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978-0-521-87395-6 - The Human Right to a Green Future: Environmental Rights and Intergenerational Justice

Richard P. Hiskes

Excerpt

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Introduction

Writing a book in a northern climate invariably means looking out the window and witnessing the change of seasons. If the book concerns the environment and the current phenomenon of global warming, writing it leads one to wonder how differently seasonal change will manifest itself years from now (or at least optimistically to hope that seasonal change will continue). As this book lengthened, a different type of season swung into full view – the U.S. presidential campaign, often referred to as the “silly season.” What gives this particular season its name has more to do with the current political climate than the natural one, of course, although these days the silliness is partly due to the connection between the two.

The 2008 presidential campaign witnessed no end to the usual list of reciprocal candidate accusations and media “gotcha” opportunities; sadly lacking was much discussion of the whole issue of climate change and what human consumption patterns bode for the environmental predicament of future generations. All of the candidates professed concern about the environment and our impact on it, but none really dared make serious proposals that plotted a path toward saving the planet and ensuring environmental justice for future citizens.

The current politics of environmental preservation – and the lack of political courage that typifies it – is not the primary concern of this book; rather, what the future holds for the convergence of the natural and political worlds is my focus in what follows. This book offers a new set of concepts and a new language with which to bring politics and environmental protection together in the service of preserving for future generations a legacy of clean air, water, and soil. Those three elements I take to be central to any program of environmental preservation, and in this book I argue that together they constitute claims that all citizens, both present and future, ought to have honored as a matter of right.

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What follows then is a human rights argument for environmental entitlement to clean air, water, and soil. Not only living citizens possess this environmental right; I shall contend that future citizens do also, and because they do the second aspect of my argument is for environmental justice across generations. As a matter of justice, all citizens present and future possess the environmental human rights to clean air, water, and soil. Future citizens rely on these environmental rights of present citizens being protected for the possibility that theirs will be also; more interesting perhaps is that we shall see how the reverse is also true – the environmental rights of the present depend on the protection of the rights of future citizens. This reciprocity between present and future makes environmental justice across generations possible.

Both concepts of intergenerational justice and human rights are newcomers to the politics of environmental preservation. As we shall see, many if not most scholars have denied that either concept is relevant when it comes to making environmental decisions. Certainly there are other political and moral arguments aplenty that encourage the recognition of an environmental obligation, but those arguments are usually framed using concepts like sacrifice, good citizenship, or stewardship, and invoking a vocabulary from ethics full of righteous-sounding invocations to “care,” to recognize a “moral obligation,” to “be generous,” or “to do one’s duty.” Surely these are all good words and sentiments, and they are all guaranteed to move environmental policy to the rear of any political agenda or presidential campaign bus. Environmentalism needs a new and more muscular political vocabulary grounded in today’s central political ideas of human rights and justice. It must present an argument rooted in these power words of contemporary politics so that it cannot be ignored in any election or by any government. This book attempts to supply that argument and that new vocabulary.

A case for environmental justice that enfranchises future generations and is grounded in human rights is not an obvious argument, nor is it an easy one to make. In making it I shall first cut a large swath across human rights theory today and engage many of the most important discussions taking place among human rights theorists and practitioners. I shall offer some entirely new conceptualizations such as “emergent human rights” and also revisit and redefine some ongoing conceptual disputes, particularly those surrounding the concepts of group rights and identity politics. I shall also explore the relationship between the idea of community and human rights, and how the moral particularism that undergirds communitarianism can be brought into concert with the universalism of human rights. Along the way I shall also discuss how nationalism, long considered the antagonist to human rights even though nation states are the addressees of those rights, can play a role in finally

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achieving a universal consensus on the applicability of human rights across the globe and in every culture.

Environmental justice itself is a controversial idea for many philosophers as well and particularly so when placed within an intergenerational context. Environmentalism, I shall argue, invokes a special relationship between present and future generations by linking their interests within an intricate web of responsibility and dependence. It therefore would seem, and most philosophers have argued, that whatever else can characterize the relations between present and future, justice cannot. Philosophers since Aristotle have insisted that justice is a relationship always characterized by reciprocity in some sense; therefore where is the reciprocity between our future generations and ourselves? How is such a relationship with those who do not yet exist even possible? I shall present a novel argument that there is in fact such reciprocity present – I name it “reflexive reciprocity” – and within such a convergence of present and future lies the foundation of intergenerational environmental justice.

