Climate Change and Environmental Ethics

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editor

Transaction Publishers
New Brunswick (U.S.A.) and London (U.K.)

Library of Congress Catalog Number: 2010043862
ISBN: 978-1-4128-1459-1
Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Nanda, Ved P.
Climate change and environmental ethics / Ved P. Nanda.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-4128-1459-1 (alk. paper)
1. Climatic changes. 2. Environmental ethics. I. Title.

QC903.N355 2011
179'.1--dc22

2010043862

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Future Generations' Rights: Linking Intergenerational and Intragenerational Rights in Ecojustice[1]

Laura Westra

This chapter supports the extension of human rights to include the community of humankind and even the community of life that supports it. In general, references to future generations' rights can only be found in the preambular sections of environmental law instruments. The future is viewed as remote, and less worthy of our attention than many other urgent human rights and environmental problems. But the concept of ecojustice the author proposes is intended to join intergenerational and intragenerational justice, and includes the first generation, that is, the generation that is now coming into being and hence is immediately present and fully possessed of rights that we must respect.

Introdnction

Climate change is a serious threat to the poor and the vulnerable around the world, especially those in developing countries. It also is a potentially serious threat to future generations. How are we to find appropriate means to ward off the danger to developing countries, especially low-lying coastal states and the least developed states which lack the wherewithal for needed mitigation and adaptation? Equally important, how are we to consider future generations' rights in this context? I suggest that it is essential to link intergenerational and intragenerational rights in ecojustice.

A Philippines Supreme Court case, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources,* affirmed specifi-

cally that those inhabiting the Earth today can sue on behalf of future generations (Minors Oposa 1994):

> This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.

This appears to be the only judgment that appeals under international law specifically to intergenerational equity. Barresi goes on to point to the significance of the case: "[I]t was decided by a national court on principles of intergenerational equity for future generations of nationals of that national state" (Barresi 1997, 10). This, I believe, is only partially correct: appeals to future generations for ecological purposes and to preserve "environmental rights," a "nebulous concept" according to Davide, J., who authored the opinion, have far wider implications than the protection of the area's citizens, present and future, as they affect a much larger proportion of the Earth than appears, prima facie, to be the case.

From my point of view, what is particularly important is the appeal to the *parens patriae* doctrine, as the minors request explicitly for "protection by the State in its capacity as parens patriae." As I discuss the rights to health and the environment of children and the preborn, I find the *parens patriae* doctrine to be the best approach to governmental/institutional responsibility for the rights of the first generation. The doctrine has progressed from being used initially for economic/inheritance problems, to juridical use in cases that are exclusively medical and protective; it can also be used for the protection of the lives and health of children and future generations by means of the preservation of a naturally supportive ecology.

Nevertheless, despite its explicit support of intergenerational equity and the novel use of *parens patriae*, subsequent cases did not follow in the footsteps of *Minors Oposa*. In 1997, the courts in Bangladesh took an opposite position in fact (*Farooque v. Government of Bangladesh* 1997).

The major work on intergenerational justice and the law is that of Edith Brown-Weiss. Hence it might be best to approach the topic with a review of the "Sustainable Development Symposium," where she revisits her 1990/1992 argument and responds to the critiques brought against it (Brown-Weiss 1993).

Obligations to Future Generations in the Law: The Proposal of Edith Browu-Weiss

What is new is that now we have the power to change our global environment irreversibly, with profoundly damaging effects on the robustness and integrity of the planet and the heritage that we pass on to future generations.

What are the main characteristics of Brown-Weiss's position? The first thing to note is that her proposal comprises both rights and duties, and that these include both "intragenerational" and "intergenerational" aspects. Intergenerational duties include the obligations:

1. to pass on the Earth to the next generation in as good a condition as it was when that generation first received it; and
2. a duty to repair any damage caused by any failure of previous generations to do the same.

Thus every generation has the right "to inherit the Earth in a condition comparable to that enjoyed by previous generations" (Barresi 1997, 2). In addition, each generation has four duties:

1. conserve the diversity of the Earth's natural and cultural resource base;
2. conserve environmental quality so that the Earth may be passed on to the next generation in as good a condition as it was when it was received by the present generation;
3. provide all members with equitable access to the resource base inherited from past generations; and
4. conserve this equitable access for future generations.

These duties impose non-derogable obligations, especially on affluent Western developed countries, which are clearly in a position of power, as most of the degradation, disintegrity, elimination of biotic capital, and other serious ecological ills proceed directly from the practices of the powerful West, to the vulnerable South. I have argued that these obligations should be viewed as *erga omnes*, and they should also be considered as founded on *jus cogens* norms, as the proliferation of harmful chemicals, the exploitation of natural areas, and the many activities exacerbating global climate change represent a form of institutionalized ecological violence, or ecoviolence, on vulnerable populations. As gross breaches of human rights, they should be thus considered to be ecocrimes and treated accordingly.

In contrast, some have argued that both limitations on economic expansion and commercial activities on one hand, and the demand for

increased respect for the preservation of endangered areas and species on the other, only represent a Western, imperialistic conceit, one that flies in the face of the South's needs and cultural practices. Guha and others contrast the Western concern with the environment as a source of leisure-time amenities, rather than understanding its role as foundational to survival, as has been demonstrated by many, including the World Health Organization (WHO) (Guha 1989, 312-319).

This partial understanding allows Guha to make a specious distinction between humanity and its habitat, something that is biologically impossible. WHO's research has demonstrated the impossibility of separating human health and normal function from environmental conditions, and the consequences of human technological activities in regard to children and the preborn. Nevertheless, it is obviously true that it is easier for developed countries to institute remedial regimes to correct and restore presently harmful environmental conditions, than it is for developing countries to do so.

Thus Brown-Weiss is quite correct as she links intergenerational obligations with intragenerational duties: rich countries and groups must discharge their duties intergenerationally in a direct form, but also fulfill their intragenerational obligations to developing countries and impoverished populations. The latter would not be able to fulfill their own obligations without help. But the institutions of rich countries can, and therefore must ensure that the global communal obligations to future generations be met not only by them, but also by those who require their help in order to comply (this relation between the ability to help and the duty to do so can be found in the "Kew Garden Principle" of 1972) (Velasquez 2000).

The principle of "equitable resource use" can therefore be understood in this way: rather than exacerbating a conflict between North-West preferences and South-East basic needs, as Guha proposed, combining the two—under the Kew Garden Principle—ensures that both intergenerational and intragenerational basic rights are met and the correlative obligations are discharged. Paul Barresi lists Brown-Weiss's proposed rights and duties, and her strategies for the implementation of these duties. He acknowledges that her point is that these should be more than just moral obligations: they should be codified as law. Strategies of implementation include establishing a Planetary Rights Commission, which might serve as a forum where individuals and groups might bring complaints for the violations of these environmental rights. Perhaps courts might be set up to complement the International Criminal Court

(ICC) and other ad-hoc tribunals, intended to bring to justice serious human rights violations.

