

### 3 Justice and the Environment: Building Blocks for a Theory on Ecological Justice

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Philosophers typically write about what other philosophers write about, and if no one has written about a problem it is difficult to get anyone to write about it. (Dale Jamieson<sup>1</sup>)

Relating justice to the environment is a tall order. Both the idea of justice and the environmental problematic are among the most important issues of modern times; however, the link between the two has not been explored. Surprisingly, there is as yet no systematic attempt to define the idea of justice with respect to the natural environment. Not even the renowned environmental justice movement has taken an interest in exploring a general theory on environmental justice. Why should it, one could ask, given the deliberate practical pursuit of equal justice in terms of race, ethnicity and socioeconomic status? The struggle for environmental health and social justice has, more than anything, been a political struggle.

Since the first adoption of a manifesto on 'The Principles of Environmental Justice' in 1991<sup>2</sup> talk about environmental justice has become ubiquitous. The term has entered the environmental and legal vocabulary. Like the case for social justice, the case for environmental justice is strong, although its implications are unclear. Far from being a defined concept, environmental justice has generated a vast diversity of discourses.<sup>3</sup> There are, to be sure, some common underpinnings. Most would accept that there is a class of problems which might be dubbed 'environmental' and that these problems arise out of the particular way we relate to something external called 'nature'. One can also say that the reference to justice implies a concern for fairness. Beyond that, the multiplicity of discourses becomes confusing. Fairness towards whom: the less well-off (minorities, ethnical groups), society at large, future generations, the environment, life on the planet?

The issues of inequality feature prominently in any environmental justice debate. But the same is true for the sustainable development debate. Economic disparity between the rich and the poor are at the centre of both. The difference between them lies in the time horizon: environmental justice refers to the distribution problem within the present generation (intragenerational equity); sustainable development alerts to the distribution problem between the present and future generations (intergenerational equity). There is, however, a third concern that underpins environmental justice and sustainable development alike: the concern for ecological stability. We

may ask whether this concern, too, involves a distribution problem which can be captured by notions of equity and justice.

While environmental justice—like environmental sustainability—clearly concerns the relationship between humankind and the natural world, this relationship is often glossed over as a mere philosophical problem. Despite a vast body of eco-philosophical literature, the debate on environmental justice has been little informed by environmental ethics. For a conceptual approach to environmental justice, however, this 'profoundly important ethical issue'<sup>4</sup> can hardly be overlooked. The ecological community of humans and other species of the natural world may be different from the social community of humans. But is it so different that equity and justice have no role in it? This chapter argues for the incorporation of the ecological community into environmental justice. From an ecological perspective an understanding of environmental justice limited to distributional problems within society appears dualistic and anthropocentric. The natural environment—and with it human society—is affected by the way in which environmental benefits and burdens are distributed. If the principles and procedures of environmental justice are defined with merely human welfare in mind, they will do little to rectify ecological imbalances. On the other hand, environmental justice as a form of (anthropocentric) social justice and environmental justice as a form of (ecocentric) ecological justice may not be mutually exclusive.

This chapter seeks to relate environmental ethics to concepts of justice. In doing so it will define ecological justice (eco-justice) as a guiding principle for environmental policy and law. This chapter will: (i) reflect on the notion of environmental justice; (ii) consider some methodological approaches; (iii) discuss the elements of ecological justice; and finally (iv) show some practical implications for environmental decision-making. The author will draw from contemporary legal philosophy, environmental ethics and legal statutes, not to aim for a complete theory, but rather to offer building blocks which may be used for the construction of a future theory.

The *first of such building blocks* is to take note of the deficit: a theory of either environmental justice or eco-justice is lacking. Any theoretical consideration must begin with the observation that philosophers and lawyers may have thought a lot about justice on the one hand, and the environment on the other, but linking the two has not been the subject of much thought. There may be good reasons for this disinterest. One may be the lack of need. As long as we have a general understanding that environmental problems are to be acknowledged in all their complexities, a specific theory or definition may not be necessary at all. Another reason may be the belief that environmental justice is reasonably well understood as 'the pursuit of equal justice and equal protection under the law for all environmental statutes and regulations without discrimination based on race, ethnicity, and/or socioeconomic status'.<sup>5</sup> Such an adoption from the US context would, however, ignore that environmental justice has also been understood to include intergenerational and interspecies issues.<sup>6</sup> Moreover, many would disagree with a concept of environmental justice that implies specific ideas (be it the description of a social movement or an assembly of certain ethical and legal principles). To acknowledge those ambiguities

<sup>1</sup> D. Jamieson, 'Global Environmental Justice', in: Attfield, Belsey (Eds), *Philosophy and the Natural Environment* (Cambridge, Cambridge University Press, 1994).

<sup>2</sup> At the First National People of Color Environmental Leadership Summit held in Washington DC; see K. Grossman, 'The People of Color Environmental Summit', in: Bullard (Ed.), *Unequal Protection: Environmental Justice and Communities of Color* (San Francisco, Sierra Club, 1994).

<sup>3</sup> For an overview see C. Shanklin, 'Pathfinder-Environmental Justice', (1997) 24 *Ecology Law Quarterly*, 333.

<sup>4</sup> Rowe, this volume, at note 8.

<sup>5</sup> 'What Is Environmental Justice?' *Environmental Justice Information Page*, www-personal.umich.edu (University of Michigan, 1998).

<sup>6</sup> See, e.g., S. Elworthy, J. Holder (Eds), *Environmental Protection: Text and Materials* (London, Butterworths, 1997), pp. 465–466; D. Cooper, J. Palmer (Eds), *Just Environments—Intergenerational, International and Interspecies Issues* (London, Routledge, 1995); T. Hayward, 'Interspecies Solidarity: Care Operated Upon by Justice', in: Hayward, O'Neill (Eds), *Justice, Property and the Environment* (Aldershot, Ashgate, 1997).

is only fair, and in the absence of an emerging consensus it may not be appropriate at all to look for a unifying concept of environmental justice.

There may be further reasons for the lack of systematic theoretical approaches to relate justice to the environment. However, the author suspects that the ultimate reason is quite trivial: lack of interest. Legal philosophers have not (yet?) discovered the deeper implications of environmental issues for the idea of justice, and environmental philosophers have not (yet?) been concerned with theories on justice.<sup>7</sup> As far as jurisprudence is concerned, the eternal debate on justice has, in recent years, focused on Rawls's observation that justice rests on basic intuitions about fairness<sup>8</sup> and on Dworkin's attempt to move beyond legal positivism.<sup>9</sup> There is, of course, no 'complete idea of justice'<sup>10</sup> in sight, nor a final solution to the positivism-natural law debate. But indications are that jurisprudence has never been more interested in the relationship between law and morality than today.<sup>11</sup> Environmental philosophy, on the other hand, has fundamentally challenged the traditional view of humanity and the world. The focus here is the relationship between morality and the environment ('environmental ethics').<sup>12</sup> Clearly, there would be implications for law and morality as well, but environmental philosophers have so far only looked at some legal aspects like 'rights' or 'intrinsic values' of nature, but not at the idea of justice. Linking environmental philosophy with contemporary jurisprudence seems timely and promising considering the importance of both for the pursuit of environmental justice. It is surprising that this has not been done in any major way.

Thus, the theoretical deficit can be described as an underrepresentation of the environmental dimension in jurisprudential debates on justice and an underrepresentation of justice in environmental debates. The challenge ahead is making a case for jurisprudence and the law to take environmental justice seriously.

A departure into unfamiliar terrain must begin with the familiar—in this case, with a brief review of the environmental justice debate to date. This will be our *second building block*.

### I. Traces of Eco-Justice in the US Environmental Justice Debate

Calls for environmental justice are commonplace in the discourse on environment and development. The calls range from the rhetorical to the constructive, and

emerge from academia and political activism alike. In their country of origin, the US, they have received the widest audience and the greatest government response. The Environmental Protection Agency reads environmental justice as the 'fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies'.<sup>13</sup> President Clinton's famous Executive Order 12898<sup>14</sup> does not define, but rather uses the term as an exercise to identify health and environmental effects on minority and low-income populations. Neither in official documents nor in the vast literature on the US environmental justice movement do we find expressive reference to the idea of justice *per se*.

However, the elements of equity and equality seem to underpin most reflections on environmental justice. The term 'environmental equity' was, in fact, preferred in early governmental deliberations as it lends itself more readily to specific measures than presumably environmental justice does.<sup>15</sup> One of the objectives of the Executive Order is that no segment of the population should suffer disproportionately from adverse health and environmental effects. The American environmental justice debate quite clearly espouses the concern for equality; however, what sort of equality?

There is a significant difference between the government and the environmental justice movement as to its implications. The government—based firmly on political liberalism—thinks of formal equality and equal rights. Remarkably, the implementation of the Executive Order has led to a Draft Environmental Justice Strategy (1996) which asserts an entitlement: 'All Americans deserve clean air, pure water, land that is safe to live in, and food that is safe to eat'<sup>16</sup> and translates equality to 'fair treatment'. Any further implementation, i.e. issues like past injustice, existing inequalities and the imbalance of wealth, are omitted. This reduction of substantive environmental justice to formal principles reflects the liberal idea of justice. John Rawls, of course, acknowledges the material conditions of life.<sup>17</sup> But his proposals to deal with the dilemma are rules of fair competition and access to justice rather than constraints on justice-denying social inequalities themselves.<sup>18</sup>

This is exactly the aim of the environmental justice movement. The whole battle is about making environmental justice possible rather than merely advocating it. Whether this battle is fought from a position totally outside the legal discourse, as some critics see it,<sup>19</sup> or whether it proceeds more within the traditional confines of political theory (discussing 'justice', 'equality' and 'rights') may not be crucial here.<sup>20</sup>

<sup>7</sup> P. Wenz, *Environmental Justice* (Albany, State University of New York Press, 1988), should be noted as an exception. Wenz considers various possible theories on environmental justice, only to decide that 'each theory failed when taken by itself', and abandons the search for coherence among moral judgements. This solution leaves us with further questions: why are certain principles preferable to others, and what is the practical use of Wenz's 'anything-goes pluralism' for strategies to overcome our environmental crisis when clearly the crisis is the result, *inter alia*, of certain kinds of moral judgements?

<sup>8</sup> J. Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1971); J. Rawls, 'Justice as Fairness: Political not Metaphysical', (1985) 14 *Philosophy and Public Affairs*, 223.

<sup>9</sup> R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977); R. Dworkin, *Law's Empire* (London, Fontana, 1986).

<sup>10</sup> L. Weinreb, 'The Complete Idea of Justice', (1984) 51 *University of Chicago Law Review*, 752.

<sup>11</sup> For observations of this kind, see, e.g., C. Douzinas, R. Warrington, *Justice Miscarried* (Hertfordshire, Harvester Wheatsheaf, 1994), p. 1; A. Hunt (Ed.), *Reading Dworkin Critically* (Oxford, Oxford University Press, 1992), p. 1; O. Höffe, *Political Justice* (Cambridge, Cambridge University Press, 1995), p. 3. For German jurisprudence, see E. Hilgendorf's review of recent textbooks on legal philosophy, 'Rechtsphilosophische Einführungsliteratur', (1997) 83 *Archiv für Rechts- und Sozialphilosophie*, 212.

<sup>12</sup> For recent overviews see R. Elliot (Ed.), *Environmental Ethics* (Oxford, Oxford University Press, 1995); R. Gottlieb (Ed.), *The Ecological Community* (New York, Routledge, 1997), and the ongoing issues of the journal *Environmental Ethics*.

<sup>13</sup> United States Environmental Protection Agency, 'environmental justice' homepage, [www.epa.gov/sweroops/ej/index.html](http://www.epa.gov/sweroops/ej/index.html).

