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JUSTICE TO FUTURE GENERATIONS A CONSTITUTIONAL ABSOLUTE?

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In this paper, I claim that a principle of intergenerational justice within the sphere of the environment (expressing our intuitive conviction that the finite resources of the planet belong to humanity across time) must be considered to be a fully authoritative component of environmental law. That claim is argued for on the following grounds:

1. the duty to conserve the environment for the benefit of present and future generations is part of the fabric of environmental law;
2. the recognition of an equitable claim of future generations on the resources of the planet belongs to just the basic structure of society;
3. the duty of the modern welfare state to care for the physical conditions of liberty is not limited to its presently living citizens.

My discussion embraces the environmental law at all levels (international and municipal), although a certain change of focus occurs in the sense that the section 1 centres on international law, while the sections 2 and 3 primarily consider our international constitutional orders. But the structural argument presented in the section 1 also applies within the domestic sphere, whereas the constitutional aspects identified in the sections 2 and 3 extend to ideal theory on a global level.

In this paper, the terms "intergenerational equity" and "intergenerational justice" are considered as synonyms. The term "constitutional" is used in the widest sense: it refers to the basic structure of the society and leaves the study of how that structure is expressed in constitutions (written or unwritten) to comparative law.

1.

„States shall conserve and use the environment and natural resources for the benefit of present and future generations."[1] Drafted in 1987

[1] Environmental protection and sustainable development, Legal principles and recommendations adopted by the Experts group on environmental law of the World Commission on Environment and Development (WCED), Graham æ Trotman/Martinus Nijhoff, London/Dordrecht/Boston 1987, p. 43 (article 2).

by the legal experts of the WCED (Brundtland) Commission, this principle codifies a norm for which the experts find support in many international instruments, and whose orientation on the future (as expressed by the words "and future generations") is already qualified as an "imperative goal for mankind" by the Preamble of the 1972 UN Declaration on the Human Environment[2]. The necessarily forward-looking aspect of our environmental concerns is confirmed by principle of the Rio Declaration on Environment and Development, which states that "The right to development must be fulfilled so as equitably meet developmental and environmental needs of present and future generations".

However, such a principle of intergenerational equity still tends to be categorized as "aspirational" or "emerging" rather than as a fully binding principle of international law[3]. In their book on environmental law, Birnie and Boyle point to the policy underlying a number of pollution treaties such as the Ozone Convention, which is the avoidance of irreversible harm, and to conservation treaties which require cooperation in the management of stocks and ecosystems for the purpose of maintaining sustainable productivity. Nevertheless, they suggest that "the record of actual practice casts doubt on the level of commitment to any theory of intergenerational equity"[4]. Taking account of their quite orthodox description of the sources of environmental law, one would have to conclude that the theory must yet find its way towards positive law by the sort of creative law-finding exemplified by the practice of the International Court of Justice, or by state practice manifesting a general consent sufficient to transform it from "soft law" into *ius cogens*[5].

I think such an analysis does't agree with the intrinsic nature of a postulate of integenerational justice. I wonder particularly whether the status of such a postulate can be measured by its degree of emergence in the practice of states, as determined by a piecemeal consideration of treaties and conventional regimes. It is no rule nor even a principle like any other, it has a structural quality (and so cannot be termed a mere "theory"). The goal of environmental protection and of its legal ordering imposes its own logics: can states pursue environmental ends, as members of the contemporary international community, and declare themselves *not* to be committed to the pursuit of intergenerational equity? I don't dispute that the postulate appears to be an "aspirational" one in terms of

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[2] Ibid., pp. 43-44.

[3] Cf. for instance Patricia W. Birnie æ Alan E. Boyle, International law and the environment, Oxford 1992 (repr. with corr. 1994), pp. 24 and 212. But the same authors declare that the "essential point" of the "doctrine" of intergenerational equity, namely "that man has a responsibility for the future", is "incontrovertible". As that responsibility cannot be separated from an intuition of justice, the authors also seem to concede the incontrovertible character of the "doctrine" reffered to. – The legal principles drafted by the WCED experts are termed by them „proposed" legal principles "which ought to be in place now or before the year 2000". Loc. cit. p. 7.

[4] Ibid., p. 212.