I have argued that ecocrimes represent gross breaches of human rights and should be judged accordingly, and no less seriously than attacks against the human person, genocide, breaches of global justice, and crimes against humanity in general (Westra 2004). Thus appealing to international criminal law might even eventually allow a Planetary Rights Commission to be part of the International Criminal Court. But far more important than thinking of the courts appropriate to try and convict those guilty of these crimes against future generations, is to prevent these irreversible harms from happening, by ensuring now that ecojustice should prevail by supporting it in both its aspects of intragenerational and intergenerational equity. Both these aspects should be codified in appropriate law regimes, and both should be enforced.

An Aside on Justice and Ecojustice: Rationality in Natural Law

> Il exist un droit universal et immuable, source de toutes les lois positive; il n'est que la raison naturelle, entant qu'elle gouverne tous les hommes. (*Code Napoléon*)

Ross notes the existence of at least three traditions of justice, basic to understand its full meaning: the positivist doctrine, where each conntry's "sovereign" expresses his will through the law, which therefore has an indisputable binding force, and the natural law theory, which views justice as an a priori rational principle. Ross adds that, therefore, the "enacted law" in this case possesses binding force only to tbe extent to which it is a realization or attempt at a realization of the idea of law. Finally, there is "the romantic or historical school of law," where law is custom, or "the mirror of the popular mind" (Ross 1958, 106-107).

The first alternative does not exist in today's legal regime, but both positive law and a principled approach may be found in common and civil law respectively, or they may both be present in some proportion, as they are, for instance, where "general principles of law," including natural law and customary law, are explicitly considered as part of the sources of international law.

Justice may also be understood as the highest virtue, including its reach in both law and morality. Justice as a principle and a concept permits us to assess the cogency and the thoroughness of laws and jndicial decisions by how they compare to that standard: "As a principle of law, jnstice delimits and harmonizes the conflicting desires, claims and interests in the social life of the people ... Justice is equality" (Ross 1958, 268).

Of course, perfect equality is not a viable principle, nor well-founded, and thus justice may take into consideration merit, performance, needs, or ability. We need not elaborate on issues that are very well discussed in the literature, particularly those arguments raised by John Rawls. What should be emphasized, however, is that certain human characteristics may never be taken into consideration if justice is to be served: these include race, geuder, creed, and social class. John Rawls's "difference principle" captnres well the need to ensure that the least advantaged be treated in a way that alleviates their disadvantage in someway, and that corrects, as does the law, the unfairness of their situation.

The second approach to justice that Ross proposes, that is, natural law, is well adapted to provide the foundation for this understanding of justice, even if one prefers to purge it of its metaphysical underpinnings, as Hugo Grotius suggests, saying that, even if one assumed that God did not exist, "the law of nature would still be valid." I have argued that, as natural law provides the basis for just war theory, it is also foundational to the understanding of crimes against humanity, genocide, and other breaches of basic human rights that singly and collectively represent aspects of what I have termed "ecoviolence."

That said, just as certain characteristics of humankind such as color, gender, or creed should not be used to dictate a discriminatory treatment of certain humans, or the deprivation of their right to protection from harm, so too the geographical or temporal distance of humans from the actor or decision-maker ought not to permit discriminatory treatment either. The argument in favor of rationality as foundational to justice, even without further inquiry about the origin of such rationality, can be found in Kantian doctrine, and it has been used to great advantage by such eminent Kantians as Onora O'Neill and Thomas Pogge on the topic of global justice (O'Neill 1996).

The main theme of global justice according to these thinkers is the continued presence of starvation and poverty globally, despite the rhetoric of providing aid, on the part of Western affluent countries. For instance, the 1996 World Food Summit in Rome issued a pledge by the 186 participating governments that ends with the following words: "We consider it intolerable that more than 800 million people throughout the world, and particularly in developing conntries, do not have enough food to meet their basic nutritional needs. This situation is unacceptable" (Rome Declarations on World Food Security).

This situation is also exacerbated and fostered by global climate change, and we have witnessed the lack of interest in signing on to the

Kyoto Agreement by the country that is the worst polluter: the United States. Yet the International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO), led by the United States, "had unprecedented power to shape the global economic order." The World Bank recognizes that global poverty will increase, not decrease, reaching 1.9 billion people by 2015.

Pogge discusses the failures of these institutions by showing "three morally significant connections between us and the global poor." In brief, these are the causal/historical connections of a shared past where the presently wealthy imposed colonialism and slavery on the presently poor, so that the foundation of the former's joint powers and affluence is suspect. Another connection is that we all depend on a single "resource basis"; we share the Earth, but only in ways that benefit those better off and harm the others. Finally, the present "global economic order" does not redress, but aggravates "global economic inequalities" (Pogge 2001, 14).

The difficulty Pogge emphasizes through the example of global famine supports Richard Falk's contention that the world as a whole has arrived at a "Grotian moment," but thus far we have been unable or unwilling to even attempt to reach across the "normative abyss" that is before us: "A neo-liberal world order based on the functional imperatives of the market is not likely to be a Grotian moment in the normative sense" (Falk 1998, 14).

His main point coincides with the argument presented here: while Grotius was able to "articulate a normative bridge between past and future" at a critical historical moment, the present world order is both unable and unwilling to do so.

Falk notes that the present world order "reflects mainly economistic priorities," and that the state system has lost much of its credibility in problem solving in the face of "the rise of market forces." Falk adds:

> We currently confront in this era of economic and cultural globalization a more profound normative vacuum: the dominating logic of the market in a world of greatly uneven social, economic, and political conditions and without any built-in reliable means to ensure that a continuing global economic growth does not at some point and in certain respects cause decisive ecological damage (Falk 1998, 26).

Neither Pogge nor Falk addresses intergenerational justice directly, and some who do so, like Hendrik Ph. Visser 't Hooft, find Rawls's work to be more helpful than I have found it to be. In sum, Rawls refuses to commit to a specific formulation of "the good" as superior to other possible choices, as he allows perhaps too much power to the "rational

contractors," even when their formulation of just principles takes place "behind a veil of ignorance." In contrast, his "difference principle" might be extended, as Visser 't Hooft would have it, to global society (Visser 't Hooft 1999, 55-56).

In general, accepting the arguments for sustainability entails that moral judgments be used when scientific evidence is assessed and legal instruments are often designed to support such judgments:

> Justice constitutes one segment of morality primarily concerned not with individual conduct but with the ways in which classes of individuals are treated. It is this which gives justice its special relevance in the criticism of law and other public or social institutions (Visser 't Hooft 1999, 54).

From the environmental point of view, intergenerational justice emerges in several conventions, such as the Biodiversity Convention, as biodiversity, for instance, is acknowledged to be a "common concern of mankind," but it cannot be said that there are in any convention substantive provisions to treat living resources as a "common heritage" or give full effect to intergenerational rights as conceived by Brown-Weiss.

