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## Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests

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## **Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests**

Presentation by S. James Anaya\*

It's an honor for me to be here and offer a few remarks at this conference. I will attempt to shed light on the relation between the human rights and environmentalist agendas, by focusing on the type of situation common to many indigenous peoples in which the two agendas meet. My concern is with identifying points of both convergence and divergence in the interests that may reside in the human rights and environmental movements.

### **The Discourses of Environmentalism and Human Rights**

Let me start by identifying what I perceive to be two discreet discourses concerning the environmental movement. One is represented by the comment "trees have rights." This is perhaps the classical environmental discourse – that nature itself is entitled to protection because it is intrinsically valuable, independently of

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whatever utility nature has for humanity. However, that discourse has come to be viewed as somewhat elitist, embraced mainly by those who have the time and affinity to sit back and talk about the value of nature for nature's sake.

So a second discourse can be identified, one that has become more dominant and that I think animates this conference. That is the discourse that trees are important because of their value to human life; or, put differently, because of their value for the enjoyment of human rights. In this discourse we talk about the environment not so much because of its intrinsic value, but rather because of its value to humanity. And we construct imagery about the connection between the welfare of humanity, the dignity of human beings, and the environment.

It is this imagery that I believe characterizes the modern environmentalism and its intersection with the human rights movement, and that I want to explore – and somewhat test -- a bit today. I want to do that in the context of the situation of indigenous peoples. These are culturally distinctive groups that form discreet communities within independent states and that have become the subjects of a great deal of attention within the environmental movement. The situation of indigenous peoples uniquely presents many of the issues that are important for discussing this notion of the environment as having value because of its connection with the welfare of humanity. This connection is not as clearly apparent in the context of industrialized societies. Take the situation of people in the Pacific Northwest who depend heavily on the logging industry. For them the connection between human welfare and keeping pristine forests is somewhat attenuated. Cutting down trees to generate income – as opposed to preserving the forest in its pristine condition – is what provides a sense of welfare.

But in the context of indigenous peoples, particularly those in less developed countries, linkages between human welfare and nature are much more readily made. The very words “indigenous peoples” evoke imagery of people living in harmony with nature. For indigenous peoples living in forested areas, the survival of the forest is considered essential to the survival of human life. The second

environmentalist discourse I have identified, which connects the natural environment with human rights, is animated by this imagery and attention to the many problems that face indigenous peoples. Related to the discourse that joins environmentalism and human rights is a discourse that focuses directly on the human rights of indigenous peoples. This discourse views indigenous groups and their cultures as valuable, and it constructs a series of rights and entitlements that are deemed to pertain to these communities and their members on the basis of broadly applicable human rights standards.

### **A Hypothetical Situation**

What I want to do now is present a hypothetical situation in order to explore some of the issues that arise in efforts to join concern for indigenous peoples' rights with environmentalist agendas. By doing this, I want to examine the extent to which the human rights of indigenous peoples in particular are wedded to values of environmental protection.

Let's imagine a Central American country that just emerged from years of war. We'll assume it's an impoverished country that is desperately in need of an infusion of capital of some sort to get the economy rolling. Within this country there is a substantial geographic area that is fairly isolated from the rest of the country, an area populated mainly by indigenous peoples. The indigenous groups of this area directly rely upon the natural environment within which they live. The area is forested, and the forest yields fruits of different kinds upon which the indigenous people depend, such as animals and fish for food, plants for medicine, and wood for shelter, etc.

Within this forested area there is a particular community of indigenous people. This community exercises effective dominion over a certain territory, and adjacent indigenous groups have traditionally respected that territoriality. Furthermore, because of their relative isolation from the rest of the country, our hypothetical indigenous community has also been able to maintain that dominion against encroachment by non-indigenous people.

Although this indigenous community depends to a large degree upon the natural environment for its subsistence, it also maintains important connections with the larger market economy. As is typical of many indigenous groups in Central and South America and other parts of the world, one important connection takes the form of seasonal labor. At various times during the year, several members of the indigenous community depart for the towns and cities where they labor in exchange for a cash income. In this way the community's subsistence economy is combined with elements of the larger market economy.

In this particular case, there is an additional economic link that connects the indigenous community to the larger market economy: the community's traditional territory has valuable mineral deposits, including deposits of gold. Although the community has not mined the gold, its members have panned for it, and they have done so with very little environmental impact. Not surprisingly, there is a market for panned gold. Those who pan the gold take it to a nearby town where they are able to sell it. The price they receive isn't very good, but it nonetheless brings in needed income.