<sup>14</sup> *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (11 Feb. 1994).

<sup>15</sup> W.A. Gunn, 'From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice', (1996) 22 *Ohio Northwestern University Law Review*, 1227, at p. 1235.

<sup>16</sup> Environmental Protection Agency (EPA), *Draft Environmental Justice Strategy* (Washington DC, EPA, 1996).

<sup>17</sup> See, e.g., J. Rawls, *A Theory of Justice*, supra note 8, p. 204: '[t]he worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims'.

<sup>18</sup> R. Keat, 'Liberal Rights and Socialism', in: Graham (Ed.), *Contemporary Political Philosophy: Radical Studies* (Cambridge, Cambridge University Press, 1982).

<sup>19</sup> G. Binder, 'On Critical Legal Studies as Guerilla Warfare', (1987) 76 *Georgetown Law Journal*, 1, at p. 36: 'legal or policy arguments are not likely to be effective in achieving social change'.

<sup>20</sup> Both strands seem to be intertwined: see R. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Boulder, Westview Press, 1990); R. Hoffrichter (Ed.), *Toxic Struggles: The Theory and Practice of Environmental Justice* (Philadelphia, New Society Publishers, 1993); D. Harvey, *Justice, Nature and the Geography of Difference* (Oxford, Blackwell, 1996), pp. 366–402.

The point is a commonly shared dissatisfaction with the 'standard view'<sup>21</sup> of environmental management that perpetuates the economic status quo at the expense of the poor. In the words of leading environmental justice advocate Robert Bullard: 'the grassroots environmental justice movement . . . seeks to strip away the ideological blinders that overlook racism and class exploitation in environmental decision-making'.<sup>22</sup> While social inequalities are in the foreground,<sup>23</sup> the struggle is for justice for all. 'All' is meant to include all people ('Americans'), but potentially other living beings as well. Bullard describes this wider perspective as the 'long-range vision'. Ultimately, the struggle is for 'institutionalizing sustainable and just environmental practices, that meet human needs without sacrificing the land's ecological integrity'.<sup>24</sup> The ethical underpinnings of such concerns are not confined to anthropocentrism. The environment is defined to include all aspects of the social and natural environment<sup>25</sup> and nature is seen as of intrinsic value.<sup>26</sup> Some of the Principles of Environmental Justice, mentioned at the beginning,<sup>27</sup> reveal an ecocentric approach: Principle 1 refers to the 'sacredness of Mother Earth, ecological unity and the interdependence of all species' and Principle 3 to 'the interest of a sustainable planet for humans and other living things'. And Don Stone characterizes the philosophical basis as non-anthropocentric ('eco-justice').<sup>28</sup>

This is not to say that the US movement has adopted environmental justice at the expense of social justice. In fact, the conflicts between more established environmental organizations focusing on 'nature' (survival of endangered species etc.) and grassroots groups focusing on 'people' (e.g. rural and urban poverty),<sup>29</sup> seem to suggest ideological differences between preservation and redistribution. However, there is no genuine moral dilemma or tension between them. These two duties do not somehow preclude each other. Morally, we are not forced to choose one or the other. The ecocentric position is inclusive<sup>30</sup> as it merely extends intrinsic values of humans to non-humans rather than replacing one by the other. Thus, redistributive or social justice would be compatible with an ecocentrically defined idea of environmental justice.<sup>31</sup>

<sup>21</sup> Harvey, *ibid.*, p. 373.

<sup>22</sup> R. Bullard (Ed.), *Confronting Environmental Racism: Voices from the Grassroots* (Boston, South End Press, 1993), p. 206.

<sup>23</sup> The 'critical vantage point' (Bullard).

<sup>24</sup> *Ibid.*

<sup>25</sup> See, e.g., the Southern Organizing Committee for Economic and Social Justice, as cited in A. Szasz, *Ecopolitism: Toxic Waste and the Movement for Environmental Justice* (Minneapolis, University of Minnesota Press, 1994), p. 151.

<sup>26</sup> The relevant literature contains many references to Aldo Leopold's land ethic, *A Sand County Almanac* (New York, Oxford University Press, 1949) and ecocentric theory; see, e.g., B. Taylor (Ed.), *Ecological Resistance Movements* (Albany, State University of New York Press, 1995), p. 15; D. Schlosberg, 'Challenging Pluralism: Environmental Justice and the Evolution of Pluralist Practice', in: Gottlieb, *supra* note 12, p. 274.

<sup>27</sup> *Supra* note 2.

<sup>28</sup> D. Stone, 'No Longer at the End of the Pipe, but Still a Long Way from Sustainability', (1995) 19 *Accounting Forum*, 95.

<sup>29</sup> As Taylor points out: '[i]t is a strange paradox that a movement which exhorts the harmonious coexistence of people and nature . . . somehow forgets about the survival of humans'; D. Taylor, 'Can the Environmental Movement Attract and Maintain the Support of Minorities?', in: Bryant, Mohai (Eds.), *Race and the Incidence of Environmental Hazards* (Boulder, Westview Press, 1992).

<sup>30</sup> It should be noted though that social and redistributive policies are little explored by ecocentric writers; their main concern is still to establish the alternative worldview to mainstream anthropocentrism. For a strategy based on both social and environmental concerns, see, e.g., K. Bossemmann, *When Two Worlds Collide: Society and Ecology* (Auckland, RSVP, 1995), pp. 264–269.

<sup>31</sup> For an analysis of the compatibility of ecocentrism with redistributive policies, see M. Michael, 'International Justice and Wilderness Preservation', in: Gottlieb, *supra* note 12.

The environmental justice movement may not have a distinct profile as an ecocentric movement. However, this is not because of an anthropocentric preference, but rather due to its peculiar character as a social movement. The US movement has, more than most other new social movements, assimilated environmental issues into a comprehensive vision of democratic process, civil rights and social justice.<sup>32</sup> Clearly, outside mainstream environmental groups, it is fundamentally at odds with environmental management strategies, but it is open to a variety of political and ethical viewpoints. This inclusiveness and diversity has often been described as the real strength of the environmental justice movement.<sup>33</sup> Some commentators identified a new 'solidarity across diversity'<sup>34</sup> and a new form of political pluralism<sup>35</sup> as the secret of the political success of the environmental justice movement.

If it is possible to trace elements of the general idea of justice from the environmental justice movement, they can be identified as elements of distributive justice. Not by accident the terms 'social justice' and 'environmental justice' are both associated with the environmental justice movement. As we have seen, social redistribution can be pursued without overlooking the need for environmental redistribution and *vice versa*. The combination of social and environmental redistribution may, of course, lead to varying preferences and may not be free of political conflicts. However, what is important in our context is the possibility, in principle, to identify a social and an environmental dimension of distributive justice. On the basis of such a possibility we can now explore these dimensions further and ask whether justice can be related to a concern for the environment.

This question forms our *third building block*.

## II. Justice and the Environmental Dimension

### A. Justice and Ethics

Any reflection on the idea of justice requires, first of all, to acknowledge its vagueness although two aspects of its meaning can be distinguished, one being almost common sense, the other highly controversial. The first aspect is that most would agree to the classical precept of 'giving everyone their due'. Where this is not the case we speak of injustice. Since Aristotle it has been commonly accepted that injustice arises when equals are treated unequally and also when unequals are treated equally. The art is to identify equals and unequals, which is the second, and the most controversial, aspect of the idea of justice.

What is a person's due depends on the highly contentious question of: which classifications count as legitimate, and which as offensive or irrelevant discrimination. Consequently, we are left with theories of justice rather than one idea. Any theory of justice becomes preoccupied with criteria of distribution, and its practitioners rehearse various irreconcilable political and economic tests under the headings of 'entitlements', 'needs' or 'deserts'. Facing such difficulties, some have tried to develop a more universally acceptable theory of justice. Marx believed that equality is the key to justice, Rawls identified fairness as the essence,<sup>36</sup> Heller

<sup>32</sup> B. Edwards, 'With Liberty and Environmental Justice for All', in: Taylor, *supra* note 26, p. 36.

<sup>33</sup> See, e.g., Environmental Career Organization (ECO), *Beyond the Green: Redefining and Diversifying the Environmental Movement* (Boston, Environmental Career Organization, 1992); B.D. Lynch, 'The Garden and the Sea', (1993) 40 *Social Problems*, 108, at p. 110; Edwards, *ibid.*, p. 51.

<sup>34</sup> B. Luke, 'Solidarity Across Diversity', in: Gottlieb, *supra* note 12.

<sup>35</sup> D. Schlosberg, 'Challenging Pluralism', in: Gottlieb, *supra* note 12.

<sup>36</sup> Rawls, 'Justice as Fairness . . .', *supra* note 8.

resorted to mere procedures<sup>37</sup> and Dworkin—in an attempt not to disguise political value—took ‘rights seriously’.<sup>38</sup> A survey of these and other theories confirms the impression that justice is blessed or cursed with a bewildering number of competing beliefs amongst which there is no agreement.

In such a situation of disagreement perhaps the best service that philosophy and jurisprudence can offer is ‘to provide means for a more accurate and informed definition of disagreement rather than for progress toward a resolution’.<sup>39</sup> At least, this remark of MacIntyre seems readily agreeable—although postmodernists like Lyotard<sup>40</sup> and Rorty<sup>41</sup> would add that the problem lies not with particular conflicting theories, but with the theoretical enterprise itself.

A postmodern concept of justice may not be available as yet,<sup>42</sup> and even if it were we are condemned to continue the search for justice. The real challenge, it seems, is to give up all hopes for a theory or model of justice<sup>43</sup> and concentrate, instead, on moral and political concerns underlying the theory-building.

In pursuing this metaphysical level the suggested approach is to reject the assumption that justice can be derived solely from legal reasoning. All jurisprudential concepts of justice rest on the deontological school of ethics associated with the philosophy of Kant. Ethics is identified as a body of rules or principles that are either grounded in reason or reached through universally agreed preconditions of argumentation and discourses. Kant reversed the ancient tradition that morality is grounded in some pre-existing idea from which the law is derived.<sup>44</sup> According to Kant it is not the concept of good that posits the law but the moral law that defines good and evil. Kant’s categorical imperative<sup>45</sup> appears, therefore, out of a pure sense of duty and respect. It is only a slight overstatement to say that Kant’s moral person is rationalistic without any emotions and personal history. Such a rational being is the focal point for the synthesis of reason, freedom and the law, and only what passes the test of reason can be considered lawful. As a consequence, the law gains the monopoly for defining justice devoid of any ethical idea of justice. Legality and morality are bound to drift apart.<sup>46</sup>

The process of categorically distinguishing between ethics and law has dominated the modern idea of law and justice alike. Not surprisingly, even the most celebrated of the neo-Kantian theories (i.e. that of Rawls) excludes ethics from the domain of justice. Rawls assumes a variety of incommensurable, even opposed conceptions of the good and tries to create a framework of cooperation within which conflict can be constrained and individuals can pursue their private interests. The bond between them is not ethics, but a contract of free and reasonable people.

<sup>37</sup> A. Heller, *Beyond Justice* (Oxford, Blackwell, 1987).

<sup>38</sup> Dworkin, *Taking Rights Seriously*, supra note 9.

<sup>39</sup> A. MacIntyre, *Whose Justice? Which Rationality?* (London, Duckworth, 1988), p. 3.

<sup>40</sup> J.F. Lyotard, *Just Gaming*, transl. Godzich (Manchester, Manchester University Press, 1985).

<sup>41</sup> R. Rorty, *Philosophy and the Mirror of Nature* (Princeton, Princeton University Press, 1979).