Some additional examples of this somewhat limited concern, or of the presence of human interests, are left to the preambles of international treaties. For instance, the Preamble to the Whaling Convention (1946) recognizes "the interests of the actions of the world in safeguarding for future generations the great natural resources represented by whale stocks"; the 1968 African Convention, states that soil, water, and fauna resources constitute "a capital of vital importance for mankind"; the 1985 ASEAN Agreement, talks about "the importance of natural resources for present and future generations"; the 1972 World Heritage Convention says that "parts of the natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole"; and finally the Preamble to the 1973 Convention on International Trade in Endangered Species (CITES) speaks of wild flora and fauna as "an irreplaceable part of the natural systems of the earth which must be protected for this and future generations to come" (Birnie and Boyle 2002, 605).

Even such a brief discussion indicates that while Brown-Weiss's work considers both intergenerational and intragenerational equity, most existing legal instruments do not. I have suggested that the integration of the two concepts represents true ecojustice, that is, justice that recognizes humans as embedded in their habitat, so that justice that does not recognize this aspect of humanity is—to say the least—incomplete. Other

internationally used concepts, such as "sustainable development," are mostly used as a device to attempt to "green" an existing or projected policy or proposal that simply advances "business as usual."

It is clear that justice as a normative, rational principle is well-served by Brown-Weiss's doctrine in three ways. First, it requires that present populations needing help to achieve appropriate environmental goals should receive such help from the affluent countries who, it must be noted, have more than a moral interest in ensuring the conservation of common resources. Next, it avoids critiques based on identifying specific individuals to ensure that we should understand fully what their needs (or preferences) might be in the future: it is not individual rights, but group/class rights that are at issue. All considerations of equity in regard to certain groups and classes look at the general characteristics of all, NOT at the individual preferences of any specific member of the group, as some have argued against the rights of future generations. Finally, it defends implicitly the right of the present generation to protection that accrues from the present respect for "nature's services." Thus, instead of showing an unfair bias toward the future, at the expense of the needs of the poor of the present generation, it mandates the preservatiou and the protective instruments that are needed for all present peoples, especially the most vulnerable, such as the poor, those in developing countries, and the children. All these require sustainability in their habitat, which Visser 't Hooft terms, "the ecological core of the concept, which after all is the historical prior one, and ... the judgments on quality of life called for by the conception of a future integrity of the environment" (Visser 't Hooft 1999, 17).

When so understood, Brown-Weiss's doctrine on intergenerational justice not only reconciles intergenerational justice and intragenerational justice, but it also manifests the underlying integrity and nnity of justice and ecojustice. Paul Wood argues in a similar vein by addressing the question of "The Connection Between Intergenerational Equity and Allocational Equity." He proposes designing specific regimes to meet the joint goals of developed and developing countries, especially those in deltaic regions or island countries: "An equitable self-sustaining regime will meet intertemporal obligations by jointly benefiting present and future generations" (Wood 1996, 293-307).

Visser 't Hooft also remarks that intergenerational justice involves classes of individuals, but in a very novel, original way. I believe he is mistaken on this point. Decisions proscribing apartheid, for instance, or discrimination against people of color, once codified in law, are

equally intended to cover unknown groups of individuals, included in an open-ended class of persons fitting, for example, the definition of "persons of color." Those legal instruments are based on principles equally "processional and open-ended" as future generations are. He adds: "Justice between generations forms a natural alliance with the search for transgenerationally valid criteria of environmental integrity, established by means offering the best chances for consensus and clear definition" (Visser 't Hooft 1999, 54).

In contrast, I have argued, following James Karr, Reed Noss, and other biologists and ecologists, that ecological integrity needs a scientific understanding and an index (IBI) to allow the reconstruction of a baseline. Such a definition is certainly scientific and thorough, but it is not based on consensus. I have also proposed that justice, both transgenerational and intergenerational, would best be served by adherence to a "principle of integrity" that would morally prohibit any activity or process that involved humanmade products such as the ones that are putting at risk the most vulnerable among us, starting with the children of the first generation, but extending globally to the present poor and all future generations as well.

Klaus Bosselmann on Ecological Justice

Klaus Bosselmann has noted that there is dissonance between most environmental ethics theories, which do not really address social justice issues, and theories of social justice that do not fully appreciate the impacts of ecological problems. His analysis of the problem starts by noting that "a theory of either environmental justice or eco-justice is lacking." He cites a definition of environmental justice that views it as "equal justice and equal protection under the law without discrimination," but he also points out that such a view ignores the intergenerational aspect of the concept (Bosselmann 1999).

My work on environmental racism is admittedly also focused primarily on "Africana," that is, issues of concern to North America's African American population, and hence it is guilty of the same narrow scope for the most part.

Nevertheless, it is in the environmental ethics work that I have addressed future generations' rights, not the work on environmental justice. In the latter, it was important to note the impact of then President Bill Clinton's Executive Order No. 12,898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 11 Feb. 1994), which ensured that the U.S. Environmental Protection

Agency (EPA) would be more available to redress environmental injustices and harms befalling the inhabitants of African-American neighborhoods, than they had been before the introduction of the Executive Order. The grave concern for the life and health of presently affected populations had clear primacy over the possible rights of the future.

Yet, it must be admitted, a consideration of the latter would have eliminated the need for costly clean-up and remediation on behalf of the former. In addition, there is a problem in that minority groups and peoples from developing countries tend to perceive ecocentrism as a position in direct conflict with their own, justified, immediate needs and aspirations. Bosselmann acknowledges that this position portrays a false dichotomy: "The concentric position is inclusive, as it merely extends intrinsic values of humans to non-humans rather than replacing one by the other" (Bosselmann 1999, 34).

I have argued in this way as well in defense of the "Principle of Integrity," as the debate between anthropocentrism and eco/biocentric holism is based on misconceptions about the scientific underpinnings of the latter position, the holistic biocentrism I have defended. The two positions are seldom, if ever, combined or even discussed together in the literature, although I have argued that they converge in the interface between health, normal function, and ecological integrity.

Bosselmann argues for an approach to "eco-justice," based on Brenda Almond's proposal, involving:

- the relation between modern liberal theory of justice and environmental ethics;
- the various forms of distributive justice with respect to the environment; and
- their application to environmental issues (Bosselmann 1999, 37).

This set of guidelines appears to be basically flawed. There are, of course, grave difficulties produced by relying on neoliberal policies. Bosselmann himself sees the wrongheadedness of this approach:

> But like the "rights" issue, the liberal approach of justice tends to foster the very problems we are trying to overcome. Rather than fundamentally challenging the traditional idea of environmental management with its anthropocentric limitations, it would simply internalize the concept in the "idea of environmental justice" (Bosselman 1999, 39).

