Intergenerational Equity: What Role Should Law Play?

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Introduction

This paper aims to answer the following question: is it fair for the present generation to use natural resources without considering the needs of future generations?

My response is no. In doing so, I depart from an ethical standpoint related to duties and obligations born of intergenerational relations. The present generation does not take preeminence over any other generation whichever its position, in the past or in the future. The underpinning for this assumption is the intrinsic value of human life brought out by Ronald Dworkin. I surmise that law plays a decisive role in taking shape that discourse. The analysis to be made is divided in four sections: first, the issue of intergenerational equity is sketched out; second, the posthumous paper, “A new Philosophy for International Law,” by Ronald Dworkin is briefly summarized together with Adam S. Chilton’s criticisms of it; third, I point out guidelines for the fair regulation of intergenerational relations; and, fourth, I examine the impact of regulation of intergeneration equity on legal rationality.

I. An ethical justification for intergenerational equity

The first question to be answered is to what extent that conception accounts for intergenerational equity.
The 1972 Declaration of the United Nations Conference on the Human Environment held in Stockholm asserts in Principle 2 that “The natural resources of the earth … must be safeguarded for the benefit of present and future generations…."

Principle 5 of the Stockholm Declaration proclaims: “The nonrenewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion….” The 1987 Report of the World Commission on Environment and Development: Our Common Future, prepared by the Brundtland Commission, alluded to sustainable development as an agreement between generations whereby the use of natural and cultural resources must not endanger the needs of future generations. It is the underpinning of a sense of intergenerational equity to provide future generations the equal quality and diversity of and access to natural resources. The 1992 Convention on Biological Diversity requires its parties to “integrate consideration of the conservation and sustainable use of biological resources into national decision-making ... (Article 10). The 1992 United Nations Framework Convention on Climate Change (FCCC), stipulates: “The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures….” Principle 2 of the Rio Declaration starts: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem….” Article 3, Principle 1 of the Rio Declaration on Common but Differentiated Responsibilities calls on developed states to “take the lead in combating climate change and the adverse effects thereof.”
Once defined as a goal to be achieved, the safeguard of future generations alters the traditional perspective of legal norms.

For centuries, international rules have privileged the interspatial dimension aimed at guaranteeing peaceful coexistence in the absence of a centralized political power. From that perspective, justice was exclusively related to past or present human relations. Concern for the future makes the consideration of time relevant for the purpose of law in general and for international law in particular. For instance, biosphere protection requires the preservation of not only present values and circumstances but also those which will exist in the years to come. Intergenerational equity is just this; an attempt to logically combine protection of present and future generations that has been ignored up until now. Alexandre Kiss observes: “Those who live nowadays are but an element of a chain which is not to be interrupted. There is a world solidarity not only in the space among peoples of the world, but also through time, amongst succeeding generations”\(^1\).

Kiss goes on: “Time makes a purposive element. It is not a limited time, but an indefinite time, the time of future generation in a continuous succession”\(^2\).

The awareness that the present generation is a mere link in a much wider chain therefore extraordinarily enlarges the horizon of solidarity, which, accordingly, may occur in three dimensions: within the social group; in the external relations amidst groups, peoples and nations, and among successive generations across history. Likewise, the ends of law must then comprise

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\(^2\) Id.
protection of future generations, whether close or distant, from an indeterminate temporal perspective.

Contractarian authors state that there is no contract between the present and future generations. It would not be possible to speak of a contract with individuals who do not exist, the only plausible interests would be those of currently existing subjects who would be interested in preserving nature for the future. Instead of supporting a contractarian perspective that has lost its core, it would be better, according to Peter Singer, to simply abandon it and consider the question on the basis of universality, for which we must include a moral argument.3

My ethical argument in favor of protecting future generations is founded on Dworkin’s view on the idea of the sacred.

