Human rights and environmental wrongs: Achieving environmental justice through human rights law

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Abstract

The links between the environment and human rights are well established internationally. It is accepted that environmental problems impact on individuals’ and communities’ enjoyment of rights which are guaranteed to them under international human rights law. Environmental issues also impact on governments’ capacity to protect and fulfil the rights of their citizens. In addition to these links between the environment and human rights, it is argued that human rights principles offer a strategy for addressing environmental injustice. The justice implications of environmental problems are well documented, with many examples where pollution, deforestation or other degradation disproportionately impacts upon poorer neighbourhoods or areas populated by minority groups. On the international level, there are environmental injustices which exist between developed and developing states. Further, there are also potential injustices for future generations. This paper investigates the role of human rights principles in addressing these instances of environmental injustice, and argues that the framework of human rights norms provides an approach to environmental governance which can help to minimise injustice and promote the interests of those groups who are most adversely affected. Further, it suggests that the human rights enforcement
mechanisms which exist at international law could be utilised to lend more weight to claims for more equitable environmental policies.

Keywords: human rights, environmental justice, environmental equity, inter-generational equity, international law

Introduction

Environmental justice is concerned with the fair and equal distribution of environmental burdens and benefits at the local, national and international levels. It also strives to include in decision-making processes those who are most likely to be affected by environmental change. Environmental injustice can therefore be identified wherever there is inequality, unfairness or exclusion in an environmental context. This extends to potential injustices between developed and developing states, and between present and future generations. Instances of environmental injustice are often accompanied by, or constituted by, human rights violations. This paper investigates the role of human rights principles in analysing these instances of environmental injustice, and argues that the framework of human rights law provides a normative approach to environmental governance which can help minimise injustice and promote the interests of those groups who are most adversely affected by environmental change. Further, it suggests that the human rights enforcement mechanisms which exist at international law could be utilised to lend more weight to claims for more equitable environmental policies.

The place of the environment in the human rights legal framework

In his separate opinion in the Gabcikovo-Nagymaros case before the International Court of Justice, Judge Weeramantry stated that:
‘the protection of the environment...is a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the *Universal Declaration on Human Rights* and in other human rights instruments’ (1991: 207).

At international human rights law it is a well accepted principle that a healthy environment is a necessary precondition for the promotion of several recognised rights (Sachs 2003: 26). The environmental dimensions of existing human rights can be described as either direct or indirect: direct in the sense that a poor environment will directly limit an individual’s or a community’s ability to enjoy a specific right that is guaranteed to them, or indirect in the sense that a poor environment will affect an individual’s or a community’s capacity to realise their human rights generally, or impede a government’s ability to protect the rights of its citizens. In this sense environmental protection can be constructed as a prerequisite for the full enjoyment of human rights. The corollary of this approach is that environmental degradation can amount to a violation of human rights under international law. This section will outline some of the rights which are guaranteed under international human rights law and highlight the necessary role that the environment plays in ensuring these rights are fulfilled and protected. Part four of this paper will consider in more detail the practical possibilities for using human rights enforcement mechanisms to promote environmental justice.

*The right to health*

Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966) guarantees to all people the right to the highest attainable standard of health. This
right is also articulated in the Convention on the Rights of the Child (1989), the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the International Convention on the Elimination of All Forms of Racial Discrimination (1965).

In its General Comment 14, the United Nations Committee on Economic, Social and Cultural Rights elaborates on the scope and content of Article 12 of the ICESCR. It makes clear that the wording of the right to health in Article 12 is intended to include a wide range of socio-economic factors and underlying determinants of health, including ‘food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment’ as well as ‘the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health’ (2000). General Comment 14 clearly indicates that the environment is considered a significant contributing factor to achieving an adequate standard of health, and environmental problems such as pollution are constructed as barriers to full enjoyment of the right.

The right to an adequate standard of living

Article 11 of the ICESCR guarantees to all individuals the right to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living standards. This right is also guaranteed to children under article 27 of the Convention on the Rights of the Child. The right to an adequate standard of living is considered to imply the right to water (Committee on Economic, Social and Cultural Rights 2002) as well as the right to food (Committee on Economic, Social and Cultural Rights 1999). Where environmental degradation such as pollution, deforestation or desertification affects the
availability of clean and secure water supplies, or limits a community’s ability to provide adequate food and nourishment, then the right to an adequate standard of living is violated.

**Indigenous rights**

Human rights can also be adversely affected by environmental harm where the environment plays a particular role in the traditional cultural or spiritual lives of certain groups. Indigenous peoples in particular may experience violations of their rights where the natural environment around them is disturbed. A range of human rights are accorded to indigenous peoples. Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) (1966) states:

> ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

The International Labour Organisation’s Convention 169 includes measures to protect the environment of indigenous territories, as well as traditional activities such as hunting, fishing, trapping and gathering (1989). Indigenous peoples may also be entitled to self-determination, a right which is located in common article 1 of the ICCPR and the ICESCR. Under common article 1, all peoples have the right to dispose of their natural resources and must be protected against deprivation of the means of subsistence. The components of self-determination can be considered to be under threat from environmental harm.