Finally, invoking distributive justice leads to the problems on which Richard De George, for instance, bases his argument against future gen-

erations' rights, as well as introducing the difficulties present in various forms of "exponential discounting" (De George 1981, 289).

Bosselmann wants to link intragenerational justice and intergenerational justice, citing Brown-Weiss's own proposal noted above and extending the meaning of "future generations" to non-human animals. I have proposed going even beyond that, by including all life under the same protective umbrella, thus including the unborn, or first generation as well. By starting with the consideration of health and normal function, thus relying not only on ecology, but also on epidemiology and the work of the WHO, the form of ecojustice proposed here is indeed radical. But, hy connecting existing regulatory regimes not only to their explicit environmental—even if non-anthropocentric—thrust, but also to their implicit interface with all human health, I believe this proposal for ecojustice might be the most extensive one, best suited to inform supranational and international law regimes. In the next section, the case of the First Nation Peoples of Canada will demonstrate the links between intergenerational and intragenerational harms, connected through health considerations.

Intergenerational Harms: The Case of the Canadian First Nation Children

> Chiefs must consider the impact of their decisions on the seventh generation (paraphrase of precept of the Great Law of the Haundenosaunce [Six Nations Iroquois Confederacy]; Seventh Generation Fund, P.O. Box 4569, Arcata, CA 95518).

In a case out of Winnipeg, Manitoba, Canada, only "environmental" in an extended sense, the abuse of a common chemical compound, glue, by an expectant mother, posed a grave threat to the health of the yet unborn child. She had made similar choices previously, to the irreversible detriment of her two other children. Aside from the question of the possible restraints of the addicted mother, there are two important issues that also emerge from the case, and that are particularly relevant in a discussion of group rights and transgenerational and intergenerational equity.

The first point of significance is the use of the *parens patriae* doctrine which, as we will see, is here also used for the protection of group rights. The second point relates directly to specific harms suffered by aboriginal peoples, especially the harmful legacy initiated by the policy of "assimilation" of First Nation children. Social science research shows today a dismal picture of harm to these children, as the following statistics indicate:

Child functioning by Aboriginal and non-Aboriginal Children in Care

- Substance Abuse Birth Defect: Aboriginal Children (7%), non-Aboriginal Children(4%), Other visible minority children (1%)
- Behavior Problem: Aboriginal Children (18%), non-Aboriginal Children (25%); Other Visible Minority Children (18%)
- Irregular School Attendance: Aboriginal Children (15%); non-Aboriginal Children (10%), Other Visible Minority Children (6%) (Blackstock, Trocme, 2004, Table 4).

This table, coupled with what is presently known about pre-birth exposures, indicates a persistent, ongoing, intergenerational form of injustice. Unchecked, this injustice leads routinely to harms to all First Nation's Peoples, as most of these children's problems arise because of exposures and circumstances beyond their control.

Many of the difficulties these children face are due to earlier Canadian and Provincial policies of "assimilation," intended to eliminate all forms of cultural "Indian-ness" from children, by placing them in white institutional schools, removed from their parents and extended families except for two months each Summer, forbidden to speak their native tongues, and forced to abandon all their traditional practices.

These practices, intended to educate Aboriginal children to "the ways of the white man," without any respect or appreciation for their own traditions and culture, placed a heavy burden on the children, and produced harms that cannot be righted, even with the best will, within one generation. The results of earlier Canadian policies continue to produce "intergenerational effects" today:

> Aboriginal communities have not yet recovered from the damage caused by the residential schools ... For the first time in over 100 years, many families are experiencing a generation of children who live with their parents until their teens (Report of the Aboriginal Justice Inquiry of Manitoba: the Justice System and Aboriginal People 1991).

This is not the appropriate place for a lengthy historical discussion of the failnres of the Canadian Government policies in regard to its Aboriginal Peoples. The main point is that this is another case where intergenerational justice should have been practiced in several areas:

> (1) pre-birth protection, in order to prevent many of the childhood problems statistically prevalent in Aboriginal children; (2) the proper implementation of *parens patriae* doctrine in the defense and protection of Aboriginal children with behavioral, emotional, and neurological problems arising (in part) from environmental or other substauce exposure; and (3) the serious

and informed consideration of intragenerational issues connected with the intergenerational ongoing harm inflicted upon these children.

Starting with the final point as the most obvious one, Canada's Aboriginal Action Plan addresses the question of "intergenerational effects":

> The intent of the residential school policy was to erase Aboriginal identity by separating generations of children from their families, suppressing their Aboriginal languages, and re-socializing them according to the norms of non-Aboriginal society (ibid.).

As noted earlier in the discussion of Brown-Weiss's proposal, one of the major objections to her position was the open-endedness of the proposed obligation to the future. This is an example of harms to a whole class, present, future, and even to the past generation; it is the reality of all social and legal changes imposed on Aboriginal children.

The first point mentioned above is also of greater importance to First Nation Children than to others, given the statistics exposing the grave problem disproportionately affecting them because of pre-birth drug and alcohol exposure. These problems affect children immediately, but they also add to delinquency in older children and adults, thus representing another form of intergenerational injustice. Against this background, however, Canada's Child Welfare Statutes give primacy to the "best interests of the child."

> Although these documents start with the "Respect for family autonomy and support of families," and add "Respect for cultural heritage especially for Aboriginal Children," they also include "the paramountcy of the protection of children from harm." Certainly, protection of children from harm should not only initiate after their birth, when the endangerment could happen long before it. Health Canada produced a study, "Canadian Incidence Study of Reported Abuse and Neglect." Nicholas Bala writes: "Each child welfare statute has a definition of a "child in need of protection" (or an "endangered child"). This is a key legal concept as only children within this definition are subject to an involuntary state intervention under the legislation" (Bala 2004, 19).

If the need for protection arises long before social workers or the courts may be confronted with it, then it is worthy of serious consideration at the time of exposure, that is, at the time of the origin of the harm. In other words, it implies that pre-birth child endangerment should be viewed as impermissible and that legal and social measures should be put in place before the harm occurs. Legal instruments are needed to prevent such harms before they affect both the child and society. Serving justice

by preventing the harms would make both logical and economic sense as well. As the greater percentage of affected children is Aboriginal, it would seem that any instrument that does not consider the pre-conditions of their humanity is flawed and incomplete.

Intergenerational and intragenerational justice would seem to require this additional protection, as additional protection seems to be necessary, for example, from the freedom of chemical companies and other polluters to impose harm on the most vulnerable, based on the extensive research of the WHO.