[5] Ibid., pp. 24, adn 26–30 on "soft law."

orthodox source theory, and that there is a good chance of its being found not (yet) actionable for that reason if invoked before an international tribunal. What I am claiming is that this treatment would reflect a too narrow approach, and that in judging its status in contemporary environmental law, one should consider the structural quality of the postulate instead of following the piecemeal approach characteristic of the traditional theory of sources. From such a perspective, the poor record of state practice (which constrasts starkly with the rhetorics of official recognition!) would have to be accounted for by the leeway which the international order still offers for the defense of interests contrary to the common interest (the latter interest being represented in our case by the need for environmental protection), rather than by a deficient commitment of states to the postulate of intergenerational justice in particular (there is no evidence that commitments directed at "short-term" hazards are in any way easier to obtain). It is true that even if it is qualified as fully authoritative on the grounds I propose, the postulate of intergenerational equity is not sure of being found directly actionable, on account of its indeterminate character. But I shall claim that this characterization is only true up to a point.

I now present my arguments for holding that intergenerational equity is a part of the fabric of environmental law. My main points are that no plausible criterion exists for drawing a boundary around the "intergenerational" dimension in purely generational terms, that a demarcation of that dimension based on the nature of environmental problems is more convincing, but precisely happens to underline the urgent nature of problems having an intergenerational scope, and that it is in the light of intergenerational equity itself that those problems have become urgent for us in the first place.

Let us observe to begin with that care for the environment (the term "environmental conservation" already suggests so by itself) shows a structural orientation towards the future that admits no demarcation in purely temporal terms of a separate domain for intergenerational concerns, in such a precise or general way as to be relevant for the environmental law. No consensus can be envisaged about a particular distance in time, calculated as from the present, at which the forecast of environmentally relevant events or developments would *begin* to require a response based on intergenerational equity. This impossibility is due to the structural vagueness of the concept of "generation". There is no sharp criterion that would permit us to distinguish one generation from the next, and so the "present" generation from "future" ones. What distance should we travel into the future in order to meet the latter? I am not aware of any concrete proposal having ever been made on that point: I suspect that it would be quite arbitrary.

All the same, one cannot easily resist the feeling that there should be a way of saying with some propriety that certain environmental issues do not, or not manifestly, involve the interests of future populations. According to a conceptual framework proposed by the Dutch authors van Hengel and Gremmen, this

could be done in the following way[6]. One would have to distinquish between 1. a "short-term" temporal framework in which society determines the environmental quality it is willing to pay for in respect of elements of the environment that carry no in-built risk of irreversible loss, possible damage to those environmental values being capable of redress without burdening society in a disproportionate way (various forms of pollution or nuisance, landscape values etc.) and 2. a "long-term" perspective dealing with the risk of losses affecting the ecological resource basis (the "ecospace") that are either irreversible or that cannot be made good or compensated for without heavy sacrifices (depletion of natural resources, major hazards to the ecosphere etc.). Within the first context, the living are free to determine the quality of their environment and so to trade off environmental values against other ones (it is their world which they shape by doing so), whereas in the second, which involves the presumed conditions of a decent life for future generation (though in certain cases, harmful effects could already develop in the short-term), intergenerational justice imposes a stringent duty of prevention. Let me assume that the distinction proposed by van Hengel and Gremmen, although its concrete interpretation poses a host of problems, has an initial plausibility (one has to start somewhere!). It has the merit of realism in that it acknowledges the existence in contemporary society of a broad pattern of balancing environmental values against others, while reminding decision-makers of the widely shared intuition that those values do not tolerate compromises which are bound to reduce the options of future generations[7]. The crux of the distinction lies in its substantive analysis of environmental problems. It identifies the risks which affect the future of mankind on this planet: what is crucial is the probability that we are setting off a negative chain of events.

I think that it is those risks of irremediable ecological loss, affecting the living conditions of the on-going processional reality of future people, which provide the main focus of the environmental concern. There is a fear of incurable degradation. But if that is true, how can a postulate of intergenerational equity still be located in the merely "emerging" areas of the environmental law? It can all the less since it is fundamentally an intuitive notion of intergenerational justice which makes us sensitive to the interests of future generations in the first place. We perceive environmental degradation from the perspective of its being contrary to the equal right which populations placed at different positions in time all have on the finite resources of the planet. Would we take that degradation seriously otherwise?