Our concern for humanity in coming centuries only makes sense if we consider it intrinsically important that the human race continue to exist even if such existence is not relevant to the interests of other people.4 We also consider it important that people live well and therefore believe we have a responsibility not only to avoid eliminating the possibility of existence of future generations, but also a responsibility to leave them a fair share of the natural and cultural resources. Therein lies the problem called justice between generations by philosophers; that is, the idea that each generation must, for the sake of justice, pass on a world not only habitable for their children and grandchildren, but also for generations descendants whose identity is not yet established.5 Our concern for future generations is not at all a matter of justice, but our instinctive feeling that both the flowering as the survival of the human being has a sacred

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5 See Id. at 107-108.
importance. In many cases, the essence of the sacred resides in the value that we assign to a process, undertaking or project, rather than its results regardless of how they were obtained.

Our attitudes towards works of art and culture show deep respect for the enterprises from which they originated. We do not respect these enterprises merely they produce particular results. Equally, we show concern for the conservation of animal species out of respect for how they came to exist. We think it is a mistake and an inviolable desecration that a species that has come to exist is expected to disappear because of our actions. Dworkin stresses two other characteristics of our beliefs about the sacred and inviolable. In the first place, for most of us there are degrees of sacred as well as degrees of wonderful.6 It would be unfortunate that a distinct and beautiful species of exotic bird was extinguished, but it would be ever worse if we killed all the Siberian tigers, even though we might regret a little less the extinction of other dangerous species. Similarly, in the second place, our convictions about inviolability are selective.7 We do not treat as sacred all that is done by humans. For us, art is inviolable, but not wealth, cars or commercial advertising. Large numbers of individuals attach sacred value to some species of animals, yet no one would regret eradicating the AIDS virus. Our selections are configured for our needs. They reflect each other, configure and are set by the other opinions we have. We revere nature because it has created magnificent geological forms, majestic plants and extraordinary living creatures, including ourselves. We protect the mountains, rivers, or particular animals because they are natural.8 Dworkin remembers that the reciprocity between our admiration for processes and our admiration for what results from them is complex and, for most people, the result is not only a general principle from which flow all beliefs on the inviolable, but rather a complex web of feelings and institutions.

6 See Id. at 111.
7 Id..
8 See Id. at 112.
II. Dworkin vs. Chilton: who is right?

The aim of this section is to examine whether Ronald Dworkin offers plausible responses to the challenges posed by intergenerational equity in his posthumous “New Philosophy for International Law.” It also discusses whether Adam S. Chilton’s criticism to Dworkin’s ideas are really significant for my goal. Taken up by both authors, the climate change issue is unavoidably associated with intergenerational equity. First of all, Dworkin posits an intriguing question: how can we understand international law as part of what morality requires of states?9

Unrestricted sovereignty, Dworkin concedes, provokes a great deal of citizens’ harms10. First, the citizens’ rights may be violated by a state endowed with unrestricted sovereignty.11 Second, states may be prevented from aiding foreign citizens in cases of genocide and other egregious human rights violations if tolerance for unlimited sovereignty is the prevailing rule.12 Third, unmitigated sovereignty threatens coordination among states because of the ‘prisoner’s dilemma’.13 For example, states might resist putting into place common measures to curtail emissions of green-house gases. Faced with this scenario, Dworkin opines, the conclusion is obvious: states must commit to putting limits on the nefarious effects that stem from unmitigated sovereignty,14 and therefore, the “duty of mitigation provides the most general structural principle and interpretive background of international law.”15 Dworkin continues: “In many circumstances, a number of different regimes of international law would each serve to improve

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10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
the legitimacy of the international system, were it enacted and enforced, and states may reasonably disagree about which would be best.”16 Dworkin then refers to the principle of salience:

“If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.” 17

Dworkin’s example is clear: if some set of humane principles limiting the justified occasions of war and means of waging war gains widespread acceptance, then the officials of other pertinent nations have a duty to embrace and follow that set of principles.18 The obligation is created not by consent but by the salient moral force as a path to a satisfactory international order.19 The principle of salience, Dworkin explains, provides a better account of the sources of international law set out in Article 38 of the International Court Statute than the account offered by consent theory.20 Such sources of international law are considered more fundamental than consent and not contingent upon it21. For Dworkin the underlying aim of international law is to create an international order that protects political communities from external aggression, that protects citizens of those communities from domestic barbarism, that facilitates coordination when it is essential, and that provides for some measure of citizen participation in their own governance.