The various possible forms of environmental harm, such as pollution, deforestation, exploitation of natural resources or climate change, have the potential to impact on a wide
range of human rights. The international human rights framework recognises that the environment is a significant factor contributing to a State’s ability to protect and fulfil its citizens’ human rights, and in some circumstances environmental harm has been held to amount to a violation of human rights guaranteed by law. This paper argues that human rights principles can be used as a normative framework to assist with decision-making and policy formulation and that doing so can help achieve just outcomes. The following section considers the nature of environmental justice in order to demonstrate the sorts of problems which a human rights approach can help address.

The concept of environmental justice

The term ‘environmental justice’ can be defined using a range of theoretical approaches, and encompasses a wide range of justice considerations. One formulation of environmental justice can be drawn from the emerging fields of eco-crime and green criminology, which provide an understanding of environmental justice based on conventional criminological discourses as they apply to environmental harm (see Walters 2010; White 2008). Another account of environmental justice is based on the theory of distributive justice, whereby just outcomes are assessed according to the equality and fairness with which environmental benefits and burdens are distributed between individuals, communities and States (Bosselman and Richardson 1999). This paper uses the distributive justice model, and argues that where environmental injustice is identified it is often accompanied, or constituted, by human rights violations.

In 1989 Edith Brown Weiss wrote what might be considered to be a rather farsighted paper on climate change and equity. She argued that climate change represented an issue for environmental justice in terms of its unequal effects for certain communities, countries or
generations. She drew on John Rawls’ theory of justice (1979) to identify the problem of achieving distributive justice between members of the same generation in relation to the effects of climate change. In doing so she highlighted one of the key injustices of climate change: that people in developing states are likely to be worse affected because of their vulnerability to environmental change and their lower capacity to adapt to it (2008: 618). Although this problem is particularly well-illustrated by the problem of climate change, the same kind of injustice can be found in relation to many forms of environmental degradation. It is often the case that environmental harm such as pollution or deforestation affects poorer communities more seriously, be it because of their reliance on the environment for subsistence and their consequent vulnerability to environmental harm, or their economic incapacity to cope with such harm successfully, or a combination of these factors. Climate change entails an additional facet of environmental injustice, in that many of the people who will suffer worst, and in all likelihood first, from the effects of climate change are among the least responsible for its causes.

Climate change also illustrates another level of environmental injustice: injustice between present and future generations. Because of the extensive time frame over which the results of global warming are played out, there is a disparity between past and current generations who have been responsible for greenhouse gas emissions, and future generations who will have to live with the consequences (Chandani 2007). Brown Weiss identifies inequities in terms of the quality of the natural environment which future generations would inherit, as well as their access to natural and cultural resources. Her theory of inter-generational equity incorporated three elements: conservation of options, conservation of quality and conservation of access. In discussing the challenge of climate change, she argued that our strategies must address
these three issues, and we must strive to leave the Earth in no worse condition than we received (2008: 623).

Environmental justice can therefore be interpreted as operating on two planes: intra- and inter-generational justice. These two layers of justice do not operate independently however. As Brown Weiss pointed out, ‘in the present generation, one cannot expect people to fulfil obligations to future generations if they are not able to satisfy their basic needs’ (2008: 216). She argued that a failure to address the needs of communities today would exacerbate the inequalities facing future generations. This presents one of the key ways in which human rights principles can help address environmental injustice: by working towards the protection and fulfilment of human rights for all people, and particularly for developing states, we can build capacity in these communities so they can more meaningfully engage with sustainable development practices, and focus their attention on the environmental legacy that they will leave for future generations. The following section will expand upon this notion of how a rights-based approach can help achieve environmental justice.

**A human rights approach to achieving environmental justice**

There are a range of ways in which a human rights approach to environmental problems can help achieve just outcomes. As outlined above, a human rights approach which works towards capacity-building in developing states can help establish the conditions necessary to encourage sustainable development and thereby improve the likelihood of inter-generational equity. Inter-generational equity is also bolstered by a rights-based approach because a broad understanding of human rights requires not only that we protect the rights of present generations, but also that we ensure that our actions today will not jeopardise the chances of future generations of enjoying those same rights.
In terms of intra-generational equity, human rights principles also have a valuable role to play. The capacity-building which Brown Weiss identified as a precondition to inter-generational equity also has positive consequence for environmental justice among members of the same generation. This can occur in a number of ways. Environmental problems may arise where impoverished communities or developing states strive to achieve economic development by any means available. By working towards full enjoyment of rights such as the right to adequate living standards, the right to education and the right to the highest attainable standard of health, these communities and their governments are under less pressure to pursue economic development at the expense of the environment, but are instead better able to take more environmentally compatible and sustainable measures. Capacity-building also helps reduce communities’ vulnerability to environmental exploitation by external parties, governmental or corporate. Further, when environmental problems do occur, such as those caused by climate change, communities possess greater resilience and capacity to adapt. This helps to mediate against the inequitable impact which climate change would have on developing states or otherwise vulnerable communities.