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[6] E. van Hengel and B. Gremmen: 1995, "Milieugebruiksruimte: tussen natuurwet en conventie", in Kennis en Methode, jg. xix 1995-3.

[7] The protection of the environment would come nearer to being raised overall above the competition between socially relevant interests, if a fundamental human right to an adequate environment were recognized. But what is an "adequate" environment? In any case, so such recognition exists in international law nor on the municipal level. Cf. WCED legal experts, op. cit. p. 38-40: the experts propose such a right as a matter of lex ferenda.

That central role of the concept of intergenerational equity also shows most clearly in the circumstance that it forms the moral core of the sustainable society, and that the concept of "sustainability", though it has to carry in contemporary discussions a too heavy semantic load, at least does mean according to general usage that our societies should eliminate patterns of production and consumption that endanger the maintenance of an ecological resource basis over time[8].

Now, I am aware that my thesis must be able to cope with the objection that the principle of intergenerational equity – even if its structural role is conceded – cannot be termed a binding, actionable, "hard" principle of positive international law, because it is too indeterminate for that. It needs to be implemented by the negotiation of agreements about particular environmental hazards with specific time-tables, or by the establishment of conventional regimes in respect of particular resources, with appropriate institutional provisions. So states retain a large measure of discretion concerning their degree of commitment to the environmental cause. This is all the more so since the subject-matter itself calls for a wide range of difficult determinations. For instance, a characteristic problem lies in choosing what environmental standards to apply: where, exactly, do we draw the line where future generations are concerned?[9]

All this must surely be admitted; at first sight, the principle of intergenerational equity is a perfect example of the "soft" law. However, I think reasons exist for insisting on a stronger status for it.

First, an obligation of justice imposes the duty of seeking the best ways for implementing it. So the principle offers a ground for denunciating the manifestly obstructive behaviour of states where long-term interests are involved.

Second, even if its implications must inevitably be controversial over a wide range of issues, the principle still is capable of directly prohibiting environmental harms of a certain magnitude. Let me draw inspiration from Rawls' theory of justice. Rawls says that in applying the principles of justice, the test of justice "is often indeterminate: it is not always clear which of several constitutions, or economic and social arrangements, would be chosen. But when this is so, justice is to that extent likewise indeterminate...". However, "(this) indeterminacy in the theory of justice is not in itself a defect. It is what we should expect. Justice as fairness will prove a worthwhile theory if it defines the range of justice more in accordance with our considered judgments than do existing theories, and if it singles out with greater sharpness the graver wrongs a society should avoid."[10] Now, I think that the last remark is particularly applicable to the question we are discussing here. Let us imagine a government that must choose between giving in

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[8] According to the WCED legal experts, article 3 of their proposed legal principles, on conservation and sustainable use, elaborates the principle formulated in article 2 (cf.my p. 1 above). Op. cit. (note 1), p. 44.

[9] Birnie æ Boyle, op. cit. p. 211, let that point weight heavily when discussing the "doctrine" of intergenerational equity.

[10] John Rawls, A theory of justice, Oxford UP 1972, p. 201.

to important economic interests, and respecting environmental needs of future populations some 50 or 100 years hence which will be vital for them according to any reasonable expectation. I don't see how an environmental legal order in any meaningful sense of the word could tolerate a decision in favour of the first-named option (to which one might add that in a context of interdependence, environmental negligence must presumably affect the future citizens of other countries and so cannot be considered neutral from an international point of view). Intergenerational equity here directly motivates the charge that one has acted in breach of an obligation. Many environmental hazards exist that can be classified without difficulty under the heading of "the graver wrongs a society should avoid", as they affect, by definition, the basic physical conditions of life. So it seems that there is an environmental minimum in respect of which it is not true that "states retain control over (their) degree of commitment" (a control considered to be characteristic of "soft law" by Birnie and Boyle)[11]. This is also an answer to the objection that the environmental standards to be projected into the future are indeterminate. They may be, partly, but around a core of minimum ecological needs which are beyond discussion.