16Id.
17Id.
18Id.
19Id.
20Id.
21Id.
across the world.\textsuperscript{22} These goals must be interpreted together in such a way as to make them compatible.\textsuperscript{23}

Dworkin’s project goes much further than the traditional conception of international law, however, insofar as it contemplates the virtues of a world government in the place of the Westphalian system. Demands of justice that are now local to particular states would be demands on the world as a whole. A coercive political community must respect the dignity of those over whom it exercises domination by showing equal concern and respect for them all. Justice would therefore require a world government to show equal concern for all living.\textsuperscript{24} There are, Dworkin preaches, different conceptions of what equal concern requires, but although a global requirement of equal concern would certainly not generate equal wealth for everyone in the world, it would almost certainly produce far less inequality than the Westphalian system.\textsuperscript{25} He adds that nothing in his argument supposes that the duty of nations to mitigate the risks of an unmitigated Westphalian system includes a duty to form a world government or for individual governments to assume for itself the responsibilities for equality that would fall to such a world government.\textsuperscript{26} If some world government materializes, in which the duty to mitigate inequality, abetted by the principle of salience, produces international legislation of greater and greater scope, then the question of whether sufficient coercive authority exists in some global institution to enforce the international responsibility of equal concern will become pressing\textsuperscript{27}.

Adam S. Chilton, in a paper entitled “A Reply to Dworkin’s New Theory of International Law,” criticizes Dworkin on three points. In Chilton’s opinion, Dworkin does not provide an

\textsuperscript{22}Id.  
\textsuperscript{23}Id.  
\textsuperscript{24}Id.  
\textsuperscript{25}Id.  
\textsuperscript{26}Id.  
\textsuperscript{27}Id.
explanation of what should give when domestic preferences and international obligations are in
tension.28 This doubt arises because Dworkin contends that, for a state to be legitimate, citizens
must play some “role in their own government.”29 Theorists share an understanding that
widespread suffrage in the election of officials is both necessary and sufficient within distinct
political communities.30 How international law deals with climate change again provides an
illustrative example. At the heart of the question is determining when elected officials have an
obligation to comply with international agreements designed to address climate change despite
the opposition of the majority of their constituents. Adopting Dworkin’s theory, the argument
can easily be made that elected officials are required to comply even if their citizens do not
support compliance.

In light of Dworkin’s theory, I think, it seems more appropriate that elected officials still
be required to comply with international norms even when their citizens do not support
compliance. Chilton’s criticism fails to convince me. To begin with, once ratified, international
treaties bind states and future rulers must comply with them. Nor does Chilton indicate which
means would be used to identify the will of the people. The election of new representatives does
not lead to the end of international obligations. The failure also derives from Dworkin’s
conviction that human life has an intrinsic value. Chilton goes on to point out that Dworkin’s
theory does not provide an account of why states should be bound by international law when the
coordination problem that states face does not actually constitute a ‘prisoner’s dilemma.’31 Put
another away, even though states would be better off by taking coordinated action, and that the

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29 Id.
30 Id.
31 Id.
dominant strategy is to defect and avoid cooperation until avoiding it becomes impossible.\textsuperscript{32} Chilton argues that not all such coordination problems represent examples of the prisoner’s dilemma. For Chilton there are certainly many states that would benefit from coordination on climate change and, likewise, some states that face catastrophic consequences if that coordination does not take place; yet there are other states that stand to gain from global warming, such as Russia and Canada.\textsuperscript{33} A problem yet to be solved is whether compliance should still be demanded in cases where any given state would suffer from coordination. Here Chilton seems to be right, despite his narrow view of compliance which is equated to the states’ self-interests, which is only one type of the interests that states must tend to.

