

INTERGENERATIONAL EQUITY: ASSESSING THE FUTURE GENERATIONS' ROLE IN ENVIRONMENTAL PROTECTION AND STANDING TO SUE IN CASES OF ENVIRONMENTAL HARM

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Abstract

In today's continuously changing world, problems regarding environmental damage plague various jurisdictions. These changes occur due to both natural processes and human actions, and among these detrimental effects are climate change and the impairment of ecosystems, which affect not only members of the present generation, but those who are part of the generations yet to come. Central to this paper is the issue of intergenerational equity, and the role that future generations play in environmental policies, after the advent of the 1972 Stockholm Declaration and the 1992 Rio Declaration. The underlying thought of this thesis, then, is that every generation is a caretaker of the environment for the generations to come. In case the present generations renege on their responsibilities as caretakers, future generations, as holders of the right to a healthful ecology, must be allowed recognition and standing to enforce their rights thereupon.

Key words: *environmental harm, intergenerational equity, future generations*

Abstrak

Dalam perkembangan dunia dewasa ini, masalah yang berkaitan dengan pengrusakan lingkungan mewabah. Perubahan ini terjadi akibat proses alam dan tindakan manusia, dan beberapa kerugian diantaranya adalah perubahan iklim dan rusaknya ekosistem yang tidak hanya berpengaruh pada generasi kini, namun juga pada generasi yang akan datang. Pokok dari tulisan ini adalah isu keadilan antar generasi, dan peran dari generasi mendatang dalam kebijakan lingkungan setelah lahirnya Deklarasi Stockholm pada tahun 1972 dan Deklarasi Rio pada tahun 1992. Dasar pemikiran dari tulisan ini, setiap generasi adalah pemelihara lingkungan demi generasi yang akan lahir. Bila generasi kini melalaikan tanggungjawabnya sebagai pemelihara, maka generasi mendatang sebagai pemegang hak atas ekologi yang sehat harus diperbolehkan menyatakan dan membela hak-haknya tersebut.

Kata Kunci: pengrusakan lingkungan, keadilan antar generasi, generasi mendatang

Intergenerational equity in environmental law

Issues on environmental law affect everyone and are in the core of human rights. To live a good life, people everywhere must have access to a healthful ecology. The advent of environmental issues such as global warming impresses upon us that

environmental degradation is impacting not only our own welfare but also that of future generations (Guth, 2009: 1).

Intergenerational equity, as explained by Edith Brown Weiss of Georgetown University, who is one of the main proponents of this concept, argues that "we, the human species, hold the natural environment of our

planet in common with all members of our species: past generations, the present generation, and future generations" (Weiss, 1990: 198-199). The concept treats the present generation both as trustees of the Earth for future generations, and as beneficiaries of the Earth's resources to which they are entitled to use and enjoy. Most people would acknowledge a moral obligation to future generations, particularly as people who are not yet born can have no say in decisions taken today that may affect them (Beder, 2000: 227-243; Parfit, 1984: 351). Intergenerational equity is made up of three principles: conservation of options, conservation of quality, and conservation of access (Weiss, 1992).

The first principle, "conservation of options", presents that each generation is required to maintain the diversity of the natural and cultural resources, so that it does not unjustifiably limit the options of future generations in attending to their needs and satisfying their own values, which must be comparable in diversity to that enjoyed by previous generations (Weiss, 1992).

The second principle, "conservation of quality," espouses that each generation is required to maintain the quality of the planet so that it is passed on to succeeding generations in no worse condition than that in which it was received. Necessarily, the coming generations should also be entitled to a planetary quality comparable to that enjoyed by previous generations (Weiss, 1992).

Lastly, the principle of "conservation of access" mandates that each generation should provide its members with equitable rights of access to the legacy of past generations and, as such, should conserve this access for future generations.

Considering these principles, treatment of the environment, as a common and intergenerational resource, may be efficiently patronized. As a result, emphasis must be allotted to the normative connection between

present and future generations, and their respective rights and responsibilities.

To backtrack, the concept of future generations is actually founded on precedent - both ancient and modern, international and domestic (Science and Health Network, 2008). The indigenous Americans, for example, are known to take into account the obligations of present generations to mind the lasting effects of any action they may take on their environment. The term "future generations" is also used in the Brundtland Report in 1987, which presents recommendations for sustainable development in a manner that would protect the options of future generations (World Commission on Environment and Development, 1987). "Future generations", in relation to the doctrine of intergenerational responsibility, was also significantly discussed in the Supreme Court of the Philippines' decision, *Oposa v. Factoran* (*Oposa v. Factoran*, 1993). In this Philippine case, the Supreme Court of the Philippines ruled on the issue of the future generations' "standing" to sue in environmental cases and allowed the suit based on intergenerational equity.