I think a further line of reasoning in favour of the fully authoritative character of a principle of intergenerational equity consists in pointing out that even where that principle is in need of further specification, and calls for controversial findings, an appeal to its binding force still makes a difference in the context of judgment. It justifies the claim that the environmental interests of future people, when found to be involved at all with the requisite gravity, have to be taken account of, and even preferred to contrary interests (with the possible exception of the interests of present people having a comparable importance: a point to which I shall be turning again). So in making out a reasonable case for that involvement, one shapes the context of judgment in a critical way.

Finally, it is clear that one of the important factors that contribute to the indeterminate character of a principle of intergenerational equity, namely scientific uncertainty, tends to be neutralized by the so-called precautionary approach (....„Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.")[12]

2.

I have put the above argument within the framework of the international law of the environment, but its conclusions are valid at the municipal level of regulation as well. Intergenerational justice has been declared a principal aim of the environmental protection by many national laws or constitutions. As concerns the sustainable society, which has become an important background

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[11] Birnie and Boyle, op. cit. p. 27.
[12] Rio Declaration, principle 15.

concept in the international sphere since the WCED (Brundtland) report "Our common future" ("sustainable development"), it is evident that its telos is to fashion the national economic systems, and so the domestic legal systems, in a directly forward-looking way. At the present stage of international organization, it is still there, in the municipal sphere, that one must expect to find the legal arrangements offering the most effective guarantees against environmental discruption (although this should immediately be qualified by pointing out that certain major environmental hazards don't respect frontiers and so cannot be coped with unless appropriate regimes are worked out on the international level)[13].

I now centre my argument on that domestic level, the level of fully organized social entities at which we use to theorize about the just society, in order to press the claim that a principle of intergenerational justice, which guarantees equal rights to the finite resources of the planet to its future inhabitants, must be considered to be a part of just the basic structure of the society.

I think indeed that it would be wrong to underestimate, as to its structural importance, the enlargement of our social time perspective that has been caused by the development of ecological awareness. The conviction that we, the living, have no right to despoil the planet – that the planet is a home to humanity across time – crosses a conceptual threshold: it draws the long-run future of human life and community within the sphere of concerted action. Human society has always conceived itself more or less implicitly as an on-going entity; because of the ecological risks affecting life on the planet, that on-going character has lost its self-evidence ("the children shall carry on"), it has become a task we have to set for ourselves. By taking an active stance in regard to the future, society now perceives itself across the dimension of time. It takes care of itself by caring for its future members; those future members are no strangers, they already belong to its natural constituency.

The planet is seen as a common resource basis over time; it is that common dependence that brings future generations into view; now if the living were to despoil the earth and make future life "brutal, nasty and short", or just simply lacking in quality in comparison with the present, this would have to be considered as a serious imposition of a tiny privileged minority on the indefinitely large procession of people composing the future membership of society. So society must care, on the basis of expected numbers, for the long-run, average environmental conditions of a decent life. Let us consider also that there is nothing

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[13] The WCED legal experts have focused on continuity between the different levels of environmental law by making it clear that their proposed general principles are not meant to apply only in areas beyond the limits of national jurisdiction or in the transboundary context, but also in the entirely domestic domain: op. cit.(note 1), p. xi (foreword by judge Nagendra Singh) and 40. This is related to the circumstance that their proposed article 1 purports to establish a fundamental human right to an adequate environment. So these principles do not merely intend to protect the interests of States inter se, but also those of individual human beings.

in the concept of a potential existence that stands in the way of such an anticipated membership. It is the anticipation that matters.

What I am trying to do is to identify a fundamental sense in which we commit ourselves, as members of society, to "maintain open the doors of history", and to frame that commitment in moral terms, as an imperative of justice which belongs to society's basic structure. If I am right about this, the duty to care for the long-run future does not derive primarily from moral feeling in the abstract ("future people are human beings like us") or from some extended form of social justice (future generations being perceived as a new sort of social underdog), but rather from a fundamental but rarely articulated interest we all have in being able to place our own lives within the framework of an on-going social environment that extends beyond our personal life span. I suspect that a close analysis of the temporal perspective implicit in different forms of life would confirm such an hypothesis. So confident belief in the on-going character of society forms in many ways an existential condition of meaning; a claim to durability naturally inheres in society and its institutions like the state and the legal system[14]. The fundamental interest in "things going on", once it is forced into a defensive posture by the risk of environmental disruption, opens a new domain for the idea of equality: we realize that we, the living, participate in a larger historical whole, and that no conceivable privilege could justify us in robbing its future members of their share in the common resource basis. The moral point of view asserts itself within a new area of social self-awareness.

