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Human Rights and Environment

Riding the Wave of Change and Opportunity in the Americas

(Written for Legal Action 2004)

by Jorge Daniel Taillant¹

The last quarter century has brought enormous social and political change to the Americas. Following the end of the cold war era and the collapse of the egregious dictatorships of the 1970s and 80s, Latin American nations found themselves in an entirely reorganized international political arena, fueled by rapidly advancing communication technology, the abandonment of centralized top-down government paradigms, a strong focus on individuals and communities as the nucleus of social development, and grounded in nascent commitments to decentralization, local development, and democracy and its principles as the most desirable political and social constructs. The total economic, social and political collapse provided a unique opportunity to make a new beginning and rethink governance paradigms.

The continent began to build its new, albeit uncertain future upon a broad body of newly ratified international and regional human rights law, just as the world awoke from its cold war “nuclear” phobia to the more tangible and *real* imminent dangers of environmental collapse. “Sustainable development” became the buzz-term of development debate. The Stockholm Conference on the Human Environment of 1972 placed *people* at the center of discussion of environmental sustainability. The Earth Summit of 1992 furthered the sustainability concept to include social and economic pillars, and brought to an apex an era of global environmental conferences where human rights and environment were, albeit implicitly in some cases, at the center of debate.

Many Latin American nations rewrote their constitutions in this period and incorporated many articles in their nascent constitutions relevant to the environment, such as the explicit “right to a healthy environment”. The San Salvador Protocol to the American Convention established the Right to a Healthy Environment at a hemispheric level.

Civil Society in the Americas: A nascent focus on Human Rights and Environment

Human rights organizations in the hemisphere, largely born to expose the egregious abuses of past dictatorships, have focused their advocacy agenda naturally on civil and political rights of victims, which were generally rights violated during the “dirty war” years.² Environmental groups, which appeared on the scene at a similar juncture in time, were born of very different concerns, largely in reaction to the spiraling decline of environmental resources in the region, which is one of the most naturally rich in the world. Environmental groups grew exponentially in parallel to the world’s awakening to

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² The “dirty war” is the name given in the region to the worst years of military repression.

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our environmental problems. Advocacy in the environmental field was traditionally void of human content (and lacked human rights conceptions). Environmental advocacy was about natural resources (air, land, water, forests, etc), not about people.

The idea that the “environment” and “human rights” are somehow related, is actually quite new, and although it might seem natural to most that “human rights”, such as the right to health, property, life, cultural identity etc. can be adversely affected by environmental collapse, the practical rapprochement and unification of two advocacy movements, and of legal processes and systems to protect rights, has been difficult. In the early 1990s, a few environmental NGOs (non-governmental organizations) began an effort to bring the United Nations’ highest human rights agencies and environmental programs together. The post of Special Rapporteur on Human Rights and Environment was created and important advances were made to begin to monitor “human rights and environment” problems worldwide. However, the political timing was not yet ripe and the effort received strong opposition from country governments, who feared that the UN would use its policing forces against them (including economic sanctions) grounded on poor environmental records. The Rapporteur post was eventually renamed (narrowed in scope to focus on toxic wastes) and the initiative lost force.

In the late 1990s, a illegal lumbering case brought by the Awas Tingni indigenous community against the government of Nicaragua, found its way to the Inter-American Commission Human Rights (and later to the Inter-American Court on Human Rights), which was poised to reject the case on the ground that it was an “environmental case” and not a “human rights” case. The Commission viewed its primary role as a protector of “civil and political” human rights, and was accustomed to admit cases against dictatorial governments committing torture and killings. This case was different. It was about the impacts of environmental collapse on a community. Lobbied strongly by human rights and environmental NGOs³ to take the case based on its human rights merit (the human rights violated by the lumbering), the Commission recognized the Awas Tingni’s human rights and ordered Nicaragua to stop the logging. A new page turned for the continent.

Developments in the Americas since *Awes Tingni* have rekindled efforts to promote a greater linkage between human rights and environmental advocacy. Earthrights International, launched in the late 1990s with an international agenda focused largely at its origins on a human rights and environment case in Burma, and the Center for Human Rights and Environment (CEDHA) in Argentina, created specifically to promote this linkage in the hemisphere and worldwide, along with other organizations such as the Center for International Environmental Law and the Environmental Law Institute, have devoted targeted resources to promote this linkage. Slowly, Earthjustice (one of the original promoters in the early to mid 1990s) is reentering the push, partly through its stewardship of the Inter-American Association for Environmental Protection (AIDA) and in collaboration with CEDHA, is making an effort to get litigating environmental organizations across the Americas, to take up the human rights and environment agenda,

³ Romina Picolotti, a Human Rights attorney and co-founder of the Center for Human Rights and Environment, along with Durwood Zaelke, of the Center for International wrote the Amicus Curiae brief that convinced the Commission to admit the case.