<sup>42</sup> C. Douzinas, R. Warrington, *Postmodern Jurisprudence* (London, Routledge, 1991). Recently, Ian Ward has shown some of the common intellectual traditions on which Kantianism, postmodernism and critical legal thought rest: I. Ward, *Kantianism, Postmodernism and Critical Legal Thought* (London, Routledge, 1997).

<sup>43</sup> Lyotard, supra note 40, p. 26.

<sup>44</sup> For a discussion of the transition of the traditional concept of justice through Kant, see Douzinas, Warrington, supra note 11, pp. 138–150.

<sup>45</sup> I. Kant, *Critique of Practical Reason*, transl. Beck (London, Macmillan, 1956), p. 30: ‘[a]ct in such a way that the maxim of your will can always be valid as the principle establishing universal law’.

<sup>46</sup> For more detail, see Bosselmann, supra note 30, pp. 226–228; K. Bosselmann, *Im Namen der Natur* (Munich, Scherz, 1992), pp. 354–365.

Fairness is nothing but the virtue to play to general rules, and justice—freed from being the spirit of the law—turns into conformity with the law. We find the symbol of legal justice outside our public buildings and law courts: a blindfolded *Justitia* holding scales of justice and a sword. There is something chilling about the austere image of scales accurately balancing actions and the sword threatening the punishment of the unlawful. Justice is presented as a ‘cold virtue, sometimes even a cruel one’.<sup>47</sup> The world of legal justice ‘lacks the warmth’ of morality.<sup>48</sup>

Justice being so cold and neutral forbids rich and poor alike to steal bread and to sleep under bridges. *Fiat justitia et pereat mundus*. It is here where Dworkin comes in with his attempt to (re)introduce morality into law. More than any other of modern liberals Dworkin admits to the dependence of legal theory on political and moral theory. As a result, his reasoning on justice becomes value-laden and morality part of legality. However, the law’s empire that Dworkin espouses<sup>49</sup> is an empire built on liberalism and overly optimistic in its belief that it can resolve social conflict. For those unrepresented, unrepresentable and without access to ‘integrated’ community, the law’s empire may not have a place.<sup>50</sup>

The point to be made here is that there can be no concept of justice without morality. After all, even the most positivist legal concept expresses a certain kind of morality (i.e. the belief that it can be ignored). The value of Dworkin’s attempt to ‘remoralize’ the system of justice and law is that it allows for further discussion of ethics in the context of law. Ethics are in demand, and contemporary jurisprudential debate has seen a notable return to ethical issues.<sup>51</sup>

It seems, therefore, quite legitimate to focus on ethics and moral principles with respect to justice. Likewise, any theory surrounding environmental justice would have to be grounded in ethics reflecting the relationship between humans and nature.<sup>52</sup>

## B. A Systematic Framework for a Theory on Ecological Justice

Brenda Almond, professor of moral and social philosophy at the University of Hull, provided a suitable framework for the formulation of a theory on environmental justice (in both anthropocentric and ecocentric terms).<sup>53</sup> In considering the justice approach to environmental thought, Almond identifies three crucial areas of debate:

- the relation between the 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.

The following reflects on each of these aspects.

<sup>47</sup> Heller, supra note 37, p. 11.

<sup>48</sup> J. Lucas, *On Justice* (Oxford, Clarendon, 1980), p. 263.

<sup>49</sup> Dworkin, *Law’s Empire*, supra note 9.

<sup>50</sup> For a critique, see, e.g., Hunt, supra note 11.

<sup>51</sup> Douzinas, Warrington, supra note 11, p. 1.

<sup>52</sup> The difference between social and environmental ethics is crucial here. While Rowe remains within the realm of social ethics and derives environmental justice from distributive or social justice (see Rowe, this volume, at note 8), environmental ethics challenges us to incorporate the relationship between humans and the natural world into our reasoning about environmental justice. This is the aim of a theory of environmental justice ‘taking nature seriously’ (rephrasing Dworkin). The term of ‘ecological justice’ or ‘eco-justice’ captures this intention more accurately; see also K. Bosselmann, M. Schröter, *Ökologisches Gesetzbuch* (Baden-Baden, Nomos, forthcoming, 1999).

<sup>53</sup> B. Almond, ‘Rights and Justice in the Environmental Debate’, in: Cooper, Palmer, supra note 6.

### i. *Justice and environmental ethics*

Central to the *liberal idea of justice* has been the concept of rights. And even though neither Rawls nor Dworkin nor any other leading liberal writer on justice has argued for the possibility of extending rights to animals and plants<sup>54</sup> it would be possible to do so, at least structurally. Whether or not non-human entities like animals or plants can have rights is a matter not so much for lawyers, but for philosophers to decide. From a legal perspective, rights can be attributed to all sorts of entities like, for example, companies and States. There is no legal reason to confine rights to the sphere of human beings. From a philosophical perspective, on the other hand, the issue becomes more complex and many have written about nature's rights. There is, in fact, a tradition of rights for nature since ancient times (Stoic School) including such names as Spinoza, Leibnitz, Goethe, Schopenhauer, Bentham and, in our days, Jonas, Meyer-Abich or Singer. All of these are philosophers, but it was Christopher Stone<sup>55</sup> who triggered a broad public debate on rights and social change. After a 25-year debate it can be concluded today that nature's rights are only acceptable to liberal theorists, but not to those of an ecocentric persuasion.

It is worth taking a closer look as to why rights and ecocentric ethics are ultimately opposed to one another. Take, for example, Giagnocavo and Goldstein,<sup>56</sup> who have argued that the concept of nature's rights is tantamount to a 'quick legal fix', which, like many other legal solutions, precludes the deep questions necessary for genuine world change.<sup>57</sup> In particular, they have challenged the theory that 'rights' are an appropriate method of social reform, leading us to change our attitudes and value entities (in this case nature) to which 'rights' are ascribed. Giagnocavo and Goldstein reject rights theory as a 'false claim' as they give the holder some advantages, but this only amounts to valuing by legal institutions, not society at large.<sup>58</sup> This and other criticisms of the political weakness of rights are often directed against Stone. Ironically, however, Stone himself explicitly recognizes the limitations of his 'rights' theory and has repeatedly stressed the crucial importance of a changed environmental consciousness. He clearly states that legal reform will be insufficient without 'a radical shift in our feelings about "our" place in the rest of Nature'.<sup>59</sup> Thus Stone himself does not fall into the trap of treating 'rights' as an end in themselves but treats them as a means to an end.

The importance of the rights debate was that, for the first time, modern legal theory was forced into a discussion on fundamental ethical issues. Without Stone and like-minded lawyers we would not today be in a situation where it becomes possible to contemplate a legal theory of environmental justice.

If rights are not an appropriate legal tool, what about justice? The same reservations apply. In a liberal context the utilization of the notion of justice with respect to the environment makes little sense. It would be possible, of course, to establish a liberal theory of environmental justice. But like the 'rights' issue the liberal approach of justice tends to foster the very problem we are trying to overcome. Rather than fundamentally challenging the traditional idea of environmental

management with its anthropocentric limitations it would simply internalize this concept in the idea of environmental justice. The treatment by the US Government is a good example of how environmental justice can be marginalized if reduced to a set of formal procedures.<sup>60</sup>

It should be conceded though that we need a vivid debate on the question whether a liberal approach based on justice and rights is too limited to meet the wider needs of an ecocentric ethic or whether it helps paving the way towards such paradigm shift. Almond stays deliberately undecided in this respect.<sup>61</sup>

### ii. *Distributive justice*

The second of the relevant areas identified by Almond is *the appropriate form of distributive justice*. Criteria for a fair or just distribution of goods and benefits include:

- that they should be distributed absolutely equally;
- that they should be distributed according to need; and
- that they should be distributed in proportion to merit or desert.<sup>62</sup>

The criterion of *arithmetical or absolute equality* would be of limited use for distributive environmental justice. There are a number of reservations. First, a concept of equality that denies that there are differences between people is questionable, and this is even more so if differences between humans and other creatures are denied. Secondly, even if all people are treated equally the issue of helping those in need would remain unresolved. Social justice ignorant to differing needs hardly deserves its name. Likewise, environmental justice without recognition of differing needs among people and in relation to nature would not achieve very much. Finally, the sort of egalitarianism associated with arithmetical equality is politically biased and not concerned with social change. While egalitarianism may be a justifiable position in relation to future generations, it is certainly not acceptable in relation to the present generation and the environment. There is, after all, a common sense that the environment has been treated badly and deserves more attention; it is undisputed that we need, at least, some form of social change to improve environmental conditions.

The criterion of *need* seems more plausible for the allocation of goods than blind equality. The problem here is to define need. One could consider basic needs like food and shelter as sufficiently clear, extend this idea to future generations (i.e. their ability to meet their basic needs) and draw an analogy to basic needs of animals, plants and ecosystems. Such basic needs would have to do with the ability to live, reproduce and regenerate. If a basic moral intuition can be assumed that people deserve certain goods then a similar intuition may be possible that nature deserves certain goods. The difficulties start, however, once these goods are to be clearer defined and related to the needs of humans.

The criterion of *merit or desert* refers more to the actual history and uniqueness of an entity, compared with the need criterion that looks more into the future and into the abstract. The criterion of desert allows for greater consideration of the specific case, but is, of course, value-laden. More than any other criterion desert is related to values and ethics as Wojciech Sadurski has pointed out.<sup>63</sup> To allow for

<sup>54</sup> With the possible exception of Joseph Raz who writes: 'Rights ground requirements for action in the interest of other beings': J. Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986).

<sup>55</sup> C. Stone, 'Should Trees Have Standing?', (1972) 45 *Southern California Law Review*, 450. See also C. Stone, *Earth and Other Ethics: The Case for Moral Pluralism* (New York, Harper and Row, 1987).

<sup>56</sup> C. Giagnocavo, H. Goldstein, 'Law Reform or World Re-form', (1990) 35 *McGill Law Journal*, 346.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, p. 357.

<sup>59</sup> Stone, 'Should Trees Have Standing?', supra note 55, p. 495 and see generally pp. 489-501.

<sup>60</sup> D. Harvey remarks 'that cooptation (of the environmental justice movement) into such a legal-political quagmire would be the kiss of death' (supra note 20, p. 370).

<sup>61</sup> Almond, in: Cooper, Palmer, supra note 6, p. 9.

<sup>62</sup> *Ibid.*, p. 12.

<sup>63</sup> W. Sadurski, *Giving Desert Its Due—Social Justice and Legal Theory* (Dordrecht, Kluwer, 1985), p. 117.

some objectivity and equality Sadurski suggests that the actual burden like work, sacrifice or inconvenience should count; such burdens call for compensation.<sup>64</sup> One could imagine that the environment has in the past made such sacrifices to meet human needs and is expected to continue to do so in the future. It may, therefore, be possible to argue that there is a need for compensation to keep (or restore) an equilibrium.

While the criteria of equality, need and desert may all have relevance for the inclusion of nature into a concept of distributive justice, difficulties remain. And Almond in her framework does not seek a solution. She only concludes that a social orientation of justice has more to do with environmental justice than a liberal orientation.<sup>65</sup> One thing that both social justice and environmental justice have in common is the concern for discriminated, oppressed or otherwise neglected entities.

### iii. *Application of distributive justice to environmental issues*

This is the third area of debate and the most important. It is here where ethical considerations apply in full and where crucial distinctions have to be made between the anthropocentric approach and the ecocentric approach. Within the context of a framework, i.e. a mere system of reference points, it is sufficient briefly to characterize the three objects of moral concern. The first is the concern for the poor, the second the concern for future generations and the third the concern for non-humans and nature.