Now it is clear that such an understanding of intergenerational equity, which relates it to the basics of man's social and historical condition, subjects society to a constraint of the first magnitude, comparable with respect for the basic freedoms and the rule of law. It concerns the relation between the living members of society, considered in their collective capacity, and its open-ended future membership, in respect of the natural resource basis (the "ecospace") as a whole. Contemporary society places itself in a moral relation to its future self: it strives towards a sustainable form. As Norton formulates it, the ecological model "amounts in practice to an assertion that there are certain preemptive constraints placed on the pursuit of economic criteria for resource use".[15] Whatever room may be left by the specification on these constraints for differences of opinion, their preemptive character shapes the context of judgment in a decisive way: the standards chosen to make them operational tolerate no compromises, no trade-offs against other values; it is justice that one wants to pursue, and justice cannot be satisfied half-way[16]. Resource-use decisions affecting multiple generations cannot be measured

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[14] Cf. Michael Walzer, Spheres of justice, Blackwell, Oxford 1983, p. 197: "Every human society educates its children, its new and future members. Education expresses what is, perhaps, our deepest wish: to continue, to go on, to persist in the face of time."

[15] Bryan G. Norton, "Intergenerational equity and environmental decisions: a model using Rawls' veil of ignorance", in Ecological economics vol. 1 no. 2, May 1989, pp. 137–159 (cf. p. 145).

[16] Cf. Rawls, op. cit., p. 4: "the rights secured by justice are not subject to political bargaining or to the calculus of social interests."

by a unified scale of value: they call for a two-stage analysis that guarentees a clear priority to the considerations dictated by equity[17]. So what these characteristics suggest is that one should be able to say, with some conceptual clarity, that intergenerational equity is a part of the basic structure of the just society.

It is towards Rawls'theory of justice that one has to turn in order to find an elaboration of the concept of the basic structure. (It should be noted that Rawls himself takes account, from a perspective of material and cultural progress considered relevant to the realization of the just society, of relations between generations; intergenerational justice materializes as a principle of "just savings" that is part of the just basic structure as he defines it, and that doesn't tolerate an impairment of the environmental resource basis of future generations.) "For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements"[18]. A conception of social justice provides "a standard whereby the distributive aspects of the basic structure of society are to be assessed"[19]. I don't want to discuss here in what respects the first-mentioned, more detailed definition accommodates intergenerational relations (or not); I assume that there can be no doubt as regards the general relevance, to our case, of the concept as Rawls explains it.

I claimed that the categorization of intergenerational equity in the environmental sphere as a part of just the basic structure is justified by the very general constraint it imposes on society as a whole and by the fact that it does so in the name of justice. If it is carried out within the framework of Rawls' theory (as it should be because it is that theory which provides a clear concept of just the basic structure), this categorization endows the principle of intergenerational equity with the general priority attributed by Rawls to the principles of justice in relation to other socially relevant goals such as the principle of efficiency and that of maximizing the sum of advantages. "Justice is the first virtue of social institutions.....laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[20] Rawls here applies the notion of a "lexical" priority, which means that justice must be fully satisfied before these other goals may be taken into consideration. In a lexical ordering, the values placed earlier have an absolute weight in relation to the later ones[21]. Now that

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17) Norton, op. cit. p. 146. Cf. also T. Page, "Sustainability and the problem of valuation", in Ecological economics (ed. R. Costanza), Columbia UP 1991, pp. 58–74, on p. 67: we need a two-tier value theory, the first tier specifying the conditions under which the second operates.

18) Rawls, op. cit. p. 7.

19) Ibid., p. 9.

20) Ibid., p. 3.