My argument ends in Chapters 6 and 7 first with a discussion of how to implement environmental justice by employing environmental human rights, and then how to secure those rights themselves. Both constitutionalism and participatory democracy, it turns out, are requirements for environmental human rights and for environmental justice. The necessities of democracy for human rights and of constitutionalism for justice have been commented on before, but bringing the four together opens new possibilities for institution building and for global policy making concerning rights and justice that have so far remained unanticipated. It becomes then the emerging responsibility of the globe’s already established democratic nations to take the lead in pursuing environmental justice and human rights, and in the process to continue the spread of constitutional democratic institutions.

Underlying all of the many arguments and conceptual innovations spread across the chapters that follow is one central belief: that politics at all levels is (and should be) increasingly defined in terms of commitments to human rights and justice, and to the spread of both across the globe. As an intellectual or normative commitment this belief can itself be challenged; as a portrayal of the current trajectory of the politics of globalization its accuracy is difficult to dispute. I shall discuss globalization at length in Chapter 5, but what emerges there and from even a cursory examination of any news source of record is that the language of human rights and of justice is the new vocabulary of politics, domestically and internationally. Invoking that language in a new domain of political endeavor that seems daily to be ever more pressingly relevant to our every political interest is not only good philosophy, but good politics as well.

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All of politics and life itself is tied to the welfare and general good health of the natural environment that surrounds us. It has always been thus; as a species we are finally realizing it. It is therefore time to let the state of nature back into our political calculations, but our political efforts on behalf of nature need our best arguments. Environmentalism needs the power to persuade that the concepts of human rights and justice have always offered. At the same time, exploring the place of those concepts within the argument for environmental preservation also helps us to uncover new meanings within those concepts themselves. What follows therefore is also an exercise in exploring the conceptual boundaries of human rights and of justice. Those boundaries will be stretched in these chapters, but not, I think, too far.

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Environmental Human Rights and Intergenerational Justice

I can't help feeling that we are the most wretched ancestors that any future generation could have.

Yehudi Menuhin¹

The phenomena of global warming and climate change give rise to a singular question: what do the living owe those who come after them? For many thinkers this is a nonsensical query; for others it is simply unanswerable, yet politically it tantalizes in its persistence, especially among environmentalists. As we shall see, the entire cause of environmentalism presumes a connection with and a concern for the claims of future persons that ensure this question a defining place in environmental politics.

As a question invoking the language of justice, many philosophers follow the eighteenth-century philosopher David Hume in his disdain for even asking it, and liberal theorists of justice have been on the defensive ever since. Hume ridiculed social contractarians for believing that the circumstances of justice could be met in a relationship between a living generation and one that either no longer existed or did not yet exist. His logic, at first glance anyway, seems impeccable: it has always been difficult to envision real obligations owed to persons whose nonexistence makes their claims irrelevant in both law and logic. Nevertheless, the twenty-first-century concerns surrounding environmental degradation have revived the need for a convincing argument to protect future generations. This book seeks that argument within the muscular language of human rights, specifically the human rights that together constitute “environmental human rights.”

¹ Violinist Yehudi Menuhin in a conversation with Dr. Jonas Salk, broadcast on PBS-TV, 27 September, 1982. Quoted in Terence Ball (1985), “The Incoherence of Intergenerational Justice,” *Inquiry*, 28, p. 334.

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JUSTICE, HUMAN RIGHTS, AND THE PASSAGE OF TIME

Before we can make the case for an intergenerational sense of environmental justice based on human rights, there are many definitional issues of justice and human rights, and their possible relation, whose answers might explain how environmental human rights can serve as the medium of intergenerational justice. Even exploring briefly what others have said on these issues cuts a large swath across several fields of moral, legal, and political philosophy. First, concerning justice, many scholars agree with Beckerman (1999) and Ball (1985), who simply deny that justice can be construed as relevant within a cross-generational context. Both follow Hume's logic that because justice is a matter of reciprocal obligations, it can only pertain to living beings.

Furthermore, when focusing on the concept of justice, we should be careful not to confuse what Sheldon Wolin (1960, 2004) might call "the presence of the past" with the more tangible debt owed to the future. As a historian of political theory, Wolin is referring mostly to what honor or respect we owe to past generations for their legacy of ideas and knowledge. Brian Barry (1999) recognizes that the question of environmental justice across generations raises the possibility that we shall owe much more – and of a more tangible nature – than mere reverence to future generations. He therefore admonishes that at the very least we should recognize that intergenerational justice is a potentially misleading term, because scholars use it "as a sort of short hand for 'justice between the present generation and future generations.'" He is correct that time's arrow does render it impossible to alter the relative justice of our relations with past generations, but others would insist, following Hume, that a similar impossibility persists governing relations of justice between present and future.