Now let us also say that there is an environmental organization in this Central American country, and that organization is part of an influential network of international environmental groups. The environmental organization has identified problems on the horizon: a multinational mining corporation has targeted the indigenous community's territory for the economic potential of its gold deposits. This corporation has begun to make overtures to the country's government, seeking permission to develop the gold resource.

The environmental organization opposes the multinational's initiative, citing examples of mining operations in the past in this very country that have wreaked havoc upon the environment. Previous mining operations in the country have resulted in toxic streams and soils, and these in turn have resulted in serious health problems, including escalating mortality rates among affected communities.

The environmental organization approaches the leaders of our hypothetical indigenous community to inform them of the multinational mining company's initiative targeting the deposits of gold within the community's traditional territory. The environmental organization proceeds to do an excellent job of explaining to the indigenous leaders the devastation that can be brought about by mining, and cites multiple examples of what has happened before in that same country.

The environmentalists then say to the indigenous leaders, "Why don't we join efforts to muster up support internationally and push the government to make all your land part of a protected area? If we can get special legislation and the accompanying administrative measures passed which would make your territory a protected area, you'll be able to secure your traditional subsistence way of life, unimpeded by mining operations."

And the indigenous leaders respond, "Yeah, we don't want these mining people to come and disrupt our natural environment the way you are telling us they are going to do."

Thus an alliance is formed, and the two groups decide they are going to advocate for the establishment of the protected area. But in the meantime the government has granted a license to the mining company to start prospecting. Developments are now rapidly moving towards the granting of a mining concession to the multinational corporation.

As a result, the environmental organization shifts its focus from having the territory declared a protected area to the more immediate concern of stopping the mining operation in its tracks. In mounting a campaign with that goal in mind, the environmental group looks to the emerging and existing norms that can be found within the international realm of human rights and the environment. These norms are regarded as important tools in the fight against the mining.

### Four Categories of Relevant Norms

The international norms that are available to the environmentalists and indigenous peoples in contexts such as these can essentially be broken down into four categories. One category has to do with the basic rights to physical well being which are expressed in the major international human rights documents. These include the right to life, which can be seen as the essential basis for the enjoyment of all other human rights. This first category also includes the right to be free from bodily harm and the right to physical and mental health, and related concepts.

Many authoritative international actors and scholars have discerned an emerging human right to a healthy and clean environment on the basis of this first category of rights. The Inter-American Commission on Human Rights, in a report released in September of 1997, addressed the human rights situation in Ecuador. The report discusses environmental concerns in the context of the situation of indigenous peoples in the Amazon who face the devastating consequences of years of oil development in their territory. Grounding its analysis in the well established right to life, the Inter-American Commission connects that right to the need to have a healthy environment, and essentially articulates what might be described as a human right to a healthy environment.

So this first category of rights focuses on the physical well being of people, and from these rights a norm is constructed which is opposed to development activities (such as mining) that are potentially harmful to the environment. This norm is connected directly with the environmentalist agenda. However, the actual subjects of the underlying rights are human beings, not the trees, not the ground, and not the water. Human beings are the beneficiaries both of the cluster of rights related to physical well being and of the clean environment that is necessary to uphold those rights.

The second category of rights to which the allied environmental and indigenous groups might turn is centered on the right to cultural integrity. Several international instruments in one way or another promote the notion that groups in general and

indigenous peoples in particular have the right to maintain their distinctive cultures. For instance, Article 27 of the International Covenant on Civil and Political Rights affirms the right of persons belonging to minorities to enjoy their own culture in community with the other members of their group. The United Nations Human Rights Committee has interpreted Article 27 as having special meaning in the context of indigenous peoples, essentially as meaning that an indigenous people has the right to maintain and develop all those aspects of its cultures which support and define its existence as a distinct community. This includes those aspects related to the environment and to land resources.

To the extent indigenous cultures can be characterized as harmonious with nature, we see rights to cultural integrity fitting in very closely with environmentalism. It has been widely argued and accepted that indigenous peoples' cultures, and their existence as discrete groups, is closely connected with the natural environment, including the land upon which they live. However, it is important to remember that the right of a group to maintain its own distinctive cultural attributes remains a separate and distinct value from the value of having the environment protected for its own sake. Furthermore, it is more than a theoretical possibility that indigenous peoples' cultural practices may develop in a manner that strains the perceived unity of culture and environment.