Finally, the second point, the implementation of the *parens patriae* doctrine, appears to be as justified to support the intervention required by the first point as it was in the case where, for instance, a Jehovah's Witness parent refused a blood transfusion to the serious detriment of the child. As Justice MacLachlin said:

> Para. 76. Canadian Child protection Law has undergone a significant evolution over the past decades. This evolution reflects a variety of policy shifts and orientations, as society has sought the most appropriate means of protecting children from harm. Over the last 40 years or so, society has become much more aware of problems such as battered child syndrome and child sexual abuse, leading to a call for greater preventive intervention and protection. At the same time, Canadian law has increasingly emphasized individual rights to protection against state intervention (R.B. v. Children's Aid Society of Metro Toronto 1995).

In addition to the Jehovah's Witness case cited above, La Forest, J. discusses the implications of that decision regarding s.7 of the Charter (citing Whealy Dist. Ct. J.):

> When an infant, totally incapable of making any decision, is in a life threatening situation and the appropriate treatment is denied or refused by its parents, it cannot be said that any potential protection as given under section 7 for the family unit can be invoked against the right of the infant to live. Section 7 addresses itself also to "the principles of fundamental justice." It can hardly be said that the principles of fundamental justice could be invoked to deny a child a chance to live. It is worth noting as well that the rights set out in section 7 are conditional and not absolute. The rights therein set out can be interfered with if done in accordance with the principles of fundamental justice. The scheme of the Child Welfare Act, in my view, meets all the tests of fundamental justice, including a fair hearing before an impartial judge (para. 54) (ibid.).

It is important to note two major points here. The first is that the freedom of religion was here appealed to by the parents of Sheena B., the infant at risk, as they attempted to block the medically required blood transfusion. Freedom of religion is a very important principle, far superior, I believe, to the freedom of choice to engage in a lifestyle

that includes the use of alcohol or drugs. Neither is protected by the Charter.

The second point is the appeal to "principles of fundamental justice": if they could not be invoked "to deny a child the chance to live," I believe they also could not be invoked to deny to a child the right to be well-born, that is, to be born with normal physical and mental function.

The Rights of the First Generation and of the Future: The Interface

> [B]y its very nature, law must play a protective role. If violence and dependency to strong men in a society is to be replaced by the rule of law, law fulfills a role according to its most fundamental principle, i.e., to protect the equal dignity of all men, in freedom and mutual responsibility (Hirsch, Ballin Ernest, M.H. 1999, 7).

Children are the world's citizens. But while they are children they cannot speak on their own behalf or represent themselves, and one cannot always guess exactly what their future choices and preferences might be. These are also the characteristics of future generations, in fact, the very characteristics that render future generations' rights hard to defend both in morality and in the law. I have argued that ecoviolence, an attack against the human person perpetrated through environmental means, is an accepted and institutionalized criminal activity against an "other" we do not want to recognize as worthy of respect. These "others" could be citizens in developing countries, where the ecoviolence acquires a sinister racist perspective, as well as poor and "different" citizens of the most developed countries. The "other" may also be one of our own: the developing child of this population, that is, the first of future generations.

Similar thoughts and sentiments are found in an unexpected area of scholarship: in the reflections on the Holocaust. Eva Hoffman says: "Systematic violence—especially what Primo Levi called "unnecessary violence"—that is the violence that does not serve the ends of battle or victory but is meant to humiliate and brutalize the victim, is the ultimate form of mis-recognition or deliberate non-recognition" (Hoffman 2002, 280).

The "meaning," the "intent," is absent from environmental harms, and also lacking in pre-birth and perhaps some other harms to children. But, as "deliberate cruelty" is judged to be an attempt to discount, negate, and ultimately destroy the identity and the subjectivity of its target, perhaps we can also say that the converse is true. In other words, "to discount, negate the subjectivity" of those who are harmed, even without the requisite *mens rea*, necessary for the commission of a crime, is ultimately, a form of destruction that manifests an unthinking but undeniable cruelty. The humanity of these "others" is kept faceless, their identity denied.

Is this possible account of the converging plight of the first and future generations overly dramatic? Perhaps. But if we cast our minds back, to consider the consequences of our refusal to recognize the mindless violence offered to future generations and to the unborn through environmental means, we will have to acknowledge that such wholesale harms are not compatible with respect for humanity. Even within a war situation, where institutionalized violence is expected and accepted, it is not the case that any "externality" (in capitalist/consumerist terms), or "collateral damage" (in just war terms) is considered to be acceptable either morally or legally.

In the ambit of just war, there are still *jus in bello* conditions to be met, even when the objective of winning a battle, or a just war itself, is at issue. Senseless cruelty or violence is not condoned, nor is any attack against medical personnel, prisoners of war, hospitals, or the cultural or religious icons of a people (Geneva Convention 1948). These restrictions apply even when the goal to be achieved is a legal one and—for the most part—morally just. Therefore, it seems fair to also ensure that both corporate profit-making enterprises, and the activities of common citizens, whose lifestyles may impose grave "collateral damage" on those who are negligently or unintentionally harmed, be subject to similar stringent restrictions.

The freedom of persons, be they legal or biological, is not absolute and many restrictions are already in place: through public health (e.g., freedom of movement restrictions because of communicable diseases, from measles to T.B.; of smoking in public places; of having unprotected sex when HIV positive as in the recent Canadian murder conviction); or through police powers (e.g., through restrictions of speed of movement on highways, or the very impermissibility of driving if intoxicated or under the influence of certain substances).

In these cases and many others, liberty is limited by our responsibility not to harm others, a responsibility that is not only moral, but also legal and enforced through public institutions and the courts. One may object that the harms imposed by drunk driving or second-hand smoke, or even TB exposure, are clear and obvious. However, based on the scientific research of the WHO and of many epidemiologists, the results of unrestrained activities by industry or single individuals may soon well be considered "clear and obvious" too. In some cases, these effects may not

be immediately visible, but neither is the result of second-hand smoke, HIV exposure, global warming, or even drunk driving. The latter, for instance, may continue for a period without accident; but the potential for accidents and grave harm increases exponentially when the harmful preconditions persist.

Of course, neither the harm to the unborn nor to the next generation may be immediately observable. But the scientific research today is clear and robust enough to prompt us to adopt laws that defend the rights of the future.

Edith Brown-Weiss and Others on the Protection of the Future: *Standards of Fairness*

Standards of Fairness. Experts generally adopt one of two general approaches to fairness. One measure depends on a priori rules, or "focal points"—cultural or ethical rules broadly perceived as measuring fairness, which derive authority from legal and cultural traditions. The second approach views fairness as the outcome of strategic bargaining emerging from the negotiating process instead of being pre-determined. Bargained for rules derive their legitimacy from the explicit consent of agreeing parties (Brown-Weiss, quoted in Wood 1996, 305).

Given that the latter is usually subject to the will of Western power blocs as a main guiding principle, and that negotiated treaties are usually brought down to the lowest possible denominator, I have argued that ethical norms, including natural law, represent a far better option to ensure that justice and fairness be served. In fact, although *erga omnes* obligations do not explicitly include the rights of future generations, it seems that the right to survival and, if only minimally, to the health and normal function that will make such survival meaningful and re-affirm the basic rights of future people, are and shonld be at least as important as the right to escape racist or gender-based harms.