21) Cf.ibid., p. 302 for the final statement of the principles of justice (second priority rule, combined with the presupposition of the first priority rule) and pp. 42-43 for the explanation of lexical priority.

priority analysis can go one step further: Rawls establishes a lexical ordering internal to the principles of justice themselves by attributing lexical priority to his first principle ("Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all") in relation to the second principle on social and economic inequalities (difference principle and fair equality of opportunity principle); liberty can only be restricted for the sake of liberty. The question arises whether such a priority must also be claimed for intergenerational justice in the environmental sphere. I think it must, if one takes seriously its preemptive status: it cannot be traded off against advantages sought in respect of the realization of justice between contemporaries in the socio-economic domain[22]. But the serious issue one then has to face is how to deal with conflicts between intergenerational equity and the basic liberties, as both are made to share the same primacy; for instance, we all know about poor countries in which the right to live must presently be bought at the expense of environmental protection. However, that issue merits special treatment at another place[23].

It might be asked on account of its preemptive status whether intergenerational equity is rightfully termed a "principle" at all, if Dworkin's well-known description of legal principles as legally relevant values subject to balancing against other ones (in contrast with the black-or-white applicability of rules) is chosen as a guideline. If one considers the principle in relation to the state and its legal order, one could argue that it rather seems to belong to a category of fundamentals such as having a population and territory: it expresses the states's existence through time. Society takes care of its *existence* over time by being just to its future members.

3.

I have argued that because of its structural importance, intergenerational justice must find a place within some concept of just the basic structure of the society, and that Rawls' theory is an indispensable guide in that last respect. It is clear that if one accepts that argument, a too modest evaluation of the legal status of intergenerational equity becomes difficult to maintain: as that

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[22] In that sense Brent A. Singer, "An extension of Rawls' theory of justice to environmental ethics", Environmental ethics 1988 (vol. 10), pp. 217–231, on p. 220. Singer develops a position according to which justice between generations in the environmental sphere is secured by considering environmental goods as a "higher" sort of primary good which tolerates no trade-off against economic or social privileges, of any sort, in the same way as the basic liberties (pp. 218-220). Cf. Rawls, op. cit., pp. 62–63 on primary goods and the priority of the primary good of liberty with respect to other such goods.– Rawls himself stipulates that the "just savings principle" (which doesn't tolerate environmental negligence harmful to future generations!) constrains the application of the difference principle, cf. op. cit., pp. 292–293 and statement p. 302.

[23] With Rawls, the eventuality of having to sacrifice the environment in order to save the liberties seems to be excluded by the assumption of moderate scarcity which excludes having to deny equal liberty in order "to prepare the way for a free society", cf. op. cit., p. 152. Singer (op. cit. p. 219) suggests that Rawls presupposes the availability of environmental goods (considered as "higher" primary goods) because he counts on such conditions of moderate scarcity.

principle is placed on a par with the basic liberties, it must be held to share with them the characteristic of being a fundamental norm of the constitutional order – a fundamental mandate which society gives to itself[24]. It instructs society to care for its future membership.

Now this still is a fairly abstract proposition. Let us recall the wide scope of Rawls' basic structure: it doesn't comprise only the constitutional order stricto sensu, but also the main social and economic arrangements of the society. Very little is said, at this abstract level, on the mechanisms by means of which the fundamental mandate has to be carried out. The question is a complex one, but I want to comment on it within the following general context.

The issue can be raised whether the realization of the fundamental mandate doesn't require an empowerment of the society in respect of resource-use decisions at all levels which its existing legal system might not provide in a sufficient measure or which would be contrary to its reigning political ideology. Let me suggest, however, that there is a large consensus in the contemporary world on attributing to the state a welfare function according to which it must care for the minimum physical conditions of liberty, and that this provides a strong reason for claiming that concern with the living conditions of future generations already is an object of constitutional commitment. If that suggestion is right, an argument based on the nature of the modern state joins forces with the argument based on the structural character of intergenerational equity. It tells us what the modern state is about, and so what is the *raison d'être* of its existing through time.

In an interesting study published in 1988, the Swiss constitutional lawyers Peter Saladin and Christoph Andreas Zenger defend a position centred on that welfare function of the modern state. I summarize that position as follows. Saladin and Zenger propose a draft declaration of the rights of future generations. These rights list various elements of the environmental integrity and culminate in a general right to the physical conditions of a decent life[25]. Saladin and Zenger base these rights on the following argument. They point out that the constitutional guarantee of the basic rights and liberties (they refer particularly to Austria, Germany, and Switzerland) is limited nowhere as to its temporal scope. No reason can be imagined why potential citizens should be excluded from that guarantee; on the contrary, the constitutional commitment to the conditions of human dignity is an absolute one which tolerates no such limitation[26]. So no obstacle exists to a formal recognition of the constitutional status of the interests of future generations. It is true that potential citizens don't yet exist and so cannot defend their constitutional rights. But that obstacle could be overcome by some

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[24] I use the term "mandate" in the sense of: an order given to carry our a certain task or duty.