*The concern for the poor* includes all social and minority groups discriminated against, by the social and economic system. Conflicts between rich and poor, white and non-white, Western lifestyle and indigenous cultures and North and South belong here. Essentially, the environmental justice movement in the US has its origins in those conflicts. The concern for the poor (social justice) represents the social dimension of environmental justice and can usefully be termed 'intragenerational justice'. The importance for a theory on environmental justice is to determine the relationship between intragenerational and intergenerational issues as there are competing claims and priorities.

*The concern for future generations* is a familiar feature in international and environmental law. Since the seminal text of Edith Brown Weiss,<sup>66</sup> rights and interests of future generations have been incorporated in international agreements and national legislation. The notions of 'justice for future generations' and *intergenerational justice* may be less familiar, but both have become increasingly popular in recent years, obviously reflecting a broader acceptance of the idea that justice spans past, present and the future. One of the issues to be discussed here is whether intergenerational justice is to be seen as an anthropocentric concept or whether it has ecocentric implications.

*The concern for the non-human natural world* is in the centre of environmental ethics. The question here is which idea of justice could accommodate such concerns best. From a liberal, anthropocentric point of view the non-human world is outside the *justitia communis*. From an ecocentric point of view *justitia communis* includes both the human and non-human world. It may already be seen as an important step that, today, there is discussion of 'justice for the nonhuman world'<sup>67</sup> and *interspecies*

*justice*<sup>68</sup> which connotes affinities to intra- and intergenerational justice. The inclusion of an elaborate concept of interspecies issues is certainly crucial for a theory on environmental justice as distinct from mere social justice. The question is how to define it ethically and legally.

Having identified the concern for the poor, the future and the non-human world as the third building block, we can now concentrate on the ethical foundations of environmental justice, i.e. basically the question why and to what extent we should care for the environment. The *fourth building block* will be to answer these questions by discussing some key elements of eco-justice.

## III. Elements of Ecological Justice

### A. Relation to Sustainable Development

The three mentioned concerns are closely linked and equally important for a theory on ecological justice. We can, therefore, say that eco-justice consists of three elements of distributive justice: intragenerational, intergenerational and interspecies justice. The first two elements are well known and represented in many political and legal documents, most notably in the standard definition for sustainable development. According to the World Commission on Environment and Development:

Sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. It contains within two key concepts:

- the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organizations on the environment's ability to meet present and future needs.<sup>69</sup>

The third element, interspecies justice, is not mentioned here or in any of the international agreements related to sustainable development (e.g. Rio Declaration on Environment and Development, Agenda 21). Obligations toward nature are not normally associated with sustainable development. However, this may be due to the fact that the anthropocentric notion of sustainable development has dominated the political debate. In literature, environmental sustainability has emerged as an ecocentric conception that includes the recognition of intrinsic values. This ecocentric conception stands against a technocentric conception of sustainability<sup>70</sup> promoted by the United Nations Conference on Environment and Development process and most governments. As Andrew Dobson has observed, the ecocentric approach marks the point at which economists leave the sustainability debate.<sup>71</sup>

At the heart of the conflict between the technocentric and the ecocentric approach lies the ambivalence of the word 'sustainability'<sup>72</sup> which—not unlike the

<sup>68</sup> Ibid., p. 15; see also A. Johnson, 'Barriers to Fair Treatment of Nonhuman Life', in: Cooper, Palmer, supra note 6; Hayward, supra note 6.

<sup>69</sup> World Commission on Environment and Development, *Our Common Future* (New York, Oxford University Press, 1987), p. 43.

<sup>70</sup> See D. Pearce, *Blueprint 3: Measuring Sustainable Development* (London, Earthscan, 1993), pp. 18–19.

<sup>71</sup> A. Dobson, 'Environmental Sustainability: An Analysis and Typology', (1996) 5 *Environmental Politics*, 401, at p. 416.

<sup>72</sup> C. Mitchum, 'The Sustainability Question', in: Gottlieb, supra note 12; also W. Beckerman, '“Sustainable Development”: Is it a Useful Concept?', (1994) 3 *Environmental Values*, 191; J. Pezzey, 'Sustainability: An Interdisciplinary Guide', (1992) 1 *Environmental Values*, 321.

<sup>64</sup> Ibid., pp. 116, 134, 144–153.

<sup>65</sup> Almond, in Cooper, Palmer, supra note 6, pp. 15–16.

<sup>66</sup> E. Brown Weiss, *In Fairness to Future Generations* (New York, Transnational Publishers, 1989).

<sup>67</sup> Almond, in: Cooper, Palmer, supra note 6, p. 18.

word 'love' or 'justice'—causes uniform agreement, yet great confusion as to what it actually means. It is widely accepted though that ultimately there are just two possible meanings. One starts from the argument that 'sustainability is not enough'.<sup>73</sup> The concern here is that sustainability too readily denotes stasis and equilibrium whereas life is about change and growth. From this perspective development is the important dynamic element making sustainable development a concept which ensures lasting economic growth and energy production or—in the words of the World Bank—simply a 'development that lasts'.<sup>74</sup> Opposed to this philosophy of 'more-is-better' lies the philosophy of 'different-not-more'. It asks the question 'sustainability of what?'. The concern here is that sustainable development simply means to sustain the Western way of life at the expense of the poor and of future generations. To be sustained are not the economic, but the ecological conditions requiring substantial changes in economy and society. From this perspective the central issue is environmental sustainability<sup>75</sup> and not development, making a concept of a sustainable society preferable perhaps to sustainable development.<sup>76</sup>

The (anthropocentric) market-based approach and the (ecocentric) equity approach to sustainable development<sup>77</sup> represent different political agendas. It is, therefore, not possible to define *a priori* the relationship between sustainable development and environmental justice. However, an analogy can be drawn between both concepts. 'Environmental' can be understood as modifying 'justice' in much the same way as 'sustainable' can be understood as modifying 'development'. On this basis, the only permissive paths to development are those which are sustainable. What the 'sustainable paths' exactly are depends on a further qualification. Like sustainable development, environmental justice can be understood either in anthropocentric or in ecocentric terms. For an anthropocentric approach to environmental justice the idea of human development is in the foreground, whereas the ecocentric approach prefers environmental sustainability as the concept for a broader community of recipients. Further, an anthropocentric conception of environmental justice would emphasize the need for fair distribution between the rich and the poor—intragenerational justice—but an ecocentric conception would include nature into the equation—interspecies justice. Since both conceptions are concerned with distributive justice, it could be concluded that they are both means—albeit with different emphasis—to achieve the ends of sustainable development.

In any case, the difficulties with sustainable development suggest avoiding a similar confusion with the meaning of eco-justice by disclosing its ethical and political underpinnings.

## B. Linking Intragenerational and Intergenerational Justice

If both intragenerational and intergenerational justice can be seen as relevant to environmental (and ecological) justice, then the issue of the balance between the two arises. Does the just distribution of natural resources and environmental burdens within society and between societies have priority over the just distribution between

generations? Is poverty of those alive today of greater concern than the prospects of people coming after us? Is, for example, Alex Mauron right or Stephen Luper-Foy? Mauron finds programmes to safeguard the future unacceptable if they put a burden on the poorest people and countries.<sup>78</sup> Luper-Foy, on the other hand, considers intergenerational justice as a precondition for intragenerational and international justice.<sup>79</sup>

The fair use of environmental space (i.e. natural resources and environmental impacts) has, for a long time, been treated as an issue of social justice. The US environmental justice movement is an example of this. Many poor people live in unsafe and unhealthy physical environments, and economically impoverished communities are more affected than their more affluent counterparts. Adding the international dimension, one can consider this social justice challenge as an issue of global justice. On a global scale, citizens of affluent countries draw substantial material benefits from the use of the environmental space at the expense of the citizens in poor countries, who are already worse off as a result of historical processes (colonialism and neo-colonialism). So, there is enough reason for a massive—national and international—re-organization in the use of the environmental space. Proposals in this direction require no further justification. For example, Thomas Pogge's proposal of a global resource dividend or tax would be an effective means of global redistribution.<sup>80</sup>

There is, however, a time component in the use of environmental space. By adding the needs of future generations, the fair use of the environmental space becomes a matter across the globe and across generations. This may require a ceiling on the resources that are available to each generation, and delineation of resource consumption to be set. The United Nations Commission on Global Governance has recently recommended intergenerational equity as a strategy that is 'followed by all societies, both rich and poor'.<sup>81</sup> But should intergenerational justice really be given priority over intragenerational justice, as the Commission and Luper-Foy are suggesting?<sup>82</sup>

The right balance may be found in a more differentiated solution. One could start with the requirement that even poor countries pay for their actual use of environmental space and so contribute to a global scheme that provides for the future. On the other hand, it would not be fair to ask poor countries to slow their development when the primary cause for the environmental crisis lies in the overdevelopment of the rich industrialized countries. Thus, the costs of coping with the harmful global environmental change should be borne by the rich countries, not by the poor, while the costs for preventing further harm could be shared by providing financial aid and transfer of technology.<sup>83</sup>

<sup>73</sup> V. Ruttan, 'Sustainability is Not Enough', (1988) 3 *American Journal of Alternative Agriculture*, 607.

<sup>74</sup> *World Development Report 1992* (New York, United Nations, 1992), p. 34.

<sup>75</sup> E. Brown Weiss, 'Introductory Note', (1992) 31 *International Legal Materials*, 814. See also Art. 1 of the Draft International Covenant on Environment and Development, prepared by the Commission of the World Conservation Union (IUCN) on Environmental Law (Gland, IUCN, 1995): 'The objective of this Covenant is to achieve environmental conservation and sustainable development by establishing integrated rights and obligations'.

<sup>76</sup> See L. Brown, *Building a Sustainable Society* (New York, W.W. Norton, 1981) and the annual *State of the World* reports of the Worldwatch Institute on 'progress toward a sustainable society'.

<sup>77</sup> Dobson, supra note 71, p. 423.

<sup>78</sup> A. Mauron, 'Genetics and Intergenerational Concerns', *Societas Ethica Conference* (Sicily, 1993).

<sup>79</sup> S. Luper-Foy, 'International Justice and the Environment', in: Cooper, Palmer, supra note 6.

<sup>80</sup> The Global Resource Dividend would be funded by taxing the use of natural resources and be paid by the governments of the using (harvesting or dumping) countries in order to eradicate global poverty. According to Pogge this could be achieved within one or two decades if the economic benefits to the using countries were taxed by 1% of their respective gross domestic products: see T. Pogge, 'Eine Globale Rohstoffdividende', (1995) 17 *Analyse und Kritik*, 183; T. Pogge, 'An Egalitarian Law of People', (1994) 23 *Philosophy and Public Affairs*, 195, at p. 200.

<sup>81</sup> Commission on Global Governance, *Our Global Neighbourhood* (Oxford, Oxford University Press, 1995), p. 52.

<sup>82</sup> Luper-Foy proposes that the World Bank works out what resources are due to each generation: supra note 79, p. 100.

<sup>83</sup> See W. Achterberg, 'Environmental Justice and Global Democracy', *Environmental Justice: Global Ethics for the 21st Century, 1-3 Oct. 1997* (Melbourne, University of Melbourne, 1997), pp. 8-9. With respect to climate negotiations Henry Shue has proposed a model which aims to meet the needs of both the present poor countries and the future generations: H. Shue, 'The Unavoidability of Justice', in: Hurrell, Kingsbury (Eds), *The International Politics of the Environment* (Oxford, Oxford University Press, 1992).

Along these lines, our conception of environmental justice would balance intergenerational justice and intragenerational justice in a way that the former is a prerequisite for the latter, but that intragenerational justice itself shapes the commitments coming from intergenerational equity. In other words, the existing rich-poor gap determines who has to enforce and finance our obligations toward future generations. Considering the cause of the crisis—making environmental justice necessary in the first place—it seems only just to demand that the rich in the Western world pay for the poor.