As we continuously move towards globalization, natural resources are used up to further amplify economic development and trade. However, this exploitation of natural resources tends to exceed reasonable and sustainable usage. Should the present rate of environmental degradation persist, the natural living conditions of future generations may be significantly compromised.

Impetus For Considering The Intergenerational Impacts Of Environmental Harm

Climate change caused by the employment of fossil fuel to produce the energy needed by nations across the globe endangers the future generations' quality of life. But then again, climate change is far from being the

only environmental crisis and harm in fact caused by human activities.

As globalization becomes a reality for the present society, and developments are being undertaken all around for the benefit of states' economic growth, environmental challenges also surface. The advent of frequent trading between and among nations, add to this the proliferation of companies that engage in multi-national trade, brings about issues on climate change, widespread air and water pollution, and generally, the over-exploitation of resources, including public natural resources as water, land, and minerals found therein, ecosystems, and biodiversity, amongst other global, trans-national, and, of course, domestic, environmental issues.

The degradation of our natural environment has continuously been worsening over time, and has affected even the basic needs and welfare of the world's inhabitants. Statistics show that:

"Between 1950 and 1996, the world's population has doubled but the demand for grain has nearly tripled; seafood consumption has risen fourfold; paper use has gone up six fold; burning of fossil fuels has quadrupled; and the use of water, beef, and firewood have all tripled. These exponentially growing demands on the earth's resources in the rapidly expanding global economy are damaging the foundation of earth capital on which all economies rest. Evidence of such damage includes shrinking forests and wetlands, disappearing species, falling water tables, eroding soils, collapsing fisheries, polluted lakes and rivers, and ozone depletion" (Anderson, 2000).

These issues directly impact not only the conditions of the environmental landscape, but the lives of the people living in the affected areas, as well. Climate changes

already occurring and threatening human health, for example, are rising, imminent, and universal, with the most destructive and costly hurricanes having already doubled in frequency over the last 30 years (McCue N.D.). Should issues such as this progress, those individuals who are to walk the planet decades from now, may inherit a world that has already been broken by the hand of its own present inhabitants.

The statistical evidence already points towards a long-term tendency of depletion and degradation of natural resources. Given this and the existence of general biases in favor of the use of these resources for economic and consumptive reasons, we may need to review our present statutory environmental rights framework, in order to account for the impacts of these negative ecological changes on future generations.

In answering the question, "What can be done to protect the environment and the rights appurtenant to it, and who can initiate proper legal actions to protect it?" The legal standing of future generations, as well as the matters of rights and obligations concomitant thereto, in natural resource claims is brought into focus. However, we cannot tackle the issue by looking at environment conditions alone. The health and well-being of humans, as well as the benefits of exploiting natural resources to answer the needs of humans and communities, and the development of societies, across the globe must also be taken into account.

Intergenerational equity and sustainable development

When talking about intergenerational equity, however, the principle of sustainable development must necessarily be considered. Sustainable development should be understood as that which supports an improvement, or at the very least, maintenance, in the quality of life, rather than just

sustaining its existence (Beckerman, 1999: 73).

Intergenerational equity and sustainable development are inevitably linked since, according to Brown Weiss, "sustainable development rests on a commitment to equity with future generations" (Weiss, 1992: 385). Alterations in the global environment influence societies' ability to have the goals of sustainable development and its concomitant processes come into fruition. Alternatively, economic developments also cause global economic changes (Weiss, 1992: 385).

The Stockholm Conference on the Human Environment (Stockholm Declaration, 1972) reconciled the management of the environment and economic progress, and recognized that there exists a responsibility to protect and improve the environment for the present, as well as the future generations (Weiss, 1992: 385). Its primary objective was to provide the normative springboard for governments all around the world in the adoption and implementation of policies that will protect and further develop the human environment (Hawke & Magraw, 2007: 614).

The term "sustainable development" was first visibly used in 1980 in a document by the International Union for Conservation of Nature and Natural Resources entitled "World Conservation Strategy" (Hawke & Magraw, 2007: 615). Therein, sustainable development was defined as "the integration of conservation and development to ensure that modifications to the planet do indeed secure the survival and well-being of all people" (Hawke & Magraw, 2007: 615)

The United Nations General Assembly's World Commission on Environment and Development, otherwise known as the Brundtland Commission, thereafter adopted the term in 1987. The Commission formulated a "global agenda for change", in the hope that such agenda will help in safeguarding

the rights and interests of the generations to come (World Commission on Environment and Development, 1987).