Hence, *jus cogens* norms, not politically motivated agreements, should govern regulatory regimes to protect the survival of the future. Treaties support the obligations of signatories, that is, of certain specific like-minded countries, but the harms of which we have been speaking are global in reach. Brown-Weiss speaks of the "planetary legacy" that cannot be abused or consumed, as it presently is, through the "produce of Western technologies and lifestyles." Wood suggests the creation of "cooperative regimes" shifting "the focus away from benefits, costs and targets," as in the present Climate Change Protocol. He also proposes that Western developed countries should provide financial and technical assistance to developing countries, many of which are becoming major polluters, such as China, for instance.

But Wood himself recognizes that, if standing for future interests is not universal, protection would be geographically as well as temporally incomplete. In that case, relying on voluntary agreements and regimes would appear to be precarious at best, and to represent an approach that is doomed to failure. In contrast, Brown-Weiss views intergenerational obligations and the intragenerational duties that support them, as *erga omnes* in character. This appears to be the best available option, as neither negotiated treaties, nor a "world-based empathy for the environment," could possibly be used to counteract the world hegemony of the U.S. and the WTO, and their indisputable ability to dominate global policy decisions they appear to view exclusively through an economic lens.

Brown-Weiss's position is convincing instead: the protection of future generations is specifically mentioned in various international instruments, and in fact, the World Commission on Environment and Development (WCED) recommended the appointment of an ombudsman for future geuerations. In addition, treating the "Planetary Trust" appropriately means that, like it, the case for all trusts is that "maintenance of the capital is an integral component of the investment." In general, trusts require the long-term perspective demanded by the consideration of future generations. Finally, the recognition of the rights of the future is bnt another aspect of a human right, not an anomaly, or a different issue altogether. The Preamble to the Universal Declaration of Human Rights begins as follows:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (UDHR 1948).

Considering the language of this Declaration, Brown-Weiss concludes that,

> the reference to all members of the human family has a temporal dimension which hrings all generations within its scope. The reference to equal and inalienable rights, affirms the basic equality of such generations in the human family (Brown-Weiss 1992, 21).

Both the UN Declaration and Brown-Weiss's interpretation support the understanding of the rights of the future as imposing an *erga omnes* obligation on all presently existing members of the hnman family in respect to the future. The non-derogability of this obligation shows that neither preferences nor negotiations may eliminate this grave duty.

Therefore Wood's argument for viewing, for instance, the climate system as "a common property resource," though well-intentioned, misses the full understanding of the situation. The "commons" will be the topic of the next section.

The International Protection of Human Rights and the Principle of the Common Heritage of Mankind

> In our search for an Ariadne's thread to lead us through the intricacies of international relatives we stumble upon a new concept creeping in and out of the intricacies of international reality: the "common heritage of mankind" (Cassese 1989, 376).

When we consider the historical development of international law, we note that the powerful Western countries have tended as much as possible to support the status quo in law, through the respect for the "free will of states" and the prevalence of custom and of positive law. In contrast, the developing countries and Eastern Europe, albeit for separate motives, supported the formation of principles and rules beyond those based on the agreement and cooperation of states. Cassese's insightful analysis shows that, while in earlier years a "Hobbesian or realist tradition" prevailed, which saw each country's position as essentially self-defensive in regard to other states, a later Grotian or internationalist conception of state interaction emerged, emphasizing "cooperation and regulated intercourse among sovereign States" (Cassese 1989, 31). Finally, the universalist "Kantian outlook" emerged, "which sees at work in international politics a potential community of mankind, and lays stress on the element of 'transnational solidarity'" (Cassese 1989, 31). The latter approach, together with a strong thrust toward the emergence of *jus cogens* norms and of obligations *erga omnes,* represent the preferred approach of developing countries as they press "for qnick, far reaching and radical modifications" (Cassese 1989, 123).

In contrast, Eastern European countries "prefer to proceed gingerly, believing as they do, that legal change should be brought about gradually, as much as possible through mutual agreement" (Cassese 1989, 123).

Nevertheless, both Eastern European and developing countries joined in supporting Article 53 of the Vienna Convention on the Law of Treaties (1969). Cassese remarks:

> To developing countries, the proclamation of *jus cogens* represented a further means of fighting against colonial or former colonial countries—as was made clear in 1968 at the Vienna Conference by the representative of Sierra Leone, who pointed out that the upholding of *jus cogens* provided a golden opportunity to condemn imperialism, slavery, forced labour and all the practices that violated the principle of equality of all human beings and of the sovereign equality of all states (Cassese 1989, 176).

For Eastern European states (such as Romania and Ukraine), *jus cogens* was viewed as a "means of crystallizing once and for all, peaceful coexistence between East and West."

Despite the support of both of these blocs, Western countries were initially on the defensive before bowing to the inevitable will of the majority, and the need to espouse norms consistent with their own legal traditions. It is instructive to consider that it is the weakest countries, those which felt most disempowered by Western alliances and treaties, which enthusiastically supported a "new law" approach, characterized by the introduction of *jus cogens* norms (although the "old law"—the Westphalian order where only states were the subjects of international law—also took a similar position). E. Jimenez de Arechaga (Uruguay) termed these developments "a flagrant challenge to international conscience" (Cassese 1989, 178). I have argued that we are all disempowered in the face of mounting environmental threats to our health and survival, and the powers that support global trade and current economic policies instead of life (Westra 2006, 157). Perhaps that is why we see protesting groups joining forces not only from developing countries, but also from Western environmental and animal defense groups. At any rate, Cassese summarizes the three principles that were codified in the 1969 Vienna Convention: "First, it introduces restrictions of the previously unfettered freedom of States; Second, there is a democratization of international legal relations; Third, the Convention enhances international values as opposed to national claims" (Cassese 1989, 189).

A controversial principle is arising within the "new law" paradigm, one that has not quite lived up to its true potential, at least so far: the Principle of the Common Heritage of Mankind. The concept appears *prima facie* to step forward, but this does not represent the whole picture. Birnie and Boyle say:

> An important factor contributing to the classification of living resources as common property is that they have generally been so plentiful that the cost of asserting and defending exclusive rights exceeds the advantages to be gained. A regime of open access in these circumstances has generally been to everyone's advantage. However, as Hardin has observed, the inherent logic of the commons remorselessly generates tragedy, as the availability of a free resource leads to overexploitation and minimizes the interest of any individual state in conservation and restraint (Birnie and Boyle 1992, 118).

The Principle of the Common Heritage of Mankind

Law does not spring anew; old concepts evolve and new ones emerge to fit new fields of human enterprise. In this manner, the unique historical developments manifesting themselves in the emergence of a North-South cleavage have been responsible for the introduction of a new international legal concept: the Common Heritage of Mankind (CHM) Principle. The new legal concept, CHM, can be defined as follows: the area under consideration cannot be subject to appropriation, all countries must share in the management of the region, there must be an active sharing of the benefits reaped from the exploitation of the area's resources, and the area must be dedicated to exclusively peaceful purpose.