A third category of rights to which our allied indigenous and environmental groups might turn has to do with property precepts. The right to property has been affirmed in the International Declaration of Human Rights and several other documents. The basic notion of property entitlement has been extended to indigenous peoples in relation to their traditional lands and resources. This is manifested particularly in the International Labor Organization's Convention on Indigenous and Tribal Peoples of 1989 (ILO Convention No. 169), which affirms the specific right of ownership and possession of indigenous peoples to the land they traditionally have occupied.



This is simply an extension of the notion that people who have come into possession of something (particularly real estate) by some legitimate means are entitled to keep it, and that this right holds against arbitrary acts of the state and others. The extension of this basic idea to the context of indigenous peoples results in a norm that is more or less accepted today. This norm is related to the right of indigenous peoples to the integrity of their cultures, insofar as those cultures are connected with land tenure, but I would suggest that it is nonetheless an independent value. Quite apart from any cultural significance, possession and use of land is valued as property – or something like property – when that possession and use is understood to have legitimate origins. Likewise, property interests are quite distinct from interests in maintaining a healthy environment, although the two are often mutually reinforcing; and it is not difficult to imagine the exercise of ownership rights coming into conflict with environmentalist agendas, even in the context of indigenous peoples.

In our hypothetical situation, property precepts could be helpful to the indigenous community in its effort to retain possession and control over traditional lands. But a claim of ownership could by itself have limited impact on the effort to stop the mining if the state, as in many situations, itself claims ownership of the subsurface mineral resources independently of who owns the surface. In most countries of the Americas, unlike the United States, this would be the case. It is common for states to retain ownership over all subsurface nonrenewable resources, even such resources that underlie privately owned lands; and, significantly, no international norm or consensus has emerged to mandate an exception to this practice in regard to indigenous held lands. So in our hypothetical, even if the state concedes that the indigenous community owns the surface area because it is the community's traditional territory, we could well imagine the state maintaining the position on the basis of its internal laws that it owns the gold and is free to grant concessions for its development. Nonetheless, notions of property or ownership would

continue to have bearing on the situation; if indigenous people own the surface, then that has certain implications for any development that might affect the surface estate -- such as mining -- even if the subsurface owner is the state.

The final category of rights related to our hypothetical falls under the rubric of self-determination. The principle or right of self-determination remains controversial because of confusion over its potential full implications. Nonetheless, self-determination is a norm of international law that has been affirmed in the United Nations Charter and numerous other international instruments, and it represents a certain universe of widely accepted precepts. These precepts extend from the basic idea that human beings, individually and collectively, are entitled to pursue their own destinies under conditions of equality and that the institutions of government should be constituted and function accordingly. Self-determination implies rights of consultation and participation in all government decision making that may affect a particular indigenous group, as well as the right of an indigenous group to maintain its own autonomous systems of decision making in regard to its means of subsistence and other matters in which its interests predominate.

Such rights are affirmed in several international instruments. ILO Convention No.169 requires states to safeguard indigenous peoples' own customs and institutions, and generally requires consultation with indigenous groups over any measure that might affect them. Convention No. 169 specifically addresses the issue of State ownership of subsurface resources and mandates that indigenous peoples at a minimum have a right to participate in the planning for any exploitation or development of those resources.

### **A Convergence of Interests Based on Human Rights Norms**

Keeping in mind these four categories of norms I've just described -- categories related to physical well being, cultural integrity, property, and self-determination -- we can fairly readily see in our hypothetical how an argument can be constructed to oppose the mining. Such an argument, based on human rights norms, would

advance both human rights and environmentalist agendas. The environmental organization could see its interests entirely joined with the interests and human rights of the indigenous community. With its superior communications and advocacy expertise, the environmental organization could be expected to take the lead in articulating the threat to the human rights of the indigenous community.

The environmental organization could argue that the indigenous community has not been adequately consulted concerning the planned mining, that the mining activity would infringe the property interests of the community, that mining operations would interfere with myriad aspects of the community's relation with its traditional land and hence damage the integrity of the community's culture, and that the environmental damage resulting from the mining would unacceptably threaten the physical well being and health of the community members. Even if the property argument is weak because of state ownership of the gold residing in the subsurface, the other strains of argument are able to make for a forceful case against the mining, assuming that the mining would in fact constitute environmentally damaging activity that is opposed by the community.

