

Research Article

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## Irreversible Choices and Future Generations' Rights<sup>1</sup>

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**Abstract:** The article revolves around the question whether, given some very “fundamental threats” to future generations’ living, their very conditions of survival can be construed as rights. The issue has to tackle the problem of the non-existence of the presumptive holders of such a right, as well as with the problem of their (non-)identity. The article shows the reasons for separating what we owe to future persons under the challenge of some fundamental threats for humanity from our will to hand down our cultural and ethical ideas of the good information and eventually from paternalistic or selfish imposition upon future generations of our irreversible choices. The framework refers essentially to a conceptual grammar of justice. Moreover, it is suggested to articulate rights through the lens of “disposability” and “non-disposability” principles.

**Keywords:** future generations; present generations; human rights; rights’ theories; justice theories; paternalism; solidarity; irreversible choices; global warming; nuclear threat

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## Contents

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|--|-----|
| I. Setting the Scene. A Matter of Rightness .....                  | 111 |
| II. Time and Justice .....   | 114 |
| III. Justice and Reason .....                                      | 117 |
| IV. Rights of Future Generations?.....                             | 120 |
| V. Identity and Rights .....                                       | 126 |
| VI. Concluding Remarks and a Principle of (Non) Disposability..... | 129 |
| References .....   | 133 |

### I. Setting the Scene. A Matter of Rightness

The “Declaration on the responsibilities of the present generations towards future generations,”<sup>2</sup> expresses this “responsibility” both as a precondition and as an objective.<sup>3</sup> A number of international documents highlight the extent of such responsibilities. International law takes future generations into account in the many provisions concerning the protection of the environment and of human rights, so much so that one might think as Richard Falk wrote, that the rights of future generations have reached the “status of international law customary rules” (Falk, 2000, p. 193).

Behind a general convergence towards the dignity of human beings and future generations,<sup>4</sup> we are recurrently wondering about the ground and the moral status of such a responsibility. Being “responsible” spans

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<sup>2</sup> 29th session of the General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris from 21 October to 12 November 1997.

<sup>3</sup> “[...] Recalling that the responsibilities of the present generations towards future generations have already been referred to in various instruments (...) Bearing in mind that the fate of future generations depends to a great extent on decisions and actions taken today, and that present-day problems, including poverty, technological and material underdevelopment, unemployment, exclusion, discrimination and threats to the environment, must be solved in the interests of both present and future generations. Convinced that there is a moral obligation to formulate behavioral guidelines for the present generations within a broad, future-oriented perspective (...).”

<sup>4</sup> Article 3 of the UNESCO Declaration, entitled “Maintenance and perpetuation of human kind,” states: “The present generations should strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person. Consequently, the nature and form of human life must not be undermined in any way whatsoever.”

a number of different interpretations. It ranges from being liable and accountable for (not) damaging someone up to some thicker (and proactive) sense of caring for the well-being of someone else. While the second falls in the category of beneficiality (Engelhardt, 1996, pp. 109–110), including commitments of altruism, solidarity, the first should be considered under the duty of non-interference (and wrong-doing) in the sphere of others, that is, the Roman law canon of *neminem laedere* (Zanuso, 2005). *Respecting this “negative” duty* amounts to the first and most basic condition of justice among individuals. It should be emphasized, however, that such a route concerns the right, not the good or happiness. It is important to understand this argument conveying the positivity of law. It overcomes shortcomings of unilateral views over what is “right” and controls the inevitably relational coexistence among peers. In Kant’s view, law and justice are resorted to conceptually in order to avoid the (state of nature) condition in which the abuse of personal liberty and external control is unobjectionable. With him, even if the state of nature need not be unjust, it is devoid of justice, so that men “do one another no wrong when they feud among themselves” (Kant, 2003, § 33, 42, 86). Nonetheless, “in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence” (Kant, 2003, *ibid*). For that reason, man “ought above all else to enter a civil condition,” and accordingly “each may impel the other by force to leave this state and enter into a rightful condition” (Kant, 2003, *ibid*). Thus, there is a fundamental reason for law to be established; that is, the necessarily public nature of justice, that cannot be predicated from unilateral, self-referential positions, but relates to the equal liberty of all and independence of each from the will of the other.