This appears, at least *prima facie*, to be a wonderful addition to the small arsenal of ecologically constructive concepts. Nevertheless, the language employed in that definition shows clearly its incompleteness and deficiencies. If an area is ecologically sensitive and important enough to fit the CHM concept, then both managing it and exploiting it may be contrary to the continued preservation of the area, a goal implicit in the CHM designation. All future generations comprising humankind would be deprived of any benefit whatsoever if the area were to be both managed and exploited.

That goal would be far better served if both present and future humankind were managed instead, so that their exploitive activities could be controlled and even excluded from the area to be designated as a common heritage: the area's existence and the natural services it may provide for all life both within and without its immediate confines, are what is primarily at stake.

In essence, future generations of humankind can only benefit from non-exploitation, which, in turn, is based on regulated restraint or management of present human enterprise. Although the CHM principle is not yet established as either a treaty obligation or as an obligation *erga omnes,* it remains a "political principle" at this time and has emerged in international discourse because developing countries have been seeking a New International Economic Order (NIEO).

The developing nations, largely disempowered by free trade and the economically and politically powerful G-8, are attempting in this way to influence public policy opinion, at least in regard to areas "outside the traditional jurisdiction of states: the deep seabed, outer space and, to a lesser degree, the Antarctic" (Larschan and Brennan 1983, 310).

If one is concerned with the national systems of Earth, the focus has to be on the deep seabed and Antarctica. The first point worthy of note in this regard is that this political principle is too accepting of the status quo, and hence is not capable of protecting our common heritage as stated, because this natural patrimony of humankind does not only lie in areas that do not interest the Northwest affluent states. Oceans, old forests, lakes, rivers, and all other areas where biodiversity still abounds are surely part of the global commons and should be protected urgently, before their tragic loss may deprive all life of the support they provide.

Hence, the reference to the "benefits" of exploitation is clearly an oxymoron, unless one interprets benefit in a purely economic and short-term sense that appears to be contrary to the letter and spirit of a principle aimed at benefiting humankind as a whole, not only a rich and present minority.

Are we, for instance, to consider the global commons as *res nullius*, despite the tragic consequences that may follow the free and unrestricted appropriation of these areas by technologically advanced countries and other legal persons, bent on immediate economic exploitation? Or are we to consider it *res communis*, together with air and sunlight? The 1974 separate opinion of Judge De Castro in the case on the *Fisheries Jurisdiction* shows clearly the fallacy of this approach, as he states that "fish stocks in the sea are inexhaustible." But neither clean air nor safe sunlight is presently available to most people on Earth, and fish stocks themselves are often sadly depleted or have crashed into extinction (Westra 1998, Chapter 6).

I contend that the Common Heritage of Mankind Principle should be applied as *territorium extra commercium*, as Bin Cheng proposes, except that instead of "management, exploitation and distribution," our concern should be with preservation, non-manipulation, and respectful treatment, as these concepts, not the former, would ensure that humankind as such may enjoy the benefits of an unspoiled nature.

Here is Cheng's important passage discussing some of these concepts:

> While territorium extra commercium and Territorium commune humanitatis (for CHM) shared the same characteristics that they cannot be territorially appropriated by any State, they differ, in that the former is essentially a negative concept, whereas the latter is a positive one. In the former, in time of peace, as long as a State respects the exclusive quasiterritorial jurisdiction of other states over their own ships, aircraft and spacecraft, general international law allows it to use the area or even abuse it more or less as it wishes, including the appropriation of its natural resources, closing large ports of such ports of such space for weapon testing and military exercises

and even using such areas as a cesspool for its municipal and industrial sewage. The emergent concept of the common heritage of mankind, on the other hand, while it still lacks precise definition, wishes basically to convey the idea that the management, exploitation and distribution of the natural resources of the area in question are matters to be decided by the international community (or simply the contracting parties, as in the Moon Treaty?) and are not to be left to the initiative and discretion of individual States and their nationals (Cheng 1980, 337).

Larschan and Brennan, in contrast, are primarily concerned with distributive issues. They argue convincingly that, even though it seems that certain areas are protected under the CHM Principle, in practice it only appears to protect the "Group of 77," given that the "one nation-one vote procedure of the Assembly is cosmetic." The Council empowered to make executive decisions is dominated by states "on the basis of investments, social system, consumption, production, special interests and equitable geographical distribution" (Larschan and Brennan 1983, 323).

Our concern, instead, is with long-term preservation, not with the present distribution of the economic benefits of the global commons. The distributive approach, as Cheng points out, permits the use of the patrimony of humankind as a "cesspool," hardly appropriate to the Common Heritage of Mankind. Even with its weaknesses, it would have been highly desirable to retain the use of the principle beyond open space, the moon, and the deep seabed. The Antarctic Treaty System protects the area and the related ecosystems "in the interest of mankind as a whole" (1991 Protocol to the Antarctic Treaty on Environmental Protection, Preamble), and the most obvious common heritage—the air we breathe—has not been so designated, rather the "global climate" has been referred to as a "common concern." In other environmentally related preambles, the expression used is "world heritage of mankind" (Convention for the Protection of World Cultural and Natural Heritage 1972).

In contrast, referring to any aspect of the commons as a "property resource" eliminates the requirement of respect and preservation and substitutes an approach that only requires "fairness of allocation procedures." The latter will not support ecojustice as the combination of intragenerational and intergenerational justice, and replaces it with an approach that retains an economic/procedural flavor, as "maintaining quality, allocating capacity, and controlling access." I have argued that we are facing the "final enclosure movement" as the tragedy of the commons reaches its final stage.

To propose, as Wood does, that "stable institutions [that] include equitable arrangements, efficiency, assumed expectations through compliance monitoring and graduated sanctions" (Wood 1996, 311), shows a misunderstanding of both the nature and the gravity of the situation. It is not only a matter of slowing down the inevitable elimination of the resource base by procedural fairness and "assurance games." It is rather a question of viewing the Earth not only as property to be divided and exploited, even when fairness is employed, but to consider it as comprising natural systems whose integrity and support are essential to our survival present and future.

The protection of ecosystemic functions supports our own, as the WHO has indicated, both in the present and in the future, starting with the first generation.

Intragenerational and Intergenerational Equity: Ecojustice for the First and for Distant Generations

This we know: the earth does not belong to man: man belongs to the earth ... Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web, he does to himself (Chief Seattle, patriarch of The Duwamish and Squamish Indians of Puget Sound, to U.S. President Franklin Pierce in 1855).