Third, Chilton alleges that Dworkin’s theory regarding the sources of international law could discourage states from negotiating robust agreements in the future.\textsuperscript{34} Dworkin’s theory of sources of international law provides for strong checks against state sovereignty, even when initial consent to the agreements is lacking.\textsuperscript{35} A broad reading by the ICJ of treaties in force, for example, may lead the court to decide to hold the United States responsible for violating international agreements that it has signed because of its policy of holding prisoners in solitary confinement. This could lead the United States to respond with some combination of watered-down future agreements, withdrawal from current agreements, and further attempts to limit the authority and funding of the ICJ.\textsuperscript{36} Once more, Chilton only partially understands the realm of contemporary international law. Its significance does not lie simply in being internalized by states. Obligations provided for constitutive charters of international organizations, like the UN,
WTO, IMF, World Bank and the European Union illustrate how international law has binding force at the interstate level. Internationally, the enforcement of obligations by states profoundly affects their reputation.

III. The role of law for intergenerational equity

In connection with Section 1, I hold here that human life has intrinsic value. In conformity with Dworkin something is intrinsically valuable if its value is independent of what people appreciate, want, or need, or is good for them. Intergenerational equity is based on the idea the earth is a good bequeathed to us by our ancestors and passed on to those yet to come. The planet’s resources are transmitted to the next generation trusting that the generation who inherits the resources would not exhaust them. Rights and responsibilities spring from the conception gaining ever more adepts that past, present and future generations ought to share the earth’s natural “capital.” As true beneficiaries we must only enjoy the natural wealth we have inherited while exercising due care to avoid depriving similar enjoyment to coming generations. This conclusion is ultimately grounded in two premises that situate humankind in the environmental system and connect generations in an indivisible whole. The first is that the human species is the only one that voluntarily shifts the natural system. The second is that each generation has the same rights and obligations with regards the environment. The current generation enjoys no prerogative to exploit planetary resources.37

From the notion of parity among generations arise identical rights which counter preferences assigned to any of them. Human community becomes a partnership between

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generations to respect certain rights and obligations in order to avoid the degradation of the planet. Similar partnership is required to protect the cycles of nature necessary for life and the conditions necessary for a healthy environment.

Safeguarding resources for future generations could clash with the right to development of peoples who live at present; the likelihood of that collision has been used as an argument against intergenerational equity. I hold that the attainment of the developmental goal does not exclude the other and that both can be jointly carried out. International law is able to perform a significant function on the matter of distributive justice within the current generation. However, more efficient instruments need to be devised that go beyond the rhetorical promises. The assumption that generations are beneficiaries of the environment and responsible for natural protection does not preclude development, but rather only requires that we do not conscientiously degrade or dilapidate the earth’s natural resources and equilibrium to the point of preventing future generations from enjoying their abundance.

My reflections on this subject lead me to believe that intergenerational equity must be informed by the following regulative principles:

1. Conservation of options. Every generation must preserve the diversity of natural and cultural resources to the extent possible so that potential means for future generations to meet their needs do not shrink. For this it is urgent to ensure a right to diversity comparable to one that can be observed in previous generations. The principle of conservation of options contributes for the maintenance of natural heritage by preserving both the diversity and the quality of ecosystems. Preserving options, clearly, is not simply the equivalent of leaving portions of natural environment untouched.  

2. Preserving quality. Every generation must pass on to the next natural resources on terms that are not worse than those received. Pollution must not be permitted at

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levels that wreak havoc of irreversible character on human, animal, or plant life. Far from leaving the environment untouched, preserving quality encourages sustainable development. In the quest for sustainable development both scientific progress and indicators for assessing biological diversity will be extremely useful. The conservation of the options and preservation of quality are complementary and boost a relation of mutual interdependence. While quality depends upon maintaining as multiple options through maximum diversity, diversity itself presupposes quality39.

3. Access to conserved resources. Each generation must guarantee the right of access to the legacy of past generations and guarantee that access to the generations to come. The natural and cultural legacy of which access must be protected is the duty inherent in the right to enjoyment of what was inherited from past generations in terms of quality and diversity. Those in each generation who manage this inheritance well will additionally benefit financially.40

The principles above do not lay out the ways each generation is to use the natural “capital” of the planet or provide any basis for estimating appropriate standards of living or future consumption preferences. Rather, their purpose is to pass on to following generations as varied a natural and cultural environment as possible so that the next generation may find its own way to realize its values and wishes. The preservation of diversity and quality as much as the right to access are principles regulating intergenerational rights and obligations that directly derive from the recognition that each generation occupies equal importance in the intertemporal nature of human society.