If we take this very path in understanding whether future generations have rights, we will focus on whether the basic justice related respect for the sphere of others is to be granted. That means that we are going to locate the problem outside the idea of a duty of solidarity or beneficiality *vis-à-vis* others. In other words, we are not assuming to be responsible for the well-being of future generations, whatever it might mean, and we are not in the position to superimpose some kind

of conception of what the “good,” for them, should be. However, we should ask whether the basic condition of rightness towards others is to be satisfied. Thus, the path taken would be formally and substantively legal, in other words, it should rest on the idea that legal fundamentals are, as in the Kantian insights, a pre-condition for the conceivability of justice, first and foremost, meant as preventing wrong-doing which would encroach upon the sphere of others, unjustly interfering against it.

Of course, if we do not want to deal with the normative issue of justifications, we might prefer to rely on factual circumstances, without asking questions of justice: human beings have repeatedly shown that they have a stable, “natural” impulse to protect future generations. As Richard Epstein (1992, p. 89) wrote, a genetic connection induces us to protect them. It is certainly what evolutionary biologist Richard Dawkins defines a genetic interest, a “selfish gene” that tends to be widespread in the natural world and that ensures the survival of our DNA (Dawkins, 1989, pp. 19–20; Dawkins, 1995, p. 10; Sato, 2002).

However, the question of whether there are indeed issues of justice to deal with cannot be answered in factual terms (which include both our biological interests and our historical sentiment). Secondly, these interests explain our behavior towards our successors in biological terms, but cannot provide a solution to problems of equity or define the terms of our responsibility; moreover, their strength, just like our sensitivity, tends to halve with every subsequent generation.

On the other hand, upholding the debate on our responsibility at large would entail to step into vagueness and unended controversies. I will analyze the issue of whether there are, in fact, issues of justice. I do not intend to provide a conclusive analysis, but I shall put forward three main ideas. First, that it is possible, although not necessary or “exclusive,” to define our responsibility towards future generations by justifying it in terms of rights. Secondly, our thinking can profit from two guiding principles, which I call the principle of disposability of the present and of non-disposability of (other people’s) future. Thirdly, the issue of justice has its own defining features and helps to refrain from the ethical paternalism that leads us to impose some of our choices upon our descendants. As regards the first point, I build on the general premise I developed elsewhere (Palombella, 2002) according to which

rights are concerning the interests of individuals which are recognized as a reason for our responsibilities. In treating the idea of future generations' rights, though, I share and recall some views of Aaron-Andrew P. Bruhl (2002, p. 393), as far as they opted for the "interest theory" of rights as the best suited to address future generations and defend the rights' theory against objections resulting from the so called "non-identity" problem (essentially by separating the two concepts of "well being" of a person and the wrongful act of harming someone else's right). This line of reasoning is nonetheless here adopted within a slightly different framework: I focus on some very fundamental threats to future generations' leaving, and consider the right of future persons that their most essential interests not be harmed as a basic human right: the latter in turn cannot be considered structurally nor morally divisible from that of the present persons. The framework therefore refers essentially to a conceptual grammar of justice. As regards the second point, the disposability and non-disposability principles I suggest are defined in order to make available a first general criterion for us to respect future persons' human rights. As regards the third point, I essentially separate what we owe to future persons under the challenge of those threats for humanity, i.e., a matter of justice, from our right to hand down our cultural heritage, and eventually from paternalistic (if not worse) imposition upon future generations of our irreversible choices.

## II. Time and Justice

Although we admit our responsibilities towards our descendants, when it comes to future generations, we tend to minimize the issue, often on account that our influence is uncertain and that it decreases proportionally to the time distance that separates us from them. This hypothesis is clearly untrue. We must take into account, at least, our capacity to generate irreversible situations.<sup>5</sup>

The albeit immense distance in time does not hamper our capacity to condition the future (though it may seem far). On the contrary, it even

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<sup>5</sup> With reference to the risk of irreversibility, its catastrophic consequences, the principle of precaution *see* Sunstein, 2006; with reference to the "Catastrophic Harm Precautionary Principle," *see* Sunstein, 2006, p. 846).

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renders this capacity more evident and dramatic. If in the Pleistocene native Americans had not caused the extinction of certain mammals, the course of Incas civilization, 12,000 years later, might have been different (Seto, 2001, p. 238). At least if it is true, as Jared Diamond (1997) wrote, that the easy victory by Pizarro, the Spanish conquistador, in 1532, was favored by bacteria, diseases, horses, steel weapons and vessels.<sup>6</sup> In general, the future goes far beyond our close descendants. Today, in particular, it manifests itself in three fundamental threats for mankind: the risk of pervasive and catastrophic environmental damage caused by global warming, the greenhouse effect and the depletion of the ozone layer; the risk of mass extinctions or massacres, going as far as the annihilation of our civilization, due to the desertification caused by nuclear energy; the alienating development of bioengineering and genetic manipulation or the creation of an artificial man.<sup>7</sup> An acknowledgment of these fundamental threats does not only allow for an answer to the issue of the time extent of our responsibility, but it also defines the most concrete starting point from which we can discuss the issue of future generations.