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that is, to begin to look at environmental protection and litigation, through the optic of human rights. Renown environmental organizations throughout the Americas such as CEMDA in Mexico and SPDA in Peru, are launching human rights and environment chapters which are helping institutionalize the “human rights and environment” approach. These organizations are pushing forward inspired by cases such as *Awes Tingni*, in hopes that the Inter-American Human Rights System will be a new and effective venue to gain grounds in seeking redress and justice for the victims of environmental degradation with they defend. Newer efforts by networks such as Friends of the Earth, which recently held an international conference on Environmental rights in Colombia, and ELAW (a US based lawyers network with chapters in Latin America) are trying to establish regional human rights and environment agendas, from their own perspective, areas of action and understanding of what such linkages really mean for their advocacy agenda. In Argentina, for example, the newly launched Network of Argentine Attorneys for the Protection of the Environment,⁴ launched by CEDHA, is centering its networking and advocacy platform on what are clearly human rights and environmental linkages.

Human Rights and Environmental Advocacy Strategies

While bridging human rights and environmental issues may seem a logical direction for public interest and development legal advocacy, in a modern world where poverty is ever-increasing, where social development problems are mostly centered on access to clean water and sanitation, where industrial contamination is placing communities at enormous health risks, where climate change is affecting health patterns and conditions, where environmental degradation usually affects the poorer sectors of society (what is referred to as “environmental discrimination”), the real-life practicality of advocating such an agenda in our legal systems is no easy task. In many circles, human rights and environment discussion is cast as “environmental human rights” or “environmental rights”. Such reference posits both semantic as well as substantive questions. Are we speaking of rights of individuals or communities to “environmental quality”? Or are we speaking of human rights more generally, affected by the quality of the environment? The difference may seem trivial, but in fact, in the courtroom it may decide the outcome of a case.

The fight for a place on the legal agenda and inclusion in the list of priorities for public policy makers, for attorneys, judges and prosecutors, of “a healthy environment” and the expectation that the new generation of rights including “environmental rights” will gain priority, is still far from victory. Simply stated, “environmental rights”, and “a right to a healthy environment” (i.e. the right to a specific degree of environmental quality), are simply *not* top priority for judges and policy makers. Judges commonly shy away from handing down verdicts against powerful economic and political interests, in the name of protecting natural resources. In this respect, if the human rights and environment advocacy movement continues down the path of advocating for “environmental rights”, at least for the time being, it will have a difficult and uphill struggle ahead.

⁴ The *Red Argentina de Abogados por la Defensa del Ambiente*, was recently launched in a joint effort by CEDHA and the Environment and Natural Resource Foundation (FARN).

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An alternative platform, one that we have chosen at CEDHA, has to do with defending more traditionally understood human rights affected by environment quality. The right to health, life, property, etc, for example, with proper research and evidence gathering, can be clearly linked to environmental quality while placing the protection of people and communities (a stronger priority for judges) at the heart of the legal debate. Growing poverty and marginality offer fertile grounds for human rights advocacy, ranging from issues such as fresh water access, and land and property rights, to worker rights of scavenger communities, livelihood rights of riverside communities, and communities affected by industrial pollution, air contamination, etc.

Another hurdle we encounter in our legal advocacy work is showing causal effects between environmental degradation and specific impacts. While a cancer victim might live immediately underneath a PCB⁵-laced electrical transformer, proving in court that the pcb is *the* cause of the health illness is no easy task, largely because as a society, we have yet to reconcile the insurmountable differences that exist between a scientific world, in which the rigor of proof of causality is absolute, with the more lax real-life situation in which we live, where *probable cause* or *reasonable doubt*, *should* hold up when the evidence presented and the circumstances witnessed, so merit. When faced with this sort of difficulty of proving causality (which is quite common in human rights and environment cases), the human rights or environmental advocate might do better in defending his or her client based on the violation of procedural rights, such as the failure of the state or contaminator to provide information about a given situation, or to have properly conducted an environmental impact assessment.

Finally, and also on the human rights and environment agenda, we can mention the advancement of class action suits, in which communities or groups of individuals hold collective rights, in this case violated by environmental degradation. Class action suits are relatively new to the legal arena in Latin America. What is most appealing is the natural link between collective rights and environment. The environment is naturally a “collective good” and as such collective protection seems to be a natural fit. The collective approach is being tested in Latin America, in many countries. It is difficult to ascertain whether or not we are winning the legal battle. Nevertheless, more and more judges are familiarizing themselves with this type of suit, as more and more appear in the courts, and on environmental issues in particular.

What we are really talking about viewing social development and development problems more generally, through a rights-based optic, what some call, the “rights based approach to development”. Poverty, marginality, discrimination, informality, and many of the life conditions faced by poor communities are in fact, violations of human rights. In this respect, the issue of concern for most organizations, especially legally focused groups, is *access to justice*, that is, what can you do, really, and formally, when faced with a human rights problem.

⁵ Pcb is a carcinogenic toxin used as a coolant in older technology (such as refrigerators and transformers). It is known to have caused innumerable health impacts, including death.