### C. Intergenerational Justice

Distribution in time (across different generations) is closely linked to distribution in space (within and across societies). Considering the time and space dimensions of the subject 'environment',<sup>84</sup> any conception of environmental justice, worth its name, would have to fully include intergenerational and intragenerational equity issues. A question yet to be explored, however, is whether time and space are confined to the human sphere or whether they should include the non-human sphere as well. Is it possible to extend the requirement to fair distribution across species, so that time and space appear as universal concepts and not restricted to humans and their needs? This question refers to the idea of interspecies justice (D below), but also to the concept of intergenerational justice. Can future generations be considered in ecocentric terms?<sup>85</sup>

Intergenerational justice is traditionally understood to be anthropocentric. The term refers to society's moral and legal duties to future generations of humanity—although this qualification has never been made explicitly. However, the future generations debate developed in the anthropocentric context of environmental management strategies and liberal justice theories. There is certainly no direct evidence to suggest that future generations include non-human species or life as a whole.<sup>86</sup> Should they, and, if so, what is the justification?

Intergenerational justice approaches tend to fall into three different categories—liberal theory, cost-benefit analysis and environmental ethics. They all share the assumption that some obligation to protect the natural and cultural heritage for future generations may be felt by most people. There is a universal recognition and acceptance among peoples of such an obligation. Beyond these general sentiments the reasoning as to why, and to what extent, we are obliged to the future differs.

The liberal approach is best represented by Rawls and Dworkin. Within the Rawlsian framework justice between generations appears as a contractual arrangement. The generations are placed in a hypothetical 'original position' making them 'so to speak deputies for a kind of everlasting moral agent or institution'.<sup>87</sup> In such a capacity the parties—like rational self-interested beings—try to secure an agreement on the best possible terms for themselves and eventually accept a savings

<sup>84</sup> While the space dimensions of the 'environment' are obvious, the time dimensions have only recently informed the environmental debate: the notion of the 'ecology of time' (M. Held, K. Geiler (Eds), *Ökologie der Zeit* (Stuttgart, Wiss. Verl.-Gesellschaft, 1993) reminds us that the human time experience differs from times and cycles occurring in nature and that awareness of the diversity of times may be crucial for successful environmental policies). Harvey, supra note 20, pp. 207–326, shows how the Western idea of space and time has, in the past and today, generated a disturbed view on ecological processes.

<sup>85</sup> See K. Bossehmam, P. Taylor, 'The New Zealand Law and Conservation', (1995) 2 *Pacific Conservation Biology*, 113, at pp. 119–120.

<sup>86</sup> R. Garner, *Environmental Politics* (Hertfordshire, Harvester Wheatsheaf, 1996), p. 44.

<sup>87</sup> Rawls, *A Theory of Justice*, supra note 8, p. 128.

principle.<sup>88</sup> Rawls does not assume that this savings principle comes from any moral concern, but purely from the necessity to obey the contract and only under the assumption that all previous generations have followed it.<sup>89</sup> The deontological focus of this reasoning is the independent rational individual denying any pre-existing common good. Although Rawls refers to the 'Idea of a Social Union' and a 'community of humankind'<sup>90</sup> such collectives are little more than time and space by which individuals are naturally connected. The parties in the original position are isolated units separated from any grounding in social or communitarian experience.

Rawls's goal to set forth an improved Kantian theory of justice inevitably leads him to an individualistic perception of intergenerational justice.<sup>91</sup> Recently, Marcel Wissenburg has attempted to give Rawls's conception 'a green twist'<sup>92</sup> by interpreting the savings principle as a 'restraint principle' to which all generations as a whole need to adhere.<sup>93</sup> This restraint principle would require leaving future generations 'no worse off' which Wissenburg understands as a protection of humans and non-human nature alike.<sup>94</sup> However, the emphasis is still with rational individuals acting in their best interest. Liberal theories of justice are, by definition, constructions of individualism and human welfare that do not sit comfortably with a perception of present and future generations as ecological communities (including humans and non-humans).<sup>95</sup>

The cost-benefit approach is concerned with the overall good and as such opposed to the individualistic approach of liberal theory.<sup>96</sup> As a common policy and planning tool, cost-benefit analysis attempts to measure the future effects of present options. In modern economics the distribution problem in time—as well as in space—is usually resolved by applying a discount rate.<sup>97</sup> In this way it seems possible to weigh costs and benefits over time in a common monetary unit. The premise is, of course, that costs and benefits can be expressed in monetary terms. The construction of discount rates becomes a problem, if costs (and benefits) have no monetary value. And what happens when costs and benefits over time are not commensurable? In this case there are no objective criteria, and decision-makers are left with either applying some external values (which?) or leaving decisions to market mechanisms. However, the market offers no rational method for reconciling

<sup>88</sup> *Ibid.*, pp. 142–150.

<sup>89</sup> J. Rawls, *Political Liberalism* (New York, Oxford University Press, 1993), p. 274. In this passage of the book Rawls responds to criticism on various assumptions made in the *Theory of Justice* 20 years earlier and deliberately drops the original assumption that people have an interest in caring, at least, about their more immediate descendants. Partly replacing this is his new observation that generations exist next to each other rather than one after another: 'society is a system of cooperation between generations over time' (*ibid.*).

<sup>90</sup> Rawls, *A Theory of Justice*, supra note 8, pp. 520, 523 respectively.

<sup>91</sup> M. Sandel, *Liberalism and the Limits of Justice* (Cambridge, Cambridge University Press, 1982), pp. 18–24; B. Bobertz, 'Toward a Better Understanding of Intergenerational Justice', in: Morawetz (Ed.), *Justice* (Aldershot, Dartmouth, 1991), pp. 220–221.

<sup>92</sup> M. Wissenburg, 'An Extension of the Rawlsian Savings Principle to Liberal Theories of Justice in General', *Environmental Justice: Global Ethics for the 21st Century, 1–3 Oct. 1997* (Melbourne, University of Melbourne, 1997).

<sup>93</sup> *Ibid.*, pp. 16–20.

<sup>94</sup> *Ibid.*, p. 22.

<sup>95</sup> For this reason Dworkin's elaboration on intergenerational issues (*Taking Rights Seriously*, supra note 9) will not be discussed here. His argument on justice to posterity is, in essence, derived from Rawls's principle of just savings.

<sup>96</sup> The philosophical basis of cost-benefit analysis is utilitarianism.

<sup>97</sup> For an excellent overview of the mechanics of discounting, see A.L. Hammond, W.D. Metz, T.H. Maugh, *Energy and the Future* (Washington DC, American Association for the Advancement of Science, 1983).



individual choices with a social target if the reach of time is far beyond the planning horizons of individual market actors. One has to rely on the neo-liberal optimism in human ingenuity. Whether the market or the government, subscribing to neo-liberalism, makes the relevant decisions makes no difference: in both cases the experience has been that such decisions follow the rules of competition and not the necessities of intergenerational justice. These could only be advocated and enforced by social subjects.

Cost-benefit analysis attempts to reach the best decision for all, but the values it weighs are expressed solely in terms of instrumental satisfaction of individuals. The weight accorded to any given factor is ultimately determined by asking how much a person would be willing to pay for it. Thus, in effect, the cost-benefit approach remains materialistic, individualistic and shortsighted which may explain why it is not favoured in the literature relevant to intergenerational justice. However, given its ongoing importance in real decision-making—especially in times of neo-liberalism!—we should be aware of its ethical implications.<sup>98</sup>

The only promising way to take a non-anthropocentric perspective on future generations is an approach based on environmental ethics. As a starting-point, the common ground of all approaches to intergenerational justice should be remembered. There is a commonly shared sense in which something is indeed owed to the contemporary poor and to posterity. It is perhaps not stretching it too far to assume also that something is owed to other living creatures.<sup>99</sup> At a very basic level it should, therefore, be possible to see the concern for future generations and for the continuation of life (in its evolutionary development) as commonly accepted.

Essentially, the interest in continuing life-cycles for the future is already inherent in the concern for future human generations. They depend, after all, on the functioning and continuation of supply systems. But this may well be understood in anthropocentric terms. The next step, to seek also the future well-being of life and nature as a whole, marks the ecocentric turnaround. To take this step, one would have to accept the view that nature with all its life forms has intrinsic value independently from any instrumental values for humans.

The ecocentric approach can be derived from a number of ethically motivated concepts that have been proposed so far. For example, Agius draws on Whitehead to propose a 'relational theory of intergenerational ethics'. This emphasizes the social and ecological context of human life past, present and future and proposes that 'the long chain of generation forms one community'. It concludes that the common good is the good of all members of this chain. The interrelatedness of all links both humans and other life forms.<sup>100</sup>

Weiss takes this argument further and postulates three principles of intergenerational equity for use in international law.<sup>101</sup> These involve the conservation of options, quality and access. The first principle suggests that 'each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in addressing their problems and satisfying their values'. The second principle

suggests that 'each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than the present generation received it'. The third principle suggests that 'each generation should provide its members with equitable rights of access to the legacy from past generations'. Weiss concludes that 'enforcement of planetary rights is . . . appropriately done by a guardian or representative of future generations as a group, not of future individuals, who are of necessity indeterminate'.

The first two principles can easily be interpreted in ecocentric terms; only the third principle of equitable rights of access is anthropocentric in nature. Finally, the notion of a guardian or trustee<sup>102</sup> for future generations stands for often proposed institutions to represent entities and interests which are normally either not at all or not effectively represented. The underlying rationale for such institutions—giving a voice to the powerless—applies to both future generations and the non-human world.

With respect to future generations a 'Council for Posterity' was proposed in the United Kingdom a few years ago; in the US a proposal for a 'Court of Generations' gained publicity.<sup>103</sup> At the level of international law guardianship models are often promoted to hold States liable for the protection of the 'global commons'. As these areas outside national jurisdictions (High Seas, Antarctica, global biosphere) are, at present, without legal representation they could be governed in respect of their future and their intrinsic value.<sup>104</sup> In Germany, the idea of an 'Ecological Council' (*Ökologischer Rat*) has considerable support.<sup>105</sup> Such an Ecological Council would be a parliamentary institution, a third chamber in addition to the House of Representatives (*Bundestag*) and the Senate or Federal Council (*Bundesrat*). Just as the *Bundesrat* can block or change legislation if important matters of States (*Länder*) are at stake, so the Ecological Council would block or change legislation if important ecological matters were at stake. The members would be people of eminent standing and expertise and elected by a special parliamentary assembly (similar to the election of the judges of the federal constitutional court). Another idea is to spread the role of guardianship among various institutions, including specifically designated environmental organizations<sup>106</sup> and the environmental Minister who could have a veto-right in view of ecological necessities. In New Zealand, the Parliamentary Commissioner for the Environment has the role of a guardian for the environment, although the potential of this role has not yet been fully utilized.<sup>107</sup>

<sup>102</sup> For Weiss's trusteeship model, see E. Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity', (1984) 11 *Ecology Law Quarterly*, 495, at pp. 502–506.

<sup>103</sup> B. Tonn, 'The Court of Generations: A Proposed Amendment to the United States Constitution', (1991) 23(5) *Futures*, 482. On a 'Council for 2020', see A. Tough, 'Making a Pledge to Future Generations', (1993) 25(1) *Futures*, 90.