These three fundamental challenges lead us first of all to face the problem of the minimum we owe, in moral terms, to human beings: a matter of justice, which places itself prior to ethics and before its borders, if we assume that ethics incorporates the values and visions of the “good,” related to our different perceptions of posterity, of the public good, of private happiness and so forth. These challenges are priority issues, concerning the elementary respect for human beings as such. Indeed, the point is not whether something is good or acceptable in our scale of values, but whether it is fair towards other human beings, even when they belong to generations that do not exist yet; it is not a question of whether something is demanded by our philosophies of the good, but regardless of the controversies they generate, of whether it is necessary in terms of justice, whatever doctrine of virtue or happiness we assume today. Indeed, it is not a problem considered urgent only in

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<sup>6</sup> The author won the Pulitzer Prize with this book, in the general non-fiction category, in 1998.

<sup>7</sup> These are threats discussed by F. Cerutti, in his book *Global Challenges for Leviathan: A political philosophy of Nuclear Weapons and Global Warming* (2007).

a given cultural environment,<sup>8</sup> but it is an issue that concerns the very existence of mankind itself or the “dignity” of its members. Hence, in my view issues of justice have a status that differs from that of the values defining our personal happiness: they imply taking the others into account with the duty of abstaining from injustice, and involve thresholds of equilibrium and reasons for respect, whose distinguishability from ethical issues (in their strictest meaning) follows an uninterrupted path from Aristotle to Kant’s pure practical reason, to Mill’s harm principle, to John Rawls’ priority of the right, to Ronald Dworkin’s equal concern and respect, just to mention a few examples.

However, it is not sufficient to declare that future generations have rights to a decent life, because what should be proven in the first place is indeed *if and how they have rights*. Even the general discourse of the respect to which human beings are entitled risks failing because of certain characteristics that distinguish future generations from present ones, first of all their invisibility, or rather their current non-existence. It is not sufficient to invoke a general concept of intergenerational equality when we talk, for example, about the danger of global warming,<sup>9</sup> because the point is in a different issue: under which circumstances and with which means future generations could play the hypothetical role of accusers of present generations, since the latter have equally urgent and vital needs. Nor it is sufficient to invoke the issue in purely generic terms: many people are willing to admit that we might accept some moral ties, in terms of beneficence<sup>10</sup> or solidarity towards future generations, but not in the stricter and owed terms of “justice.”

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<sup>8</sup> We could apply a distinction similar to Michael Ignatieff’s with reference to the ethically neutral nature of human rights: “Human rights are universal, not in the sense of being a vernacular of cultural prescriptions, but rather as a language for the bestowal of moral power. Their role is not that of endowing culture with a substantive content but of seeking to condition all actors in such a way that they can liberally fashion that content” (Ignatieff, 2001, p. 75).

<sup>9</sup> For example, James Wood’s *Intergenerational Equity and Climate Change* (1995) contains also a definition of the greenhouse effect and illustrates the thesis according to which future generations must be entitled to be represented in court and at negotiating tables when protocols for environmental protection are under discussion.

<sup>10</sup> As recalled in the above, cf. H.T. Engelhardt Jr. (1996, pp. 109–110). He believes that this is an attitude that cannot be imposed, because the others are entitled

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While beneficence or solidarity are ethical sentiments and depend upon the totally free and variable choices and purposes we set for ourselves, acts of justice cannot depend on our preferences, but should be able to prevail over them as well. We should, as Brian Barry wrote, be aware of the fact that what we do for future generations does not represent optional benevolence on our part, but is demanded by elementary considerations of justice (1999, p. 117).<sup>11</sup>

While solidarity or beneficence presuppose a particular willingness, justice implies necessarily an obligation; while ethical-political choices range within several possible alternatives at our disposal, issues of justice are not at our disposal. In conclusion, I will therefore support the thesis that, through this perspective, fundamental issues concerning future generations are by us “non-disposable” issues.