### **A Potential Divergence of Interests**

Now let's make the hypothetical problematic with regard to the compatibility of the environmentalist agenda and the interests of the indigenous community, by presenting additional facts that, again, are not unlike situations that exist in the real world. Suppose the environmental organization finally convinces the government to abandon its plans for a mining concession and to consider designating the land in question a protected area. Perhaps this is brought about by the election of a new executive, or by pressure from foreign governments that provide aid to the country.

In the meantime, the leaders of the indigenous community are invited to a conference in Australia, and they meet aboriginal leaders in that country who have negotiated deals for their communities with mining companies. The deals are complex arrangements by which the companies are allowed to mine on indigenous lands under

specified environmental controls, in exchange for prescribed economic benefits for the affected aboriginal communities. The Central American indigenous leaders are surprised to learn about such deals, and they query their Australian counterparts about them. They express concern especially about the environmental impacts of mining.

The explanation provided by an Australian aboriginal leader goes something like this: "Mining technology has improved a great deal over the last several years. All that bad stuff that happened in your country was because of the use of technology that is now obsolete and because of the absence of adequate environmental controls. We've been able to impose strict controls on the mining companies that come on our land. There are of course certain negative effects on the environment as a result of the mining. But the decision to accept those effects is one we've chosen to make. We are willing to have some adverse effects on our environment, because we think it's for the larger good of our people due to the benefits that we are able to obtain. In any case, it is our decision to make, pursuant to our right of self-determination."

The indigenous leaders from Central America go back home and discuss their Australian experience with their community. The community decides that it wants to explore the possibility of economically beneficial mining on its land that is compatible with its culture and way of life. The community's leaders announce to the environmental organization the community's desire to develop the gold resource on its land through a suitable arrangement with a responsible mining company.

So at this point the question becomes, what does the environmental organization do? Does the organization help the indigenous community negotiate a deal with a mining company that includes state of the art environmental controls on the future mining activity? Or does the organization more likely try to dissuade the community from any dealings with the mining industry, claiming that industrial mining is simply incompatible with the environment, and hence with the community's subsistence lifestyle, its culture, and the ability of the community members to live as they traditionally have?

Does the environmental organization continue to try to keep the indigenous community under its wing and assert representation of the community in its international campaign against mining?

A preferred outcome, I believe, would be for the environmental organization simply to come clean and recognize the existence of its divergent interests that center on a concern for the environment for the environment's sake. I could see a responsible environmental organization saying the following to an indigenous community in this situation: "Look, we think the natural environment has intrinsic value, apart from your human rights. In a sense we think trees have rights; we think the ground has rights; we think the streams have rights. You indigenous folks can make your decisions, as you should, pursuant to your right to self-determination. But our concern is with the welfare of the trees, the ground, the water. We're nature's watchdogs. Go ahead with your effort to negotiate a deal with a mining company. But we're going to watch what you do."

That, I think, is the preferred outcome -- not to continue to try to speak for the indigenous community in regard to the content and implications of the community's human rights, or to supplant the exercise of the community's right of self-determination or prerogatives as land owner. Rather, the correct path, I think, is for the environmental movement to focus on protecting the environment for its intrinsic value. However elitist that may seem, it strikes me as imminently correct that the natural environment has value that need not be explained in terms of immediate human needs. If by contrast environmentalism is merely a corollary of human rights, it smacks of inviting the tail to wag the dog when environmentalists invoke the cause of human rights to pursue their agendas and insist on conforming the deployment of human rights norms to their primary concern for the natural environment.

Let me conclude by stressing that there is indeed a connection between human rights and the environment, and that a clean and healthy environment is certainly in many ways instrumental to the realization of human rights. But that relation between human rights and the environment does not make for a perfect unity of environmentalist and human rights values or agendas. Groups of

people that may be affected by the environmental impacts of natural resource extraction or other development activities, such as indigenous peoples, may legitimately choose to exercise self-determination and other human rights in ways that are not commensurate with the optimal environmental outcome as perceived by outsiders. Those who are concerned primarily with environmental conservation, should remain concerned with environmental conservation in relation to such scenarios; and they should acknowledge that their interests and those of the affected group are not one and the same. Both the human rights and environmentalist agendas will be better served.