As well as promoting capacity-building in otherwise vulnerable communities, human rights principles can provide a normative framework to assist in more just decision-making in environmental governance. Where projects are proposed which would cause environmental changes, a rights-based approach would assess the human as well as the environmental impacts of such work. A rights-based approach also incorporates the concepts of non-discrimination and equity that are central to sustainable development, and which can help to ensure just outcomes for individuals and communities likely to be affected by environmental change (Atapattu 2008: 36).
In a practical sense the international human rights legal framework also offers a mechanism for achieving environmentally just outcomes. Human rights laws impose obligations on states to take steps to respect, protect and fulfil human rights. While the exact standard of obligation may vary depending on the particular right concerned and according to a state’s capabilities, at the very least states must refrain from activities which violate human rights. Where states fail to meet their obligations, criticism from the international community is given weight by international law. More significant in a practical sense may be the availability of human rights tribunals, courts and committees, which could be utilised by individuals and communities who allege their human rights have been violated (Posner 2007: 3). For example, an individual may bring a complaint to the Human Rights Committee where there is an alleged violation of a right contained in the ICCPR (First Optional Protocol to the ICCPR 1976: art 1).

Regional enforcement mechanisms may also provide an avenue for redressing environmental injustice. Several cases have already been successful before regional human rights tribunals, establishing that environmental degradation such as pollution or deforestation can amount to a violation of human rights. For example, in Lopez-Ostra vs Spain (1994) the European Court of Human Rights held that pollution caused by a waste treatment facility located near the complainants’ home violated their right to privacy and family life (guaranteed under article 8 of the European Convention on Human Rights (1950)) by limiting their ability to enjoy their home. This was found to be the case even though the court did not find a violation of the right to health in the circumstances. In the Awas Tingni case before the Inter-American Court of Human Rights (2001) the Mayagna Awas (Sumo) Tingni community of Nicaragua argued that the Nicaraguan government had failed to protect their property rights
over traditional lands and natural resources, which were to be commercially developed. The Court upheld the claim and agreed that the Community’s property rights under the American Convention of Human Rights (1969) had been violated by the State’s failure to provide an adequate system of indigenous title and protection of indigenous lands. These judicial avenues provide one option for communities or individuals unjustly affected by environmental harm where such harm can be construed as a violation of human rights.

There are limitations to the ability of the human rights regime to address environmental injustices. Access to the regime relies on States being parties to the relevant instruments of international law, and in many cases individuals are unable to avail themselves of international or regional mechanisms until they have exhausted local legal options (Optional Protocol 1976: art 2). As well as these procedural limitations, any claim alleging a violation of human rights will face the causative challenge of proving that a particular state’s conduct (either directly or through its failure to properly regulate non-state actors) caused the breach of human rights. This is particularly a challenge for any claim relating to climate change, where the cumulative and transnational impact of greenhouse gas emissions and the complex scientific processes involved make it very difficult to hold a particular State responsible for a specific outcome (Stephens 2010). Nonetheless, there is normative force in the human rights regime, and the possibility of claims against States where they have failed to meet their human rights obligations may provide an important incentive for addressing environmental injustice.

**Conclusion**

Environmental injustice takes many forms, and can be identified in disproportionate impacts on poorer neighbourhoods, developing states and future generations. In many cases
environmental injustice can be described in terms of the human rights violations it represents, drawing on our evolving understanding of the interconnectedness of human rights and the environment. Beyond this descriptive function, the human rights framework also has a role to play in redressing and preventing environmental injustice. The utility of human rights in achieving environmental justice can be seen in three key areas. First, a rights-based approach to environmental governance can highlight more fully the human impact of environmental degradation, and provide a set of norms against which to evaluate potential environmental harm. Second, by ensuring that all individuals and communities enjoy the full complement of human rights we can build capacity for communities, particularly those in developing states, to focus more clearly on sustainable development strategies and just environmental outcomes. Finally, human rights enforcement mechanisms provide a valuable avenue for individuals and communities to seek redress for environmental injustice inflicted upon them. Together with other forms of environmental governance, human rights law provides a complementary and useful tool in achieving environmental justice for present and future generations.

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