### **III. Justice and Reason**

Issues of justice are independent upon our contingent interests. Ideal deciders who find themselves in the procedural condition of an “original position,” as defined in his thought-experiment by John Rawls, behave as rational beings: although their personal motivations are self-interested, they are unaware of which would be their interests, in the original position; thus, they are rationally likely to think with a fair concern for each and all persons. In this situation, Rawls acknowledges that the issue is not reaching a “consensus” (Rawls, 2001, pp. 16–17) and in fact there is nothing to negotiate (Pontara, 1995, p. 77), but it is rather a matter of identifying rational principles, taking common intuitions into account (the so-called “reflective equilibrium”) (Rawls, 1996, p. 8; 1999, p. 18).

Rawls dealt relatively marginally with the issue of future generations (1999, Para. 44, pp. 251–258). In order to take our sense of common

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neither to beneficence, nor to solidarity, which cannot be numbered among justice issues.

<sup>11</sup> “It is surely at least something to be able to assure those who spend their days trying to gain support for measures intended to improve the prospects of future generations that such measures do not represent optional benevolence on our part, but are demanded by elementary considerations of justice” (Barry, 1999, p. 117).



responsibility towards future generations into account, Rawls integrates the original position theory with the assumption that individuals do know that they are contemporaries, but they do not know to which generation they belong, as well as with the principle that each generation “saves something” in order to preserve future generations, according to the criteria or measure that individuals of the same generation would like the previous ones to have followed. It is therefore a mental experiment that shapes and justifies our beliefs. The extent of “just savings” can be determined in different ways, according to the different stages of economic development. This principle relates essentially to primary goods, given its dependence upon Rawls’ central thesis of justice that sees the equal distribution of primary goods as freedoms, opportunities and standards of self-respect as well as the non-equal distribution of income and wealth, if it benefits those who are less favored.<sup>12</sup>

In any case, this mental experiment teaches us, evidently, that the rational discourse cannot consider the futureness of generations as a justification to exclude future generations from our rational concerns of justice. In fact, it is morally absurd that indeed this circumstance (the fact that someone will only be in the future) is morally relevant. The value of the rational discourse lies in the possibility to universalize it — to human beings in this case — thereby placing ideal deciders in an indefinite position in time: they cannot be influenced by their position in time (and in the original position they do not know which one it is) when making choices, both with reference to themselves and to future generations.

The principle of time irrelevance is not just in Rawls’s contractarian theory, also it features in utilitarianist theories. Indeed, it was the teaching of Henry Sidgwick to exclude that “the time when a person exists” can play a moral role as far as questions of general happiness are concerned (Sidgwick, 1907, p. 381; Pontara, 1995, pp. 36–37).

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<sup>12</sup> In any case, these theses do not make reference so much to each individual’s fate, but to the way in which the social structure must be organized, which means that fairness is to be referred to the role of institutions. Rawls’ two principles of justice were reformulated in the essay *The Basic Liberties and their Priority* (Rawls, 1982) and developed in *Political Liberalism* (Rawls, 1996, chap. Lesson 1).

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The moral irrelevance of the futureness of generations is also supported by common intuitions. In truth, we know that harming someone is a wrong even if targeting future persons only. If we trigger a bomb that will only explode in thirty years' time, this does not mean that we are less responsible towards the children who will be hit by the explosion, even though they are not born or known to us at the time being. Rawls wrote that the simple position in time gives no reason to prefer a given moment to another (1999, p. 420).<sup>13</sup> Therefore, if it is true that the time of birth is only a haphazard, then this event cannot exclude or even limit our responsibility on the argument that the latter should decrease with the growth of the distance between us and future generations.

Economists do resort to the concept of decreasing responsibility to distribute and define our commitments towards future generations for reasons of equity, so as to reduce the burden of our present sacrifices to the benefit of those who will only live in a distant future: we create a balance between our current sacrifices and the subsequent benefits for future generations by defining a "discount rate" proportional to the time distance.<sup>14</sup> But a distinction must be made: if futureness does not relieve us from our responsibilities, which sacrifices, which means, which limitations to our lives must be chosen from time to time remains an open issue: it is a matter of means, indeed, of task sharing, which however must be distinguished from, and does not affect at all the responsibility assumption.

Justice cannot be subordinated to differences based on the time when each of us lives and therefore it must be considered independently

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<sup>13</sup> See also Rawls (1999, p. 294): "There is no reason for the parties to give any weight to mere position in time. (...) Although any decision has to be made now, there is no ground for their using today's discount of the future rather than the future's discount of today. The situation is symmetrical and one choice is as arbitrary as the other."