This is indeed the position of today's ecology, and of biocentric and ecocentric environmental ethics, from Aldo Leopold on. There are both scientific and moral reasons to support the need for ecojustice, or equity that respects the future as well as the present. From a scientific point of view, the unpredictability of future events, based ou recent chaos theory research, ensures that any prediction that makes claims to certainty and accuracy is most likely incoherent and false. Scientific uncertainty is an accepted paradigm today, but even the use of the precautionary principle is, in some sense, insufficient, as it promotes the idea that we are not sure whether ecological or biological harm will follow certain practices or activities. In contrast, what might be uncertain or imprecise might be the specific form the expected harm will have, not its occurrence. In this sense, it might be like saying that devices capable of predicting the occurrence of a tsunami (such as the one that devastated Indonesia, Sri-Lanka, and Thailand on Dec. 26, 2004) should not be put in place, because such devices cannot predict exactly the number of victims for each affected country, or the precise amount of economic damage we can expect.

The precautionary principle proposes that we should err on the side of caution, because we are not sure. But many of the harms resulting from

ecological/biological disintegrity are well—if not precisely—known and expected. The problem is not lack of knowledge, but a combination of stubborn partiality for short-term gain, and for visible immediate advantages, particularly economic ones, over both precaution and long-term safety, and for the consumerist/capitalist thrust of corporate activities. Moreover, these latter activities are insulated and protected against the undefended rights of vulnerable peoples and populations to survive unharmed.

That is why such soft law instruments as the Earth Charter are widely praised and welcomed in the developing world, but viewed with suspicion and distrust by wealthy, affluent countries, although the latter are the ones most in need of its principles of respect for all generations, and for the integrity of the Earth. Morally speaking, Brown-Weiss is certainly correct as she affirms, "As part of the natural system, we have no right to destroy its integrity, nor is it in our interest to do so. Rather, as the most sentient of living creatures, we have a special responsibility to care for the planet" (Brown-Weiss 1990, 198).

The combination of up-to-date science and moral belief culminates in some of the legal instruments cited earlier. The "right" sentiments are often expressed in preambles and such, but the quest for true equity escapes: economic interests tend to block normative considerations. Thus, harmful exposures destroy the lives and decimate the healthy functioning of the first generation, while harmful substances continue to accumulate to wreak a worse havoc on the future.

A link between first and future generations can also be found in the economic concerns found in most families. At least two common approaches found in families favors the future: first, the accumulation of wealth on the part of many parents in consideration of the future needs of their children, is useful "both as insurance for the parents, and an inheritance for the children" (Epstein 1989,1465). Second, the motive to secure a better future for the children prompts parents to reduce spending in favor of saving: "the bequest motive thus tends to defer consumption and promote investment" (Epstein 1989, 1472-1473).

This example illustrates some of the consequences of the serious concern for the future we may find in parents, but it is probably not readily present in the general population in relation to our own collective future offspring. Both the desire not to waste, but to respect (ecological) wealth, and to curb consumption of (natural) resources, would provide an excellent basis for the intergenerational equity we are seeking to promote. The aspect of respect is certainly present in the beliefs and attitudes of

aboriginal peoples, including the First Nation peoples of Canada, and most African peoples.

Respect, in turn, may well breed concern and even distaste for overconsumption, when the consequences that will surely follow are clearly understood. But neither respect nor restraint may be left to spring up spontaneously in the hearts and the thoughts of all people, although both are natural and expected when our own future (first) generation is under consideration. That benevolence must be legislated and enforced if we ourselves and our future are to be protected and if equity is to be required.

The Significance of Equity to Ecojustice

In his important Dissenting Opinion in the Gabcikovo-Nagymaros Case, Judge Christopher Weeramantry discusses equity in detail. Perhaps most important, in his long and thorough analysis, Weeramantry says that "in the context of sharing of natural resources ... equity is playing an increasingly important international role" (Gabcikovo-Nagymaros Case 1997).

Equity, as Weeramantry explains it, is far more than procedural fairness. It may be used by the courts as rationale to reach a decision when faced by facts that may not have been considered before in the Court's jurisprudence; but equity, as Judge Jimenez de Arechaga affirms, cannot be used to reach a "capricious" decision, but must exhibit "reasonableness in the light of individual circumstances." It can be used in the sense of "applying distributive justice and redistribution of wealth," should equity considerations permit, and in fact mandate, the consideration of the ensuing results of a judicial decision. Finally, it is intended "to render justice [not?] through the rigid application of general rules and principles of formal legal concepts, but through an adaptation and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case" (ibid. 124).

Thus, the arguments purporting to prove that no full knowledge or precision is available to direct and inform our thinking when seeking a just approach to all future generations, fail. Equity itself may be brought in as the necessary corrective, through its role in "tempering the application of strict rules" (ibid.). Weeramantry cites Aristotle in the Nichomachean Ethics in support of his position:

> The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general statement ... This is the essential nature of the equitable: it is the rectification of law where law is defective because of its generality (ibid. 133).

But the judicial leeway and flexibility here indicated show that judicial discretion (c) can only be applied through the choice of an equitable principle.

As noted above, not only are some of the causes of the harms to which all future generations are exposed, from the first one onward, similar, but also the reasons why these exposures are not yet clearly proscribed in the law have similar roots. They include the belief in absolute freedom as paramount for both individuals and legal persons, and the preeminence of the economic motive—the so-called "sovereignty" of the consumer.

It is hard, in fact almost impossible, to restrain freedom and preference satisfaction even in the name of intragenerational equity; it is much harder to do so for intergenerational motives. Nevertheless, it should be possible to do so, as Weeramantry's dissent suggests, because many principles of equity are already embedded in the law: "Many principles of equity such as unjust enrichment, good faith, contractual fairness and the use of one's property so as not to cause damage to others are already embedded in positive law. In the field of international law, the position is the same" (ibid. 115).

The appropriate use of equity, in fact, starts with assessing which facts and circumstances must be considered. The existence of the harms befalling the future from present practices, it seems clear, cannot and should not be excluded from any consideration used to reach an equitable position regarding those practices.

Conclusion

States as well as human beings, by both their action and inaction, share the responsibility for causing emissions and building greenhouse gases (GHGs) that have both intergenerational and intragenerational impacts. Several authors in this book have eloquently articulated the need for a renewed environmental ethic as we face global climate change. Equitable considerations enshrined in the "common but differentiated responsibilities" principle lie at the core of the legal and institutional mechanisms devised under the Kyoto Framework as the world community strives to undertake the needed action to respond to climate change (Nanda, this volume).

How the post-Kyoto scenario unfolds at the Copenhagen meeting in December 2009, scheduled to unveil the successor to the Kyoto Protocol, with fixed obligations and timetables for each state, will demonstrate whether there is in fact the political will to realize the urgency of securing both intergenerational and intragenerational rights.

Note

1. This article is based on a chapter previously published in the author's *Environmental Justice and the Rights of Ecological Refugees*, Earthscan 2009.

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