In this regard, the Principle 3 of the 1992 United Nations Conference on Environment and Development, otherwise known as the Rio Declaration on Environment and Development, declares that development "must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

To clarify, the concept of sustainable development does not deal solely with economic developments, but necessarily delves into environmental and natural resource law. Simply put, sustainable development is founded on three core topics: economic growth, environmental protection, and social justice (McKeown et al., 2006: 11). The utilization of these natural resources must benefit the present, as well as the future generations of humans. Necessarily then, the rights of future generations, especially in the environmental justice system, must be mapped out and explained. Importantly, the environment, at all times, must be protected.

By managing technology and social organization, and improving the processes used in the utilization of resources and the pertinent institutional framework that govern these processes, the kind of development that meets the current generations' needs, as well as those of the future generations, may very well be achieved. So, while it is a given that we, the members of the present generation, may use the natural resources for our generation's own development and even survival, such usage must be done in accordance with existing relevant laws, regulations, and policies. Furthermore, we are duty-bound by the intergenerational rights and responsibilities to use these resources in a way so as not to prejudice the future uses thereof by the future generations.

The Rio Declaration advances a more socially-conscientious approach in the adoption of policies or actions. The precautionary principle, enshrined in Principle 15 therein, mandates states to take socially responsible actions to protect the public from any harm that may occur by virtue of such action or decision, when scientific evidence has found a possible risk in existence.

In the case of the Philippines, the environmental regulatory framework dramatically shifted from a "command-and-control" approach, as was taken during the 1960's to the late 1980's, towards an environmental sustainable development paradigm as a result of the country's commitment in the 1992 Earth Summit in Rio de Janeiro, where the Rio Declaration was signed into existence (Pascual, 2005). Moreover, policy reforms are streamlined to conform to relevant environmental protocols that the country is a signatory of.

From an economic standpoint, the idea behind not reducing the ability of future generations to meet their needs is that, although future generations might gain from economic progress, those gains might be more than offset by environmental deterioration (Bedder, 2000).

On the other hand, intergenerational equity may also be treated as having a basis on public trust. The Public Trust doctrine articulates a philosophy where public interests and the rights to a natural equilibrium do and should trump private interests (Takacs, 2008: 476). Rights to natural resources are public rights, and the enforcement of these public rights is significant to the safeguarding of environmental values (Takacs, 2008: 476).

Constitutionalizing intergenerational equity in environmental law

With the advent of the principle of sustainable development, laws, projects, and

policies, to be adopted and undertaken by states and private entities alike, that tend to the utilization of natural resources and which may be seen to affect the environment, are necessary to promote a safe environment for both the present and future generations. Without knowing who the right-holders are in terms of environmental protection and natural resource exploitation, the formulation and eventual implementation of natural resource policies will fall flat on their faces and remain toothless.

The necessity for the constitutionalization of intergenerational equity

Environmental rights must be taken to include the rights of future generations to a healthy ecology and to the enjoyment of the natural resources. To ensure that these environmental rights do not serve merely as abstract provisions, they must be constitutionalized at the level of the state legislature, explicitly including therein the doctrine of intergenerational equity. This will enable the effective protection and conservation of natural resources, as citizens of a particular state may seek redress and judicial assistance from the courts whenever violations of their environmental rights or those of their children are committed.

While environmental protection suits may also be done via public interest litigation, the constitutionalization of these environmental rights and obligations, most particularly the rights of present and future generations to a healthy and balanced environment, and the obligations of the present generation to maintain such healthy environment for the future generations, is necessary to enable states and private entities to understand the gravity of acts that involve the environment. Stipulating for environmental protection at the constitutional level has likely benefits:

"[It] entrenches recognition of the importance of environmental protection: it offers the possibility of unifying principles for legislation and regulation; [and] it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making processes" (Hayward, 2005: 7).

Carl Bruch (2001) posits that constitutional provisions can enable the following: (1) Expansion of the scope of environmental legislative and regulatory systems, which are otherwise inadequate or insufficient to provide complete protection (Bruch, 2001: 6); (2) Elevation of the status of environmental rights and treatment of such as a fundamental priority, instead of as a mere political whim (Bruch, 2001: 6); and (3) Passing of procedural rights, which are necessary in the promotion of transparency, participation, and accountability in environmental governance.