The second broad area of definitional controversy involves our understanding of human rights. The employment of human rights as the mechanism of intergenerational justice is similarly fraught with conceptual and logical hurdles. Even if we sidestep all of the inflated rhetoric of the abortion debate, speaking of the rights of future generations seems to do violence to the whole concept of rights as the property of living persons. Especially because rights are typically viewed as the property of individual persons (although, as we shall see, this is controversial as well), it is intrinsically difficult to picture real persons many generations down the road whose rights should restrict our behavior today. Even if we construe the justice relation in general as primarily a matter of rights – another controversial move – we would still have to explain why the rights of potential persons (or groups) should function as claims against the living within our considerations of justice today.

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Other scholars have begun to make the argument that I attempt to realize more fully in this book. Recent work by James Nickel (1993), Joseph Sax (1990), and Edith Brown Weiss (1989) has argued that environmental concerns offer a role for human rights within intergenerational justice. Nickel presents a case for what he calls cross-generational “rights to a safe environment.” Sax recognizes how different such rights are (and would have to be) from traditional human rights, and Weiss introduces “planetary rights” as environmental human rights that work to protect the future’s interests. These arguments represent initial attempts to bring together the concepts of human rights and justice while recognizing that both must be alternately stretched and compressed to make room for each other, given their different emphases on individual persons or groups, negative liberty or equality, and the living versus the not yet born.

It is not difficult to see why some authors have attempted to bring the language of human rights into their case for environmental protection, sustainability, and justice. As a category of speech, “human rights” has increasingly become the lingua franca of politics in many areas, and with considerable success in other battles over justice, such as those involving racism or the oppression of women, or in the transition from genocide to political equality. Since the acceptance of the Universal Declaration of Human Rights (UDHR) in 1948, the concepts of human rights have increasingly been accepted as norms governing the behavior of states. As Risse, Ropp, and Sikkink (1999, 4) argue, “human rights norms are well institutionalized in international regimes and organizations.” Therefore the usefulness of employing the language and, for Risse et al., the “power of human rights” in the pursuit of environmental causes should not be very surprising.

This particular convergence of human rights and justice theory in an argument to preserve the environmental welfare of future generations is difficult to sustain (both for these authors and in this book) for a variety of reasons having to do with the nature both of rights and of justice and because of how they have traditionally been construed by philosophers and political thinkers. This means that the argument that unfolds in the following chapters will engage us in reinterpreting, and in some cases seriously challenging, many traditional beliefs or positions within moral and political philosophy. The results of these challenges are several conceptual innovations in how we should understand both the nature of rights and the demands or circumstances of justice. I anticipate here only a few of the arguments engaged more fully in later chapters.

First are the arguments against the idea of universal moral rights in general, including traditional utilitarian arguments such as Bentham’s that insist that all rights are creatures of law and therefore are limited in scope to contexts

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in which they are enforceable by recognizable agents such as governments. Thus, the idea of a universal moral right where enforcement is not defined and the persons with corresponding duties are not prescribed is, famously for Bentham, “nonsense upon stilts.” The utilitarian critique of universal moral rights (whether “natural rights” in the eighteenth century or “human rights” today) is still relevant today, especially within current debates over universalism versus cultural relativism regarding whether rights really are universal or merely “Western.”

More recently, some rights theorists have claimed that because rights (and/or the duties that they imply) always conflict and are therefore not “compossible” or compatible with each other in a legal sense, any notion of rights must be more local and contingent than is generally considered acceptable by advocates of rights as foundational principles. For instance, Dowding and van Hees (2003, 292) conclude, “[T]he noncompossibility of rights is an embarrassment especially to those who want to argue that rights form the foundation or basis of justice.” Because I am specifically exploring the role of human rights in justice across generations, rights’ noncompossibility seems a powerful obstacle.

A second area of difficulty in presenting an argument for intergenerational justice based on environmental human rights lies in the still “second-class” status of environmental rights compared with more “fundamental” human rights. Many theorists and commentators, if they acknowledge environmental human rights at all, would relegate them to the conceptual category known as “social and economic rights.” These are generally considered to be secondary rights, if they are considered rights at all. Sometimes arguing for such rights, which include many from the latter half of the UDHR, is referred to as promoting “positive” rights. We shall discuss the alleged difference between negative and positive rights in Chapter 2; suffice it to say here that positive rights are said to be less “fundamental” because they require more from governments or others than merely noninterference, that is, actual aid, such as educational facilities, health care, or welfare transfer payments. Such rights seem less basic than, say, the right to life or to be free from torture, because governments and peoples still disagree on the degree to which they should be met or to which they threaten other “more basic” rights, such as to liberty or property. Environmental human rights on the surface seem similar to such economic and social rights that appear as somehow secondary – on our rights wish list perhaps, but probably not even near the top.