<sup>14</sup> See Bazelon and Smetters (2001, p. 277): "Discounting addresses the problem of translating values from one time period to another. The larger the discount rate, the more weight an analyst places on costs and benefits in the near term over costs and benefits in the future. When evaluating policies that span generations, choosing a discount rate can have an overwhelming effect on the analysis. That choice, in turn, reflects the analyst's beliefs about the distant future." See also Portney and Weyant (1999).

of it. This does not mean that we can ignore the many problems raised by the time distance of future generations, but it shows that we should face such issues by assuming that the entitlement of future generations to justice cannot be different from ours and cannot lead us to exclude them from what applies to us, just because of their “futureness.”

#### **IV. Rights of Future Generations?**

According to Thomas Jefferson a generation has no right to bind the succeeding generation to its laws, because each generation has the right to define their own laws autonomously, without depending on a people of the dead; each generation should recognise a self-evident truth: “that the earth belongs in usufruct to the living”: consuming that usufruct means depriving future generations of their share of natural resources, something that no authority or right of other people can justify. In the same way, forcing them to pay a long term debt would be an unacceptable “taxation without representation.” These matters concern the rights of posterity on natural resources, the autonomy of each generation from the paternalism of previous generations, the equity of the relationship between the living and future generations with reference to “debts” and “improvements” received.

Can we therefore assume that the issues of justice may be settled in terms of rights? First of all, it is necessary to clarify that rights are relevant to justify what we owe to future generations. We could assume, for example, that some global common goods (Riordan, 2016) have a value in themselves, which implies contingent and consequent obligations even absent a theory of a right of future generations to them. At the same time, we can surmise that if something has a value (as a common good, like the biodiversity, for instance), then we should preserve it also as a value that can benefit future generations. However, our duty may have many justifications, which might not coincide with, and not depend upon the fact that others have a right to it. Indeed, as Onora O’Neill (1996, pp. 136–153)<sup>15</sup> wrote, our ethics is impoverished by our exclusive focus on rights and it misses most of its traditional

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<sup>15</sup> Raz also insisted upon our duties, our common values and a “pluralistic” ethics (Raz, 1986, pp. 193–216).

contents. Although this is true, a plural, not reductionist view can include justifications relating to rights, although it is not monopolized by them. A right-based justification places our duties directly upon the sustaining correlative right. The reason why we must assist our children, as Neil MacCormick wrote (1976, p. 313), is simply that it would be unfair to deny to them what they are entitled to: they have a right to be assisted by adults and that right is the reason why adults have an obligation to assist them. This holds true regardless of controversies about which obligations should follow and by whom they should be fulfilled.

Accordingly, the fundamental threats to (the dignity of) life for future generations lead us to the essential safeguards of justice towards future persons, they help highlighting our responsibility not (just) in terms of our possible duties (that other theories might suitably justify) but on the grounds of “their” rights. As Rawls aptly wrote, rational human beings would think it fair to treat subsequent generations the same way as they would like to have been treated by previous ones. However, when we deal with fundamental threats for humanity, a different issue emerges, which does not relate exclusively to the conditioned logic of equity, to the relative balancing in intergenerational relations. The issue becomes simply whether human beings are entitled, like us, to the elementary conditions for survival and dignity, those very conditions we tend to jeopardise because of our destructive choices. The question is whether those rights are thinkable, and whether we are in position to violate them; or rather, whether we can only assume more or less general obligations for the living, since a conceptual limit of moral doctrines or legal constructions prevents us from conceiving of human rights for future persons.

A first general remark is that rights often protect people’s choices and so entitle them to receive benefits that correspond to their actual interests: therefore the identification of interests appears both an indispensable and, unfortunately, a non-existent precondition in case of future persons whose preferences and needs are unknown to us. A possible reply to this concern is that when human rights – to a healthy environment, for instance, i.e., to goods concerning the survival of human beings – are at stake, the very “interests” of future persons easily emerge and are indisputable: the basic and essential nature

and content of such a right is even more fundamental and precedes the possibility of choice: it is an elementary condition for life and accordingly for creating values, as well as a precondition for defining any further interest.

From this viewpoint, also the objection that the attribution of rights to future generations is a form of ethical *paternalism* is not acceptable: of course, choosing the interests of future generations is in principle a paternalistic attitude if it reduces their faculty of choice by arbitrarily attributing specific interests to future persons.<sup>16</sup> Nonetheless, with reference to fundamental threats and their direct effect on the elementary conditions for human survival, granting “human” rights to future generations cannot presuppose any ethical paternalism, since it expresses, rather, the opposite option, i.e., the concern to afford and safeguard the essential preconditions for future persons to exercise their autonomous “agency:” that is, to be able to speak an ethical language, define preferences, interests and values.