<sup>104</sup> C. Stone, *The Gnat is Older Than Man: Global Environment and Human Agenda* (Princeton, Princeton University Press, 1993); K. Bosselmann, 'Governing the Global Commons: The Ecocentric Approach to International Environmental Law', in: Prieur, Doumbé-Billé (Eds), *Droit de l'environnement et Développement Durable* (Limoges, Presses Universitaires de Limoges, 1994); P. Taylor, *An Ecological Approach to International Law: Responding to the Challenges of Climate Change* (London, Routledge, 1998), pp. 177–180.

<sup>105</sup> First proposed in 1991 by an assembly of more than 100 law and political science professors and members of the *Bundestag*; see Bosselmann, supra note 30, p. 254.

<sup>106</sup> The Federal Court of Administration (*Bundesverwaltungsgericht*) attributes the role of 'advocates of nature' (*Anwältin der Natur*) to environmental organizations, however, rejects a general right of participation in environmental decision-making; BVerwG, Urteil v. 14.5.1997—11 A 43.96—, *Zeitschrift für Umweltrecht* 1997, 269, at p. 270. Full participation is provided for in conservation laws of various *Länder*.

<sup>107</sup> K. Bosselmann, 'The Environmental Commissioner: A Guardian of the Environment?', in: Hawke (Ed.), *Guardians for the Environment* (Wellington, Institute of Policy Studies, 1997).

<sup>98</sup> See, e.g., R.P. Malloy, 'Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy', (1986) 47 *Ohio State Law Journal*, 163.

<sup>99</sup> Almond, in Cooper, Palmer, supra note 6, p. 19.

<sup>100</sup> E. Agius, 'Towards a Relational Theory of Intergenerational Ethics', in: Busuttill et al. (Eds), *Our Responsibilities Towards Future Generations* (Malta, Foundation for International Studies in cooperation with UNESCO, 1990).

<sup>101</sup> E. Brown Weiss, 'Intergenerational Justice and International Law', in: Busuttill, *ibid.*, pp. 98–100.

The ecocentric approach to intergenerational justice can certainly be formulated on the basis of environmental ethics. Some of the principles suggested by Weiss and numerous proposals to institutionalize guardians or trusts would support the conception of intergenerational justice as caring for ongoing life as a whole.

There is a further argument in support of this conception. The plain fact that the future is not predictable questions any attempt to determine what is due to future generations. Given the extremely low accuracy of predicting the future beyond the next few years or decades,<sup>108</sup> there are severe limitations to any calculation of future needs.<sup>109</sup> That is why care for future generations is to be understood as requiring the conservation of 'the diversity of the natural and cultural resource base' and maintenance of the 'quality of the planet' (Weiss) rather than a measured portion of diversity and quality. We can neither determine future 'needs' of people nor the future quality of our planet. What we can say though is that any further diminishing of the planet's diversity and quality carries the risk of diminishing future options. So we need to preserve what we have got today rather than guessing what the future may require. This focus on the present world in its totality and interrelatedness suggests a need of conceiving the future world in the same way; there is no world of purely human interests and needs.

The argument of relationship between past, present and future also lies behind the precautionary principle (*Vorsorgegebot*). This principle is directed into the future, but the precautionary approach is the mere consequence of the lack of predictability. Thus, future requirements are not predicted in any way, rather present options (for a certain development) are looked at with a view to choose the one with the least impact on the future. So, the ideal is to pass on undiminished ('no-worse-off') diversity and quality and not a world made to measure future needs. Finally, the identity problem can also be seen in the international environmental law principle of common heritage of mankind. Despite its anthropocentric assumption (or arrogance) that some of the world's commons<sup>110</sup> belong to the heritage of humanity<sup>111</sup> (rather than the whole planet), it looks at the commons as such and not merely at natural resources. Obviously, not just resources for human consumption have been inherited from the past, but living systems in all their diversity. To overcome the somewhat outdated notion and anthropocentric limitation of common heritage of mankind, Prue Taylor has recently proposed an ecocentrically revised principle, the common heritage of all life.<sup>112</sup>

It may be timely to conceive intergenerational equity in ecocentric terms, and the reasons offered here show that there is a certain logic to envisage the future as the future of the planet with all its diverse life forms rather than the future of just the human species. But such a view cannot be imposed on decision-makers used to a more shortsighted, narrow view on ecological realities. For such a view to become generally acceptable we need time and perhaps a lot more exposure to ecological experiences. What should be seen clearly though is that:

- intergenerational justice is an essential part of environmental justice;
- there is no reason to restrict justice to the future of the human species; and
- claims derived from intergenerational justice and from interspecies justice may, at least in the long run, converge.<sup>113</sup>

#### D. Interspecies Justice

The basic concern of interspecies justice is that natural entities should not be considered as mere resources for humans, but as beings with a moral significance of their own; prima facie they should not be harmed. If we accept that, at least, some natural entities are such that they deserve moral consideration, and if we also agree that this moral intuition can be spelt out in terms of justice, we can conclude that ecological justice consists of three equally important elements—intragenerational, intergenerational and interspecies justice—and that the moral significance of natural entities gives environmental justice its distinct character.

How then can the morality of interspecies issues be dealt with? This question leads us directly into one of the most fundamental philosophical problems, namely, what moral freedom of action humans have in their relationship with nature. Are we as free in our use of the environmental space as each other species in its use of its own environmental space? Or are there certain self-restrictions which only humans—following reason rather than instincts—need to follow? Moral self-restrictions are the subject of ethics and are expressed in social norms, most prominently in our conception of individual freedom and human rights. One of the issues to be considered, therefore, is whether individual freedoms and human rights are limited solely by their social context—social limitations to human rights—or additionally by their ecological context. This would reflect the anthropological view that the freedom of *Homo sapiens* is not only determined by laws of society, but also by laws of existence. The author has argued elsewhere that there is, indeed, a case for ecological limitations to human rights.<sup>114</sup>

Underlying such attempts to redefine humans' relationship with nature is the ecocentric paradigm. It is beyond the scope of this chapter to discuss the various versions of anthropocentrism and their challenge by ecocentrism—in its various forms<sup>115</sup>—and the many approaches to examination of the validity of an ecocentric paradigm. These approaches range from philosophical reasoning (environmental ethics) and political arguments (green political theory) to reflections on social movements (feminism, environmentalism) right through to the construct of intellectual thought (paradigm thinking), psychological images (self-realization) and spiritual awakening (deep ecology). A full conceptualization of interspecies justice may reflect all of these, but for our purpose a brief outline of some related issues may suffice.

As we have seen earlier, the liberal, individualistic approach to justice would not be adequate to capture interspecies justice. In a general sense other species could matter, of course. As Rawls says, 'the destruction of a whole species can be a great

<sup>108</sup> Treumann posits that the behaviour of a relatively stable system can only be predicted (with a modest degree of accuracy) for a time which is somewhere between 5 and 10% of the time which was available to observe the past and present development of the system: R. Treumann, 'Global Problems, Globalization, and Predictability', (1991) 31 *World Futures*, 14.

<sup>109</sup> One of the great unknowns is the degree of creativity and consciousness which may (or may not) be higher in further human evolution, thus resulting in quite different 'needs' than what we presume as 'needs' today.

<sup>110</sup> The moon, the sea-bed and Antarctica.

<sup>111</sup> Notwithstanding, of course, that the purpose of the notion 'mankind' is to exclude territorial claims of individual States.

<sup>112</sup> Taylor, supra note 104, pp. 287-309.

<sup>113</sup> Norton's hypothesis of convergence: B. Norton, *Toward Unity Among Environmentalists* (New York, Oxford University Press, 1991), p. 240.

<sup>114</sup> K. Bosselmann, *Ökologische Grundrechte* (Baden-Baden, Nomos, 1998); K. Bosselmann, 'Human Rights and Environment: Redefining Fundamental Principles', in: Gleeson, Low (Eds), *Government for the Environment* (London: Macmillan, 1999).

<sup>115</sup> Bosselmann, supra note 30, pp. 324-338; Bosselmann, supra note 46, pp. 250-333. See further Elliot, supra note 12; T. Benton, *Natural Relations: Ecology, Animal Rights and Social Justice* (London, Verso, 1993); R. Eckersley, *Environmentalism and Political Theory* (Albany, State University Press of New York, 1992); W. Fox, *Toward a Transpersonal Ecology: Developing New Foundations for Environmentalism* (Boston, Shambhala, 1990).

evil', but he continues that in his theory 'no account is given of right conduct in regard to animals and the rest of nature'.<sup>116</sup> It should also be seen that animal rights and liberal theory may well go together.<sup>117</sup> For example, a liberal position could argue that we have moral obligations to, at least, some kinds of animals like endangered species, higher mammals, livestock or pets. In fact, in a number of European countries the ethical and legal status of animals has substantially improved over the last ten years or so. Under various amendments to civil codes and animal protection laws, animals are not regarded as 'things' any more which can be possessed and used like commodities, but as 'creatures' in their own right. Consequently, there are now a number of cases penalizing 'inhumane' treatment of animals, for example banning certain means of killing them or requiring a minimum cage size for poultry.<sup>118</sup> So, a rudimentary form of intrinsic value of certain animals has been acknowledged by some governments.<sup>119</sup> This is, however, still far from saying that all other species, ecosystems or nature as a whole have intrinsic value. Such an extension can hardly be argued on the basis of liberal theory as it would require breach of the dam between humans as members of the *justitia communis* and the non-human world conceived as outside such community. To consider nature as part of the *justitia communis* requires a non-individualistic, non-anthropocentric approach of which (liberal) moral extensionism is *per definitionem* not capable.<sup>120</sup>

Approaches based on rights have anthropocentric limitations, and the same could be said about traditional justice approaches. A theory on environmental justice *could*, of course, be moulded in the liberal tradition, but it ought not to be. The whole novelty of environmental justice—as distinct from social justice—is the recognition that natural entities, ecosystems and life as a whole<sup>121</sup> have intrinsic value; this can only be argued for on the basis of ecocentrism. Likewise interspecies justice *could*, as Rawls does, be perceived as an undefined moral sentiment for other species, but it ought not to be. To make an impact in law and decision-making it needs some teeth, i.e. the recognition of their intrinsic value.

One example may illustrate why the implement of intrinsic value would make an important difference. The example is the law related to biotechnology. At the international level, biotechnology became the subject of international law through the 1992 Convention on Biological Diversity.<sup>122</sup> Along with a general trend in recent international environmental law, the Biodiversity Convention takes the approach of ecosystem protection (i.e. protecting entire habitats rather than

individual species as such).<sup>123</sup> It does so by introducing (in its Preamble) an 'intrinsic value of biological diversity', in addition to 'the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components'. This is recognition of the distinction between (ecocentric) intrinsic values and (anthropocentric) instrumental values of the environment. Article 19 of the Convention on Biological Diversity calls for States parties to take legislative measures towards controlling biotechnological research activities. The problem is that the Convention, like most treaties, leaves the means of implementation totally to the discretion of States.

At the municipal level, several countries have introduced such controlling legislation, among them Germany with its Gene Technology Law ( *Gentechnikgesetz*) of 1990. Such legislation regulates details of notification and licensing of genetically modified products (like, e.g., the release of those products into the environment), but it always does so on the basis that there is a fundamental right to conduct genetic engineering in the first place. The principle of free production and sale is the rule; any restrictions are the exception. The burden of proof, therefore, is not with the producer introducing a new risk potential (e.g. for biological diversity), but with the general public represented, for example, by expert commissions such as the Environmental Risk Management Authority in New Zealand or various ethical commissions in the United Kingdom. Whether or not activities of genetic engineering are acceptable is determined by weighing up social costs and benefits. The problem is that such social costs and benefits are determined exclusively by values of human utility. As there are no intrinsic values of ecosystems and their components to be considered, the only relevant counterweight comes from possible infringements on rights of health protection, i.e. human health risks associated with genetically modified products. Once these concerns are met nothing could stop genetic engineering from fundamentally altering the natural genetic structures. The recognition of nature's intrinsic values would have, at least, the potential to rectify such grave imbalances and provide the counterweight necessary for more balanced decisions.