Present and future generations have both rights and obligations to each other. Obligations are due to all who will live in the future, regardless how far removed they are. Intergenerational rights have a collective nature and belong to each generation in the course of historical processes. Their existence does not depend on the number and identity of individuals making up each generation. Rather than inherent rights for particular individuals, planetary rights are essentially collective in the temporal context of generations. Ultimately, it is the right to share the

39 Id.
40 Id
enjoyment of planet fairly with future generations, a point which is not only commonly accepted by non-lawyers\textsuperscript{41}. In the case \textit{Minors Oposa vs. Secretary of the Department and Natural Resources}, the Philippine Supreme Court decided that the present generation may represent the future generations in large measure because every generation is responsible before the following as to the harmony of a healthy environment.

IV. How does regulation of intergenerational equity impact the legal rationality?

My intention now is to highlight, albeit briefly, the impact on legal reasoning of intergenerational ethics. International environmental law by and large but especially intergenerational ethics show, perhaps more than in other branches of law, the importance of science in adopting new legal norms. A true paradox is emerging: law increasingly depends on science but, where there is uncertainty, measures are warranted owing the magnitude of the environmental risk. The solutions for many environmental issues come partly from scientific progress and technology. International scientific bodies produce specialized knowledge to determine the level of environmental threats, whose credibility is verified through public debate over those bodies’ conclusions. Made up of experts that governments and NGOs nominate, epistemic communities powerfully influence the production of international norms. Technical and scientific conclusions help to form cognitive expectations and help to mould the political consensus among states. Common expectations around an environmental problem do not replace the political decision, but prepare the terrain for the decision to be made. Whilst political decisions are based on interests ordinarily measured in terms of costs and benefits, technical and

\textsuperscript{41} Id at 405
scientific data involve credible knowledge. A government faces greater difficulties in advocating measures founded on the increase of particular advantages and benefits, which in general are short-term, when scientific evidence point in the opposite direction. State officials must make clearly explicit their interests or accept the analysis of the scientific community.

Technology plays an ambiguous role in environmental protection. Over the last two centuries, technology has stimulated rapid economic growth and forms of production that have harmed the natural balance. On the other side, technological advancement helps to solve environmental problems. For instance, whether or not recent changes in the productive sector caused the deterioration of the ozone layer, recent discoveries have led to alternatives that allow the effects of this phenomenon to be mitigated. Science determines the nature of a given problem and the capacity of existing rules to overcome it. The broader the consensus over the knowledge produced, the greater the probability that a regulatory regime will be effective. Made easier by agreement among experts, political action can occur even if there is no conclusive evidence about the extent of environmental damage. The autonomy and engagement between science and politics respond to different functions and serve different purposes, as shown in the debate between developed and developing countries on global protection schemes. Developed countries consider the autonomy of science a central value, which boosts the credibility of research conducted. Developing nations, in contrast, are skeptical of the true degree of autonomy, noting that most scientific research is carried out in Northern countries and often serves those countries’ interests.

The interaction between law and science suggests a fundamental conclusion: the production of standards is influenced by the judgment of experts and not only by the bargaining
power of governments.\textsuperscript{42} I intend now to emphasize the nature of collective learning process, which often leads to the adjustment of states preferences.\textsuperscript{43}

Although science-based, international environmental law also hinges on the precautionary principle to address the risk of irreversible damage which cannot be foreseen using current scientific knowledge, for there is no scientific certainty regarding the potential harm of some acts. This creates fear of future harms that cannot be predicted. Such fear is even greater when the potential damage is of major proportion, making failure to take preventative action unjustifiable. Various international treaties and much domestic legislation claim that the absence of scientific certainty shall not be used to prevent a serious and unpredictable damage. Nevertheless, the actual content of the precautionary principle remains vague because of a group of factors and the lack of any standard for establishing the acceptable degree of certainty to identify an environmental risk as imminent.