[25] P. Saladin æ Ch. A. Zenger, Rechte kuenftiger Generationen, Helbing æ Lichtenhahn, Basel/Frankkfurt a. M., pp. 46–47.

[26] Ibid., pp. 32, 75, 77. Saladin æ Zenger quote art.2 of the French "Déclaration des droits de l'homme" (1789), according to which it is the end of every political association to maintain the natural and inalienable rights of man.

procedure for representing their presumed ecological interests (environmental law is already on the way since "green" groups and associations in many countries can be heard in court on behalf of such interests, some of which may have a long-term character). However, for Saladin æ Zenger the main point lies elsewhere. They claim (with a majority of writers on constitutional law) that the rights and liberties stipulated in the constitution should not be interpreted merely (as they are traditionally) in a defensive way, as powers attributed to the individual in order to check arbitrary government action. They also have a positive content, in that they formulate aspects of individual liberty the conditions of which must be guaranteed by the state[27]. There is insofar an inherent welfare function of the government. So the "rights" listed in the draft declaration by Saladin æ Zenger are not put forward by them, in the first place, as rights directly enforceable (on behalf of future generations) by the courts; they rather stipulate the goals which government should pursue under a constitutional duty to protect the future conditions of freedom[28]. It is interesting to note that the argument based on the welfare function of the government is supplemented with an argument based on the concept of democracy. Irreversible impacts on the environment are incompatible with the principle of democratic changeover, according to which today's minority can hope to be the majority of tomorrow: they impose on future citizens a state of affairs which cannot be corrected any more and which reduces proportionately the room they have for shaping their common life. Consequently, a decision having such effects cannot be justified by the mere circumstance of its having been taken by the majority of today[29].

So what Saladin æ Zenger propose is a mainly "programmatic" reading of intergenerational equity: the declaration of the rights of future generations forms the focus of a programme of legislative and administrative regulation the goal of which is the realization of a sustainable society. As they see it, that implementation would already be secured in an important measure by the obligation of the administrative and judicial authorities, based on the formal recognition of the constitutional status of the intergenerational equity, to take account of these interests at all levels of the environmentally relevant decision-making with the necessary priority.

Because of the formal recognition of its preferred status (through the declaration of rights of future generations), the intergenerational equality would have a far greater importance, within the proposed municipal framework, than a merely

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[27] Ibid., p. 95f. Cf. Laurence H. Tribe, American constitutional law, Foundation Press, Mineola 1978, pp. 8, 314, 574 on the emerging doctrine of affirmative government duties under the US Constitution.

[28] Ibid., pp. 25, 76f.

[29] The limits of purely majoritarian politics are also stressed by Rawls 1972, p. 296. The people may decide wrongly: a democrat is one who believes that democratic arrangements are most likely to yield just and effective legislation "(but) his conception of justice includes a provision for the just claims of future generations", and that provision may justify noncompliance.

aspirational one. It is true that the rights stipulated would in a large measure be programmatic, and insofar indeterminate. But government in the widest sense would be under a constitutional duty to implement them, an important aspect of that duty being the obligation of administrative or judicial authorities to take account of, and prefer, the manifest environmental interests of future generations at all levels of the environmentally relevant decision-making (I already commented on this in section 1 above)[30]. Moreover, although Saladin æ Zenger put the emphasis elsewhere, they expect that the environmental rights of future generations stipulated in the constitution could in certain cases work as enforceable, defensive claims before courts or administrative agencies, once procedures would have been agreed upon to represent the interests of the future people[31]. We here meet again that eventuality of unquestionably grave environmental risks, which lend themselves to a direct appeal to the intergenerational equity.