Apart from those reasons of improving the *results* of decision-making there are reasons of improving the *basis* for decision-making. Before today's complete breakdown of ethical agreement—the 'moral catastrophe' (Alasdair MacIntyre) modernity has witnessed<sup>124</sup>—there was once a well-established ethical basis for decision-making. We could go back to the beginning of modernity and remind ourselves of the close links between ethics, justice and law. In Aristotle's quest for justice,<sup>125</sup> for example, we find the directive of 'the good life' and some of the virtues associated with such a life: imagination, openness and empathy. The life of someone who is unimaginative, closed-up and rigid *may* be 'good', of course, but it is reasonable to suggest that such a person is indifferent towards fellow humans and non-human life around him or her. Being alienated and cut off from the natural world has become a dominant feature of Modernity. So, resemblance of Aristotle's 'good life' and its virtues may help to rediscover, for example, what empathy is all about.<sup>126</sup> There is no contradiction between empathy for the natural world and the good life of humans. The tragedy of Modernity has been to create a dichotomy between autonomy and dependence; we badly need a more sophisticated sense of

<sup>116</sup> *A Theory of Justice*, supra note 8, p. 512.

<sup>117</sup> K. Bosselmann, 'Nichtanthropozentrische Erweiterung des Umweltverwaltungsrechts?', in: Nida-Rümelin, Pfordthen (Eds), *Ökologische Ethik und Rechtslehre* (Baden-Baden, Nomos, 1995), p. 203. Examples of liberal animal rights theories include T. Regan, *The Case for Animal Rights* (Berkeley, University of California Press, 1983) and D. Van DeVeer, 'Interspecific Justice', (1979) 22 *Inquiry*, 55.

<sup>118</sup> A. Johnson, *Factory Farming* (Oxford, Oxford University Press, 1991), pp. 211–213; see also S. Brooman, D. Legge, *Law Relating to Animals* (London, Cavendish, 1997).

<sup>119</sup> Granting rights to animals is not necessarily a sign of abandoning anthropocentrism. To the contrary, it can be argued that the selection of certain species (whales, livestock, pets etc.) for improved protection hints to an even stronger anthropocentrism as it values animals according to their economic or social use.

<sup>120</sup> The argument against all approaches of moral extensionism (women, blacks, foreigners, animals, plants etc.) is that they simply extend already established principles to a wider constituency rather than re-evaluating the principles themselves. When Jesus Christ or the Buddha preached the compassion with even the lowest caste, they were not urging the moral high priests to apply their principles more widely, but to reject an ethic in which people are honoured and respected on the basis of status, wealth, skin colour and the like.

<sup>121</sup> For intrinsic value to be attributed to life in its various aspects see J. Kleinig, *Valuing Life* (Princeton, Princeton University Press, 1991).

<sup>122</sup> (1992) 31 *International Legal Materials*, 818.

<sup>123</sup> A. Kiss, D. Shelton, *International Environmental Law* (New York, Transnational Publishers, 1991), p. 11.

<sup>124</sup> A. MacIntyre, *After Virtue: A Study in Moral Theory* (London, Duckworth, 1981).

<sup>125</sup> See J. Urmson, *Aristotle's Ethics* (Oxford, Oxford University Press, 1988); W. Hardie, *Aristotle's Ethical Theory* (Oxford, Oxford University Press, 1980).

<sup>126</sup> A connection between ecocentric awareness and 'the good life' is made by D. Cooper, 'Other Species and Moral Reason', in: Cooper, Palmer, supra note 6, pp. 145–147.

human interdependence.<sup>127</sup> A sense of interconnectedness may well be the key for future decision-making.

Ultimately, there are no 'reasons' why we should adopt intrinsic values of nature. Ethical reasoning can only help clarifying some arguments. Ultimately, we have to rely on our ability to learn from past experience and see things differently. Interspecies justice is a new concept that cannot simply be attached to the idea of justice. The 'barriers to fair treatment of non-human life'<sup>128</sup> are deeply embedded in the psyche of modernity and can only be removed by revisiting both the idea of justice and our place in the world.

The elements of ecological justice are now before us, and we may have enough building blocks for a possible theory. However, since the building blocks sit on ecocentric foundations they cannot claim to be universally acceptable. They may be useful, though, to facilitate further discussion. The aim should, in any case, be to work on a conception that does justice to humans and nature alike.

The idea of ecological justice as outlined here is, however, far from being speculative. As the last section will show, its elements are already present in law. Recent developments in international and municipal law give an indication of how ecological justice is being implemented in environmental policy and legislation.

#### IV. Legal Implementation of Ecological Justice

For a concept as new and undefined as environmental or eco-justice there is—apart from the US experience—no example of a conscious, deliberate implementation into law and policy. It is possible, however, to assess legislative developments in terms of their eco-justice quality and make suggestions for further implementation. In this sense two developments will be discussed here. One is the adoption of the New Zealand Resource Management Act 1991, the other is recent developments in international environmental law.

##### A. New Zealand Resource Management Act 1991

New Zealand's environmental legislation is often hailed as one of the world's most advanced<sup>129</sup> although this may be true for its ambition rather than its current operation. The Environment Act 1986 and the Conservation Act 1987 espouse an ecocentric approach by providing holistic definitions for the 'environment' (including humans and nature) and recognition of 'intrinsic values of ecosystems'. The actual implementation of this approach occurred during a reform period between 1984 and 1991 when the Resource Management Act (RMA) was adopted. The RMA is the legal framework for integrated and sustainable management of natural and physical resources, and has the 'ethic of sustainable management'<sup>130</sup> at its core. The RMA is a remarkable example of translating sustainable development into law

as it integrates socioeconomic and environmental issues.<sup>131</sup> But it is also a good example of applied environmental justice as it provides for a definition of sustainable management that espouses some of the key elements of environmental justice.

To begin with, there are two major functions of 'sustainable management', the *management* function and the *ecological* function. The object of the management function is the use, development and protection of resources, which includes social, economic and cultural well-being and the health and safety of people and communities. The object of the ecological function is sustaining the potential of resources, safeguarding the life-supporting capacity and avoiding adverse environmental effects as described in paragraphs (a), (b) and (c) of RMA, section 5(2).

The word 'management' is a neutral term and sets no particular values and priorities. However, use, development and protection of resources are equally important and to be managed simultaneously. It is in this context where both intragenerational and intergenerational equity apply. Under section 5(2) decisions regarding the distribution of resources must sustain the needs of future generations. Distribution does not follow a quantification of such needs, but rather the criterion of absolute equality.<sup>132</sup> Despite the reference to 'the reasonably foreseeable needs' resource distribution is determined by sustaining the potential of resources *in view* of future needs, rather than by those needs themselves. This would be consistent with the ethical approach to intergenerational equity as defined above,<sup>133</sup> thus *potentially* consistent with an ecocentric interpretation of future generations.<sup>134</sup> The proper reading of future generations—whether reduced to humans or life as a whole—depends very much on the reading of the overall ethics shaping sustainable management.

Intragenerational equity is also addressed in section 5(2). Resources are to be allocated in such a way that the social, economic and cultural well-being of people living today is provided for. Thus, distributive justice follows the actual needs of people,<sup>135</sup> not an absolute equality. A distinction between *welfare equality* and *resource egalitarianism* made by Dworkin<sup>136</sup> can be used to describe the situation. Equality of welfare (intragenerational equity) has an element of redistribution and may require that some people or communities (e.g. Maori) deserve a greater share of resources than other people or communities. Resource egalitarianism, on the other hand, is applied to future generations (intergenerational equity). They are entitled to the same potential and quality of resources as contemporary generations.

While the management functions are essentially anthropocentric in character, the ecological functions are not. Paragraphs (b) and (c)—and arguably even (a) (concerning future generations)—of RMA, section 5(2) express long-term considerations on the basis of ecocentrism. However, crucial for this interpretation is the proper meaning of the little word 'while' between management and ecological functions<sup>137</sup> and the proper linking of the remaining sections 6–8. There has been a

<sup>127</sup> See J. Tronto, *Moral Boundaries* (New York, Routledge, 1993), p. 101.

<sup>128</sup> A. Johnson, 'Barriers to Fair Treatment of Non-human Life', in: Cooper, Palmer, *supra* note 6.

<sup>129</sup> One political historian described the reforms as 'the greatest changes anywhere, anytime, in any democracy', quoted in P. May, et al., (Eds), *Environmental Management and Governance: Intergovernmental Approaches to Hazards and Sustainability* (New York, Routledge, 1996), p. 43. See also M. Kloepfer, E. Mast, *Das Umweltrecht des Auslandes* (Berlin, Duncker and Humblot, 1995), pp. 35, 301–310; and N. Robinson, *IUCN (The World Conservation Union) Newsletter* (July–Sept. 1997), p. 3.

<sup>130</sup> S. Upton (Minister for the Environment), 'The Resource Management Act, Section 5: Sustainable Management of Natural and Physical Resources', *Second Annual Conference of the Resource Management Law Association* (Wellington, Oct. 1994); see also K. Grundy, 'Sustainable Management: A Sustainable Ethic?', *Third Annual Conference of the Resource Management Law Association* (Christchurch, Oct. 1995).

<sup>131</sup> The overall objective of *Agenda 21* (and elaborated in eight chapters) is to restructure decision-making so that consideration of socioeconomic and environmental issues is fully integrated (N. Robinson (Ed.), *Agenda 21: Earth's Action Plan* (New York, Oceana Publications). Apart from this, the Brundtland definition of sustainable development—see *supra* note 69—was considered by the legislators, but the term 'management' was preferred to 'development' because of a lesser degree of social equity and global distribution issues inherent in the RMA.

<sup>132</sup> *Agenda 21*, *supra* Chap. 2.b)(2).

<sup>133</sup> *Ibid.*, Chap. 3.d).

<sup>134</sup> Bosselmann, Taylor, *supra* note 85, pp. 119–120.

<sup>135</sup> Perhaps also merit or desert; *Agenda 21*, *supra* Chap. 2.b)(2).

<sup>136</sup> R. Dworkin, 'What is Equality?', (1981) 10(4) *Philosophy and Public Affairs*, 186.

<sup>137</sup> The relevant passage of s. 5(2) reads: 'Managing the use . . . of . . . resources in a way . . . which enables people and communities to provide for their . . . well-being . . . while (a) sustaining the potential of . . . resources (for) . . . future generations; and (b) safeguarding the life-supporting capacity . . . ; and (c) avoiding, remedying; or mitigating any adverse effects . . .' (emphasis added).

lot of debate as to whether 'while' introduces the ecological functions as being superior or as being subordinate to the management functions.<sup>138</sup> A grammatically correct interpretation would suggest 'while' to mean 'by way of' rather than a non-committed 'and' or 'also'. Consequently, all management functions are to be conducted in an ecologically sound way as defined in paragraphs (a)–(c).<sup>139</sup> Interspecies equity can be seen as being addressed in these paragraphs and further defined in the 'other matters' of section 7 for which decision-makers are to 'have particular regard'. Among these matters are the 'intrinsic values of ecosystems' (paragraph (d)) and the concept of *kiatikitanga* (paragraph (a)) which is defined as the 'exercise of guardianship', and, in relation to a resource, includes the 'ethic of stewardship based on the nature of the resource itself'. Recognition of intrinsic values and reference to guardianship clearly espouse an ecocentric understanding of interspecies equity.