The notion of intergenerational equity sets up a complex relationship between hard law, soft law and private standards.\textsuperscript{44} The rise of soft law represents a rejection of the radical division between binding and non-binding law. Even without requiring approval of the parties soft law instruments address, soft law has the power of persuasion, and accordingly is often recognized as if it were binding, such as the OECD and UNEP recommendations and practices.\textsuperscript{45} Soft law

\textsuperscript{43} Id.
\textsuperscript{45} Id.
instruments are “low intensity” legal sources, a phrase I use to describe the influence it exerts on government choices, despite its lack of binding force\textsuperscript{46}.

It is also worth noting the activity of private organizations in the development of environmental standards that impact economic trade between countries.\textsuperscript{47} As a result of increased interaction between domestic and international law, rules were drawn up by private entities like the International Organization for Standardization.\textsuperscript{48} Globalization has allowed for unusual growth of private standards for international environmental law.\textsuperscript{49} High numbers of domestic standards for product quality and safety hinder foreign trade.\textsuperscript{50} Efforts therefore have intensified, on an international scale, to set harmonized standards, which not only facilitate trade but also help to reduce costs caused by multiple inspections, certifications, labeling and conflicting regulations.\textsuperscript{51}

A fundamental change has also occurred in the consumer market: the habits and preferences of consumers reflect the crystallization of new values, such as the preservation of the environment, even when those values require paying higher prices for goods. Decisions reflecting such values affect areas as vast as clothing, food, investments and household appliances. Many corporations tend to prefer suppliers that excel with respect to good social and environmental practices. Prepared by the economic agents themselves, private standards are informal rules of business conduct that are not contained in international treaties or domestic legal rules. Without recourse to punitive forms that originate from the state, they aim to change the behavior of corporations by providing market incentives that can enhance reputation with

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  \item Id. \textsuperscript{46}
  \item Id. \textsuperscript{47}
  \item Id. \textsuperscript{48}
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consumers. Private standards are prior to international rules and may provide its technical foundation. They also serve to fill gaps or demonstrate that state regulation is sometimes unnecessary because corporations are able to solve their problems. By virtue of the cooperation between states and corporations, lately we have seen the emergence of private, semi-private and public standards, such that the radical separation between voluntary standards and mandatory rules no longer holds.

Intergenerational equity blurred the distinction between domestic and international law. A consistent policy to cope with the question demands a multilevel decision-making procedure for effective governance. The State has become too large for small things and too small for large things. A close interplay among local, national, regional and world dimensions is indispensable to address problems of different magnitude. Moreover, areas not subject to the domain a specific sovereign state, like the Antarctic region and the sea bed, must be exploited on behalf of humanity on the whole. Binding and non-binding rules increasingly take into account some goods which are intrinsically indivisible. The concept of common concern of mankind, replacing the notion of common patrimony of Humanity, is amenable to care about the climate change and shifts in biosphere.

Whatever its sources, rules governing intergenerational equity are purposively instituted. Unlike the welfare state, the purpose no longer consists in the transfer of financial resources to poorer people. The logics of results then adopted was conceived to share social wealth amassed through time. On the contrary, intergenerational equity aims to regulate the intercourse among generations regardless their position in the future. The purpose is to organize the partnership amidst generations. A successful partnership supposes the principle of solidarity, that is to say, a fair distribution of burdens and benefits. Common but differentiated responsibilities is, among
others, a tool to guide that delicate task. The contemporary society has been thought of a society of risk to mean that its structure is built to grapple with unforeseen contingencies. However, in that situation they were temporarily circumscribed. Underlying the intergenerational equity is a bleak prospect: the menace of extinction of human life on earth due to a disaster sparked by an environmental catastrophe.

The intergenerational equity commits governments to taking a long-term perspective in environmental decision-making. This implies a new way of thinking politics. We ordinarily make political decisions for a short period of time. We are compelled to project in the longer-term the reach of our actions. An extended span of successive generations fits law into a wide horizon since we are enabled to take the form of an intergenerational partnership.