Integrating intergenerational equity in environmental law via express constitutional provisions will also pave the way for a clearer understanding of how nature everywhere works and stays on, even as human beings move or even expire (East European Constitutional Review, 2: 35'8). It is vital in effectively ensuring that environmental policies do not become mere ink on paper that will soon fade and collect dust in time.

Environmental Rights as Human Rights

In jurisdictions that do not have Constitutions containing provisions that accord its citizens environmental rights, like in Bangladesh, advocates tend to link environmental rights to human rights or the "greening of human rights" (Wolfe, K. 2003), in order to support the call for environmental protection and resource conservation (Weiss, 1992). Under certain political and socio-

economic landscape, the environment and human rights come under threats together, although "threats to the environment can themselves directly constitute threats to lives and livelihoods, health, and well-being" (Hayward, 2005: 9).

Liberia' Silas Kpanan' Ayuning Siakor, known for opposing the deforestation of West African forests at considerable risk to his life and family, explained that their "struggle for the environment is not about trees. It is a campaign for social justice and respect for human rights" (Houck, 2007: 10).

Suffice to say, issues on environmental law affect human rights, as propounded by the Stockholm Declaration in 1972. Principle 1 of the said Declaration provides that man has "the fundamental right to freedom, equality, and adequate conditions of life," in a quality environment and that he bears a solemn responsibility to protect and improve the environment for present and future generations (United Nations Stockholm Declaration on the Human Environment, 1972). The complexity of the link has become better understood now, although the international community has demonstrated a reluctance to establish the right as "hard law" (Hill, 2004: 11).

Furthermore, in an article entitled, "One Species, One Planet: Environmental Justice and Sustainable Development," the Center for International Environmental Law (CIEL) concluded that environmental justice and sustainable development are virtually synonymous (Hill, 2004: 11, citing Center for International Environmental Law, 2002). In so explaining the relationship of these two spheres, the said article stated that:

"Each requires taking into account and integrating policies relating to social justice, environmental protection, and economic development. Furthermore, each involves focusing on real life conditions now facing

individuals and local communities, while also addressing the impacts that different policy options may have in the future - to ensure, on one hand, that development is sustainable and, on the other; that policy choices not only achieve equitable results in the short term, but also do not cause or perpetuate injustice in the longer term. Similarly, achieving sustainable development requires transparent decision-making processes and meaningful opportunities for public participation, as does environmental justice" (Center for International Environmental Law, 2002).

Nevertheless, the connection between human rights and environmental rights is more frequently couched in terms of rights in regional instruments than in instruments of a more global nature (Hill, 2004: 13). In fact, the 1981 African Charter on Human and People's Rights proclaims environmental rights in broadly qualitative terms (African Charter of Human Rights and People's Rights, 1981).

In Article 24 therein, the African Charter provides that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development." This provision is worded to endow the right on "peoples," which suggests a collective right rather than an individual right. It also suggests that environmental right is conditioned on development, rather than creating an unencumbered environmental right only, and in recognition of this, the provision can be viewed as reinforcing the importance of environmental protection in the larger context of development, rather than as recognizing a fundamental right independent of this context (Hill, 2004: 14).

After about four decades since the Stockholm Conference came to fruition, courts that have the chance to enforce national and international human rights tend to conclude that a "safe and healthy environment is a

prerequisite to the effective enjoyment of many human rights" (Shelton, 2011). From the foregoing, environmental law is evidently a field that is inter-related with others and, as such, must be so considered. It is also not a separate or self-contained field of law in the sense that it is the application of well-established rules, principles, and processes of general international law to the resolution of environmental problems and disputes (Birnie, Boyle, & Redgwell, 2009: 106).

More importantly, environmental law is closely linked to human rights, such that living conditions, as well as the quality of life, of human beings are greatly affected by environmental conditions, the quality thereof, and changes thereto. As such, the primordial weight of environmental rights must be accorded to and provided for in the fundamental laws of the land, to enable the citizens to protect their own interests and rights to their environment, natural habitat, and resources.

However, human rights laws do not provide sufficient basis for environmental suits, and cannot replace environmental rights that are fully and firmly ensconced in the Constitution of a state. The objectives of human rights laws do not always concur with the goals of environmental protection and conservation policies. Birnie, Boyle, and Redgwell state that "despite its evolutionary character [...] human-rights law still falls short of guaranteeing a right to a decent or satisfactory environment if that concept is understood in broader, essentially qualitative, terms unrelated to impacts on specific humans" (Birnie, Boyle, & Redgwell, 2009: 301). Given the occurrence of environmental damage, if the affected person's health, civil rights, or private life are not "sufficiently affected" however, then such person cannot bring suit for the protection of the environment via human rights law (Birnie, Boyle, & Redgwell, 2009: 301).