Leaving aside the number of difficulties that have occurred in practice,<sup>140</sup> the RMA is by no means value-free. The ethics and values expressed in the definition of sustainable management carry the elements of eco-justice.<sup>141</sup> Intragenerational, intergenerational and interspecies equity are all being addressed, albeit not always in a language clear enough to define the interrelations between them and ethical principles underlying them. Yet, ecocentrism clearly defines the ecological functions, thereby helping us to understand that environmental justice is, essentially, justice for those who cannot speak for themselves.

## B. International Environmental Law

In the context of international law, the notions of environmental or ecological justice are little used. International issues of justice usually deal with access to the institutions of dispute resolution, and the notion of international environmental justice reflects this procedural aspect. However, as Oleg Kolbasov points out, there is more to the concept of environmental justice in international law. It also has the substantive aspect of 'ensuring the preservation of the quality of the environment, in sustaining the ecological well-being of the living and future generations'.<sup>142</sup>

To make environmental justice operable in such a way we, first of all, have to consider the system of rights, duties and responsibilities. It is a commonly accepted view that the traditional structure of international law—guided by notions of sovereign states with strong rights—is at odds with global environmental challenges; the environment respects no national boundaries. Thus, accommodating environmental responsibilities would require overcoming the reciprocity of rights and duties by establishing shared duties and responsibilities. And this is, indeed, happening.

<sup>138</sup> See B. Pardy, 'Planning for Serfdom: Resource Management and the Rule of Law', (1997) *New Zealand Law Journal*, 69 (February); D.A.R. Williams, *Environmental and Resource Management Law* (Wellington, Butterworths, 1997), p. 75.

<sup>139</sup> Bosselmann, Taylor, *supra* note 85, p. 117. It should be noted that various policy papers seem to favour more of a 'balance' between management and ecological functions; on the other hand, Environment Court Judge Kenderdine speaks of 'cumulative safeguards' supporting the view expressed here: *Foxley Engineering Ltd v. Wellington CC W*, 12/94.

<sup>140</sup> These led, in mid-1999, to an amendment Bill to remove some of the procedural obstacles within the RMA.

<sup>141</sup> See also A. Gunn, C. McCallig, 'Environmental and Social Justice in an Urban Setting—Sustainable Management and the New Zealand Resource Management Act 1991', *Environmental Justice: Global Ethics for the 21st Century, 1–3 Oct. 1997* (Melbourne, University of Melbourne, 1997).

<sup>142</sup> O. Kolbasov, 'International Environmental Justice: Concept and Role', (1997) 27(4) *Environmental Policy and Law*, 284.

Following the pioneering role of international human rights law, recent international environmental law has considerably changed the face of international law-making. Many norms exist as *jus cogens*, *erga omnes* or *ordre public* expressing a general trend to derive binding law from an assumed common interest of all states. According to Eibe Riedel such 'public interest norms' indicate a major paradigm shift from a State-centred concept to a community-centred concept of international law.<sup>143</sup> While traditionally common interests are recognized only in so far as they coincide with the actual interests of individual States, it may now be possible to assume the existence of duties and responsibilities independently of the States concerned. Regimes built around shared responsibilities appear stronger than treaty regimes built around the rights of sovereign States.

An example of a shared responsibility regime is the increased recognition of the twin concepts of intergenerational responsibility and intergenerational justice. These concepts were formulated in the 'Brundtland report' of the World Commission on Environment and Development (WCED) and the WCED Expert Group on Environmental Law. The report called for the '(r)ecognition by states of their responsibility to ensure an adequate environment for present and future generations'.<sup>144</sup> Quite independently of any treaty law courts have, indeed, recognized intergenerational responsibility and justice. A few years ago the so-called 'Children's Case' of the Philippine Supreme Court made headlines. The Supreme Court based its judgment on the twin concepts and held that the petitioner, the Philippine Ecological Network, had the right to sue on behalf of the children of the present generation and of future generations.<sup>145</sup> With reference to the Philippine Environmental Code the court spoke of 'responsibilities of each generation as trustee and guardian for the environment for succeeding generations'.<sup>146</sup> So States can be attributed a responsibility to care for future generations.

But what about the environment? Being derivative from shared responsibilities, the global environment would be better protected than by way of individual treaty consensus. However, the protection only exists in so far as it coincides with the (assumed) common interests of States. While shared responsibilities have the advantage that they exist independent from the actions of States and cannot simply be revoked at the pleasure of the States concerned,<sup>147</sup> they are also severely flawed by the anthropocentrism dominating current international (environmental) law.<sup>148</sup> What happens, we may ask, if the common interest is only geared toward regulating natural resources in order to allow more efficient and/or future exploitation? Nothing could stop the community of States from plundering the planet if the

<sup>143</sup> E. Riedel, 'International Environmental Law—A Law to Serve the Public Interest? An Analysis of the Scope and the Binding Effect of Basic Principles (Public Interest Norms)', *New Trends in International Law-Making—International Legislation in the Public Interest, 7–8 March 1996* (Kiel, 1996).

<sup>144</sup> World Commission on Environment and Development, *supra* note 69, p. 330. For an examination of the current legal framework for the recognition of future generations, see Agius, Busuttil, *supra* note 1.

<sup>145</sup> *Oposa v. Factoran* G.R. No. 101083; see IUCN (The World Conservation Union) Commission on Environmental Law Philippine Group, *Watching the Trees Grow: New Perspectives on Standing* (Manila, 1995), p. 53.

<sup>146</sup> *Ibid.*, pp. 58–59.

<sup>147</sup> Stressed by R. Goodin, 'International Ethics and Environmental Crisis', in: Goodin (Ed.), *The Politics of the Environment* (Cambridge, Cambridge University Press, 1994), p. 592.

<sup>148</sup> On the anthropocentric focus and its critique, see A.E. Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in: Boyle, Anderson (Eds), *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press, 1996), p. 51; C. Redgwell, 'Life, The Universe and Everything: A Critique of Anthropocentric Rights', *ibid.*, p. 71; P. Birnie, A.E. Boyle, *International Law and the Environment* (Oxford, Clarendon Press, 1992), p. 193. For a concept of international law based on ecocentrism, see Taylor, *supra* note 104.

consensus is to regard the planet as a mere commodity for human consumption. At best, the process of plundering could be controlled and prolonged. To argue for long-term, non-anthropocentric commitments we have to go further than shared duties and responsibilities.

To start with, for one important area environmental justice can be understood in traditional anthropocentric terms. Concerns for the international (re)distribution of the environment, conceived as a commodity, are standard concerns of global environmental justice and need to be taken seriously. For this area, Rawlsian theories of justice may be sufficient to provide a model of fair distribution. They may help us to accept that the rise of countries of the North to wealth and prosperity incurred an environmental debt that they now owe to the countries of the South. At the level of relationships between countries, the classic 'big picture' theories of justice work as they are able to see the environment as a commodity, in principle no different from money, food or health care.

There are, however, a number of difficulties with thinking of the environment in this way.<sup>149</sup> One is the practical concern that nobody really knows how the environmental debt can be measured and compensated for. Is the loss of tropical rainforests *exclusively* generated by rich countries? Assuming that this is true, what is the monetary value of the loss and how is the 'rest'—significance for global climate, biodiversity etc.—being compensated for?

Another difficulty is that environmental commodities are usually not confined to particular countries. They may be located in supranational regions or parts of one country, and in many cases they cannot be located at all by referring to national jurisdictions. The global commons—High Seas, the atmosphere, the ozone shield or global biodiversity—defy any attempt of allocating portions to individual countries, rich or poor. Given, for example, the complexity and unpredictability of the atmospheric system, it makes little sense to treat it as a producer of distributable benefits. You either have a stable global climate or you don't. Compensation only becomes an issue after the damage has occurred, i.e. when it is too late (droughts, rising sea levels etc.). Related to these difficulties is the fact that many environmental goods are irreplaceable and irreversible. Loss of biodiversity and climate change are such examples; where environmental goods disappear, nothing is left for (re)distribution.

These problems cannot, of course, reduce the duties of international distribution of the environment. But they suggest the need of conceiving the environment as something more than a commodity. Perhaps the ecology of the environment requires an ecology of duties and beneficiaries. Not only governments may have duties, but also people themselves (e.g. scientists, consumers, non-governmental organizations),<sup>150</sup> and not only other people, but the environment itself may be beneficiaries of duties as all people are situated in the environment. From an ecological point of view it makes little sense to reduce the beneficiaries of justice to people living today or tomorrow. It would only be consequent to recognize the intrinsic value of natural entities in addition to, and independently from, their commodity value.

<sup>149</sup> Some of these difficulties are discussed by Jamieson, *supra* note 1, pp. 204–209.

<sup>150</sup> *Agenda 21*, for example, addresses itself to individuals and social groups as much as to governments. See also Jamieson, *supra* note 1, p. 210, who suggests that global environmental justice should be 'supplemented by a more inclusive ecological picture of duties and obligations'. A similar point is made by D. Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', (1991) 28 *Stanford Journal of International Law*, 103, at p. 110: 'humans are not separable members of the universe. Rather, humans are interlinked and interdependent participants with duties to protect and conserve all elements of nature, whether or not they have known benefits or current economic utility'.

Recent environmental-treaty development underlines such an ambition. Apart from the already mentioned Convention on Biological Diversity many environmental treaties have recognized the intrinsic value of the biosphere. Examples include the 1982 World Charter for Nature,<sup>151</sup> and a number of treaties related to the preservation of ecosystems<sup>152</sup> and endangered species.<sup>153</sup> Mention should also be made of the 32 so-called Alternative Treaties that several hundred non-governmental organizations negotiated at the 1992 Earth Summit in Rio. For example, in response to the failed United Nations Earth Charter—substituted by the anthropocentric Rio Declaration—the non-government delegates initiated an 'Earth Charter' based on an ecocentrally defined responsibility for the Earth.<sup>154</sup> A final version will be adopted by the United Nations Peoples Assembly in 2000. Together with the 1995 IUCN Draft International Covenant on Environment and Development, the Earth Charter will be the basis for a covenant on sustainable development by 2002. All existing drafts are based on the principles that life has intrinsic value and that life in all its forms is to be respected.

In Catherine Redgwell's assessment the 'increasing recognition in international environmental law of the intrinsic value of animals and nature . . . goes beyond merely an incidental spill-over effect . . . [T]he dam of anthropocentrism has clearly been breached'.<sup>155</sup> It seems timely, therefore, to take a systematic approach and shape future international environmental law along the lines of ecological justice.

A theory of ecological justice will not *per se* change the world, but it may help to better understand how it could be changed.

<sup>151</sup> GA Res. 37/7, (1983) 22 *International Legal Materials*, 55, stating, in its preamble, that '[e]very form of life is unique, warranting respect regardless of its worth to man and, to accord other organisms such recognition, man must be guided by a moral code of action'.

<sup>152</sup> For example, Convention on Wetlands of International Importance Especially as Waterfowl Habitat, (1971) 11 *International Legal Materials*, 969, and Convention on European Wildlife and Natural Habitats (1979) ((1982) *United Kingdom Treaty Series*, 56), recognizing intrinsic value of wild fauna and flora.

<sup>153</sup> Examples include the 1972 Convention on International Trade in Endangered Species and the recently amended regime on whaling: A. D'Amatao, S.K. Chopra, 'Whales: Their Emerging Right to Life', (1991) 85 *American Journal of International Law*, 21.

<sup>154</sup> Published in Pacific Institute of Resource Management (Ed.), *Commitment for the Future: The Earth Charter and Treaties agreed to by the International NGOs and Social Movements Forum, Rio de Janeiro, June 11 1992* (Wellington, Pacific Institute of Resource Management, 1992).

<sup>155</sup> Redgwell, *supra* note 148, p. 87.