Shari Collins-Chobanian (2000, 135) argues persuasively that on the other hand, even the most fundamental “right to life” presumes prior and therefore more basic “rights to clean air, water, and soil.” Still, the impression persists that Maurice Cranston’s famous (1967) division of human rights into “real

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and supposed” categories downgrades environmental rights to the level of the other social and economic rights that make up the latter thirteen articles of the UDHR.

The argument for environmental human rights that emerges in the following chapters also insists that environmental rights are ineluctably group rights, attached to future persons viewed abstractly as members of particular, although abstract, groups. In this I am following Weiss, but with the recognition that construing environmental human rights as the rights of future generations makes them therefore subject to all the arguments against viewing such group rights as “real” human rights. Group human rights, as we shall see in Chapter 3, are a topic of much contemporary controversy within human rights scholarship today. The fact that logically it is impossible to view the environmental rights of future generations as anything other than group rights makes my task even more daunting.

Finally, the concept of justice across generations presents its own panoply of problems. Hume’s critique of social contract theory is worth recalling here, but more recently the variety and sheer multiplicity of criticisms of Rawls’s (1971) argument that justice requires a “just saving principle” are also relevant. Environmentalism has its army of advocates to be sure, and its current rallying cry of “sustainability” might indeed be, as Richard Norgaard claims, “primarily an issue of intergenerational equity.”² Nevertheless, if Terence Ball (1985) is correct that the whole idea of intergenerational justice is intrinsically incoherent, my basing it on what many consider to be the tenuous foundation of environmental (group) human rights would not seem to make it any more coherent or persuasive. Ball’s assertion follows that of others in claiming that because justice intrinsically requires some type of reciprocity between individual persons, the whole idea of having reciprocal relations with persons who do not yet exist is clearly spurious. As Peter Laslett and James S. Fishkin (1992, 7) summarize, “individuals are in reciprocal relationship with their contemporaries, but with their contemporaries only.” I argue in Chapter 3 that basing intergenerational justice on the environmental rights of future generations brings a unique kind of reciprocity between present and future citizens that, although unusual, is correctly viewed as real reciprocity nevertheless.

Therefore, there are plenty of preliminary reasons to suspect the conceptual cohesiveness and power of the argument that follows. Part of my response is to suggest and explore some conceptual innovations about rights and justice, exploring the possibility that our understanding of both must grow to

² Quoted in Beckerman (1997).

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embrace “emergent” features implicit but up to now mostly ignored by modern approaches to rights and justice. If the argument succeeds, however, there is potentially a large payoff of benefit, especially to advocates of human rights. If environmental rights of future generations can be maintained and intergenerational justice can be based on them, I contend in Chapter 5 that we have hit on a set of human rights that can be adhered to by all societies, regardless of their relative cultural differences. Although those differences persist within a globalizing world, all cultures presume the existence of successor generations of their own national or “blood community.” I therefore contend in Chapter 4 that there are built-in reasons for respecting the environmental rights of clean air, water, and soil for at least the future citizens of one’s *own* country, no matter which rights other societies protect for their future citizens. Whether this might be a welcome solution to the consensus/diversity debate within human rights theory – or just another opportunity for jingoistic national self-concern – is a matter I take up in the discussion of how to implement environmental rights and justice in Chapter 6.

The rest of this chapter considers three issues foundational to the arguments presented in later chapters. They all concern what can properly be contained in a theory of justice rather than, for instance, in a larger theory of morals but outside the bounds specifically of justice. The first issue asks whether justice is applicable to future (or past) generations in any real sense, or alternatively, although obligations to other generations might be required morally in terms of respect or of supererogation, if they do not fall under the demands of justice. The second issue challenges whether environmental goods are properly contained in a theory of distributive justice at all, since they appear, at least superficially, to be quite different from the usual objects of distribution within any theory of justice. They are collective – I use the term *emergent* – goods rather than individually assignable ones; as such they are usually not contained in liberal justice theories. Finally, the third issue asks the questions why should justice be specifically about the distribution of rights, and, even if it is, why should justice extend specifically to environmental rights?

JUSTICE AND THE FUTURE

Although some theorists of justice, such as Weiss (1989), include the notion of justice toward past generations, most accept Barry’s judgment that the concept of intergenerational justice realistically concerns only the duties of present generations to those of the future. I follow Barry’s injunction as well and speak primarily of what justice requires in terms of our obligations to the future. Traditionally since Aristotle and running forward through Locke and