Even when connections can be established between them, these two groups of rights are still quite distinct from each other and, should not be used to replace each other. Though interconnected, the right to environment should nevertheless not be classified as a type of human right or as a "synthesis right" (Cullet) , because it represents special attributes that are different from other rights like human rights. As such, it cannot be maintained that an express grant of environmental right is not anymore necessary or relevant since remedies in cases involving environmental damages can be reckoned from prevailing rights like the rights to life and to health. Environmental problems such as climate change and unsustainable utilization of natural resources, as pointed out by Birnie, Boyle, and Redgewell, represent the "greatest contemporary challenge to a decent environment," but which cannot be solved or adequately addressed by human rights law (Birnie, Boyle, & Redgewell, 2009: 302).

Conclusion

Future generations have legal interests in environmental protection as they stand to inherit the earth. Therefore, further fortifying the weight of environmental policies by recognizing the rights of future generations and allowing representational suits on their behalf would protect these legal interests by allowing for legal recourse, when violations occur.

In the words of Murdie, "environmental law can no more make people respect or revere the environment and the natural world than child protection laws can make bad parents love their children. But it can do something to prevent the harm currently occurring, set standards, which no one should fall below, and punish those who fail to observe those standards' (Murdie, 1992: 10). Allowing rights-holders such as the mem-

bers of the future generations to take it upon themselves, through proper representation, to demand for the protection of their rights and interests to use and enjoy their natural environment would further strengthen the spirit of these environmental laws and greatly contribute in the satisfaction of these laws' objectives (Murdie, 1992: 10).

Davidson (2003) argues, the fact that these future generations do not yet exist "does not preclude them from being the beneficiaries of constitutional protection". As in the United States, the framers of the Constitution have "recognized that future persons had rights that limited the legitimate range of conduct of present governments and individuals" (Davidson, 2003).

To date, only the Philippines has positively addressed the issue of the standing of future generations to sue or be represented in cases of environmental harm, and has, in effect, recognized the standing of future generations in such cases. This may be largely due to the somewhat more liberal approach of the Philippines to standing in suits, wherein jurisprudence has held that when the matters involved are of transcendental importance, Philippine courts may waive the requirement of standing altogether (Lumba, 2009).

Other nations, on the other hand, have remained conservative in this respect, allowing representational suits on the bases of public interests and on the "environmental right-as-a-human right" argument only.

Hence, human rights advocates may freely employ environmental protection as an instrument to the fulfillment of human rights standards. In fact, human rights norms are already protected under international covenants and even in domestic constitutions in some jurisdictions can play an important role in environmental protection. Nevertheless, focusing on the issue of the right to a healthy environment as the basis

for environmental protection and conservation provides rights-holders with a more direct avenue for an action for rights enforcement.

The giving in favor of rights-holders, including members of the future generations, specific provisions on their right to a healthy and environment and the sustainable use of natural resources underscores the recognition of these rights as distinct. The express constitutional recognition of the environmental rights of every generation in the planet as part of the civil and political rights of a given jurisdiction enables concerned parties to assert their objections to environmental damage or harm. These express constitutional provisions also promote legal certainty, as well as efficient and speedy mechanism, in legal proceedings concerning environmental rights and the violations thereof.

Most important however is the argument that environment protection is not the primary objective of human rights (Hayward, 2005: 13). Following this, human rights cannot be deemed as being able to adequately provide legal basis for the protection of environmental rights in cases of environmental

harm since these cases, to be viable, would essentially require more substantive and definite rights.

It can be inferred that in order to attain the objectives and maximize the value of these substantive and definite environmental rights, specifically intergenerational environmental rights, they must be recognized and specifically expressed in state Constitutions. The fact that these rights are mentioned explicitly in the fundamental charter emphasizes their continuing importance and creates upon the state a solemn obligation to protect and advance these rights (Bruch, 2000). Furthermore, doing so would make suits by future generations more accessible to rights-holders and parties-in-interests to environmental protection. Moreover, it can also assist in the proper fulfillment of the objectives of environmental policies and instruments, by filling the voids or gaps therein and in statutory regulations, not only in the domestic sphere but in the international plane, as well.

This proposed constitutionalization of environmental rights would be a valuable, even necessary, legacy to leave our children and the next inhabitants of our world.

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