

Laura Westra, Canada. A thematic essay which speaks to Principle 4 on legislation regarding harm to nature

Securing Earth's Bounty for Present and Future Generations



Laura Westra has held offices in the International Society for Environmental Ethics, Science for Peace Group, Occupational Ethics Group, and Society for the History and Philosophy for Science and Technology. She is on the editorial boards of many philosophical and scientific journals, including *Environmental Ethics*. She has been a member of many boards and committees, including the IUCN Commission for Environmental Strategy and Planning, and the Planning and Implementation Group for the Earth Charter. She has been a consultant for the World Health Organization, the University of Peace, and the Ontario Government. Most of Westra's work is on environmental ethics, policy and law, with special emphasis on human rights and global justice. Westra has published more than seventy five articles and fifteen books, including *Just Integrity* (2002); *Ecoviolence and the Law: Supranational, Normative Foundation of Ecocrime* (2004). She has also received a second Ph.D. in International Law.

At a recent meeting of the World Health Organization (WHO), Budapest, Hungary, June 23-25, 2004, on the "Rights of the Child to Health and the Environment," David Staner of Denmark stated that "children are today's canaries," referring to the proverbial "canary in the mine" used to alert miners to the fact that the mine's conditions were unhealthy, possibly even lethal. I found this concept extremely disturbing, as it acknowledged an aspect of the status quo that further emphasized the widespread ecoviolence to which we are all exposed in various degrees. Children are exposed to violent attacks on their physical integrity and normal function long before they are born. In addition, children are far more vulnerable than adults to most environmental assaults and exposures, or ecoviolence, because of their different physiology and their specific health needs. Finally, children are the most vulnerable among us, because they can neither move and change their location or living conditions, nor protest what is being done to them.

In this essay, I will explore, as a legal scholar, the state of law as it relates to the right of future generations. Children should be

considered the "first generation" when future generations rights are named, as they are in many international and domestic instruments, and are explicitly cited as worthy of protection, as we shall see below, although the preborn should also be considered part of the first generation. Thus the environmental justice for which I have argued from both a legal and a moral point of view, does not encompass only North/South issues in its present synchronic aspect, as justice among peoples or intra-generational justice, but it has even stronger implications from the diachronic standpoint, as the human race as such appears to be at stake.

There is one major case in law in which children and future generation rights are explicitly linked – that is the case of *Minors Oposa v. Secretary of the Department of Environment and Rural Resources*, 33 I.L.M. 173 (1994):

1. The Rights of The First Generation and The Future

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 specifically to intergenerational equity in international law. Barresi goes on to point to the significance of the case: "... it was decided by a national court on principles of intergenerational equity for future generations of nationals of that national state". This, I believe, is only partially correct: appeals to future generations for ecological purposes and to preserve "environmental rights," a "nebulous concept" according to J. Davide, have far wider implication that 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 our point of view, what is particularly important is the

appeal to *parens patriae* doctrine, as the minors request explicitly, “protection by the State in its capacity as *parens patriae*.” I have argued in the discussion of the rights to health and the environment of children and the unborn, and found the *parens patriae* doctrine to be the best approach to governmental and institutional responsibility for the rights of the first generation. That doctrine progressed from being used, initially, purely for economic and inheritance problems, to juridical use in cases that are exclusively medical and protective. Now we note that the same doctrine is used for the protection of life and health of children and future generations, by means of the preservation of naturally “supportive” ecology. This case, therefore, explicitly links the two major areas of concern of this work: children’s life and health and the environment.

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.

At any rate, 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:

2. Obligations to Future Generations in the Law: The Proposal of Edith Brown-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’ 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 obligation to pass on the Earth to the next generation in as good a condition as it was when that generation first received it and 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”. In addition, each generation has four duties. First, to conserve the diversity of the Earth’s natural and cultural resource base; second, to 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; third, to provide all members with equitable access to the resource base inherited from past generations; and fourth, to conserve this equitable access for future generations.

These duties impose non-derogable obligations, especially on affluent Western developed countries who 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* (or universal obligations), and they should also be considered as founded on jus cogens (or non-derogable) norms as the proliferation of harmful chemicals, the exploitation of natural areas, 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 (that is, crimes perpetrated through the environment), 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 WHO.

But this misrepresents the role of ecological integrity in human survival. The Earth Charter correctly links the two by listing Ecological Integrity as its second Part, right after the one we cited above. Principle 5 calls for us to “Protect and restore the integrity of Earth’s ecological systems, with special concern for biological diversity and the natural processes that sustain life.” Essentially, Klaus Bosselmann has noted that there is a 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. He adds, “But like the ‘rights’ issue, the liberal approach of justice tends to foster the very problems we are trying to overcome...” Bosselmann wants to link intra- and intergenerational justice, citing Brown-Weiss’s own proposal 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, as an integral part of the 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 World Health Organization, the form of ecojustice here proposed is indeed radical. But, by 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. ●