I said that environmental interests would even have to be preferred, because of their constitutionally protected status. But this leaves open the issue of their relation to other constitutionally protected goods, and in particular the basic liberties. I already mentioned the problem in the section 2. As Saladin æ Zenger formulate it, the respect for the environmental interests of the future people doesn't imply disrespect for the equally basic interests of the present people[32]. They here express belief in the inevitability of compromise. I myself tend to think that the issue doesn't arise any more at a certain level of welfare, and that it therefore points to the need for greater justice between nations on the socio-economic front.

4.

I have claimed that a norm of the intergenerational justice must be held to have a constitutional value in the widest sense: it is a fully authoritative, binding principle of the environmental law at all levels, endowed with a regulative primacy. I have sought the reasons for that claim in the structural importance of the principle for the environmental law, in its intimate relation to the fundamentally on-going character of the society, and in the duty of the modern state to guarantee the conditions of liberty over time. I have also claimed that the indeterminate character of the principle, which must be admitted to a large extent, still allows it to have an important direct impact on the substance and application of law.

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30) The duty I am talking about would not be sufficiently expressed by a constitutional affirmation that environmental protection is an important goal of the government. Such an affirmation of course has a great value from the environmental point of view, but it doesn't, on the face of it, provide for the preferred status of the basic environmental interests of future generations.

31) Saladin æ Zenger, op. cit., pp. 108f.

32) Ibid., pp. 105–106.

The considerations developed in the sections 2 and 3 of this paper, which are centred on the state, would need to be projected onto the level of international ideal theory. Environmental problems don't respect frontiers: many of them need to be solved on a global level. What is at stake is the future of the planet. So the argument based on the concept of society and on the conditions of liberty is incomplete so long as it isn't clearly developed on the world level.

A more extensive discussion of our theme would also have to include as its subject new legal concepts like the "common heritage of mankind" or the "public trust doctrine" in the US, the function of which is to protect the interests of the future generations in particular evironmental goods. It is clear that an unambiguous recognition of the principle of the intergenerational equity would be most favourable to the development and application of such concepts, which introduce much needed safeguards within a legal environment characterized on the whole by the dominance of the market economy and its cult of general mobility, or by a notion of democracy centred too much on today's majority being in the right.

SPRAVEDLNOST PRO BUDOUCÍ GENERACE JAKO JEDNOZNAČNÁ SOUČÁST ÚSTAVNÍHO POŘÁDKU?

Resumé

Princip mezigenerační spravedlnosti jako princip práva životního prostředí, se musí brát v úvahu jako jeho plně autoritativní součást. Tento závěr platí jak v mezinárodním právu tak v rámci ústav jednotlivých států. Avšak současná praxe vyvolává pochybnosti o závaznosti tohoto principu.

Ve skutečnosti je to sama ochrana životního prostředí, která platnost a právní relevanci mezigenerační odpovědnosti potvrzuje. Neexistuje totiž žádný časový bod, od kterého, měřeno do budoucna, bude nutno mezigenerační odpovědnost zajišťovat. Plyne to rovněž z vágnosti pojmu generace, který nerozlišuje, kdy nová generace začíná. K tomu přistupuje rozdíl mezi krátkodobým poškozením a trvalými změnami životního prostředí. Jsou to totiž právě nevratné změny, které jsou základním předmětem environmentálního zájmu. V nepřípustnosti těchto změn jsou totiž zahrnuty základní fyzické podmínky života. Zároveň se uznává, že sám postulát mezigenerační spravedlnosti se musí stát součástí konkrétních mezinárodních smluv, např. v podobě standardů.

Takový závěr platí nejen pro mezinárodní právo, ale především pro úroveň obcí, které jsou hlavní zárukou respektu k hodnotám životního prostředí. Jeho jádrem je lidská snaha žít svůj život v rámci pokračujícího sociálního rámce, který přesahuje jednotlivý lidský život. To zahrnuje i základní svobody a vládu práva a vztahuje se také k celku přírodních zdrojů. Snahy o zavedení forem trvalé udržitelnosti jsou potvrzením těchto závěrů. Mezigenerační spravedlnost je tedy součástí základní struktury spravedlivé společnosti. Stát má proto ústavní závazek chránit základní fyzické podmínky svobody, tedy i podmínky svobody budoucích generací. V tom je raison d'être státu.

Klíčová slova: prosazování, ekologická politika, ochrana životního prostředí, policie, státní zástupce.