contained under Art. 21. Pursuant to this Article, a coastal state may adopt laws and regulations in conformity with the provisions of the Convention and other rules of international law, relating to innocent passage through the territorial sea, and among others for the preservation of the environments of the coastal state and the prevention and reduction and control of pollution thereof. It is expected that the coastal state shall give due publicity of all such laws and regulations.

Again, under Article 56, in the exclusive economic zone, the coastal states have their sovereign rights and jurisdiction preserved for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the sea-bed, and subsoil and the super adjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water current and winds. They are however enjoined in their enjoyment of these rights to have due regard to the rights and duties of other states.

What is significant is that as there are Articles conferring rights and duties on coastal states. There are also Articles of the Convention relating to the enforcement of these rights and duties. For developing nations, however, the major problem has always been how to effectively monitor such that it can deducibly be said that a particular activity in coastal state A resulted in a particular effect in coastal state B. The reason usually adduced for this has always been their lack of technical know how. This is why the issue of scientific and technical assistance to developing states as addressed by Article 202 should be of extreme interest. How we ensure that the goals of that Article are achieved and that it is made the necessary catalyst for promoting our ability to monitor those human activities that destroy our common interest is the crucial challenge.

In conclusion, coastal erosion as we have seen can be caused by both natural and artificial means. While we cannot stop but only seek ways of managing that which occur naturally, a lot can be done to stem that which occur artificially as a result of human activities in the coastal areas. Looking at the prevailing practices, the present picture of coastal erosion in Nigeria is that a lot cans till be achieved by way of reform of our laws. (Concluded).