Many believe, moreover, that speaking of rights is not appropriate, that future generations cannot have rights now (strictly speaking) but only when (and if) they come into existence, and that even if they could be entitled to rights, they would be unable to exercise them: this would make such rights empty and senseless. Eventually, even if we admitted that they do have rights, certainly these rights would not be provided with any judicial protection.

However, this is in contrast with the common intuition mentioned before: according to the above principle of time irrelevance, there should be no difference, from a moral viewpoint, if the individuals in question exist now or in a hundred years’ time. Again, the event of unavailability of judicial protection is never considered a sufficient reason to deny that all persons have a right not to be tortured, as international *jus cogens* law prescribes. Finally, we normally presume that even individuals

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<sup>16</sup> According to J.S. Mill the ruling principle which prevents us from “paternalism” is the following: “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. (...) the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (Mill, 1962, p. 135). See also the discussion on John Stuart Mill anti-paternalist position by G. Dworkin (1972).

who cannot claim their rights autonomously are entitled to them, such as certain categories of disabled, children or insane subjects. In these cases, we admit that other people may seek judicial protection on their behalf. Therefore claiming that future generations cannot have rights because they cannot invoke them against us in court is not a conclusive argument. There are many ways for them and their interests to be represented today, as it really happens, say, in some international agreements. And fairly so: conversely, in fact, we are actually able to put future persons in danger, deliver to a planet so different that it would be almost impossible to live in, if compared to the conditions enjoyed by the previous generations on earth.

In theoretical *legal* terms, the issue of the rights of future generations is related predominantly to the conception of rights we support: what does having a right mean? Certain definitions of rights are incompatible with the hypothesis that future generations may be entitled to them. Let us think, for example, of one of the theories of rights that derives from the natural law doctrine of 1600 and 1700; rights are defined through the paradigm of the “sovereignty of the will” of its holder: a definition centered upon the freedom and power to act in order to safeguard one’s interests, according to the logic that characterizes private law, at its peak of modern development. Another example is that of the choice or will theory, supported by Herbert Hart in the last decades of last century. In a way generally considered illuminating, Wesley Hohfeld had written (1917) that the term “right” refers in fact to one or more individual positions (and relations) (claim, liberty or privilege, power and immunity), or groupings of atomic relations, thereby contributing to clarify the general notion of individual rights. Hart, on the contrary, focused on the unifying element that characterizes rights, something that cannot be traced back to one or more of the relations analysed by Hohfeld and that represents the deep meaning or the *raison d’être* of rights themselves. In this way, Hart identified the rationale of having a right in the fact that the holder of a right is in a position to have the control and the choice over the juridical situations that are connectable to rights, in particular, “over another person’s duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed” (Hart, 1982, pp. 183–

184).<sup>17</sup> Naturally, considering the holder of a right as an individual endowed with power to decide, and thus a sort of small-scale sovereign, means relating the same idea of rights to the affirmation – and to the exercise – of autonomy. From this viewpoint, the rights that future persons have (towards us) appear inadmissible. Attributing rights to future generations cannot mean granting a decisional and choice power on our corresponding behavior.<sup>18</sup> It would be a conceptual path clearly prevented by the insuperability of a “natural” obstacle.

Since it is all too evident that future generations cannot be attributed rights in this sense, the same fate holds for contractual conceptions of future generations entitlement, often under the formula of the “pact between generations,” a contract between us and our descendants. What is hidden here is an undeclared paternalism, which presupposes an autonomy that presently does not exist. Furthermore, the idea itself of a “pact between generations” (which is even unconceivable with reference to remote generations) recalls a wrong and misleading category of rights: those created by bilateral relations. The (possible) rights of future generations are rather those that are not created by contract and are therefore not negotiable between the parties.

On the other hand, coming back to Hartian theory, Hart admitted, without hesitation, that his thesis is not all inclusive, since it cannot encompass rights related to primary human needs, human rights or more in general, fundamental rights. Therefore, we need more suitable tools. However, several theories of rights could be used to overcome the difficulties encountered by referring to the criterion of autonomy and to rights as “choice” (or will). In the European continental area, the theory of law developed by Rudolf von Jhering shifted the focus on the interests protected by the legal order (Wagner, 1993, p. 319). This traditional conception can be connected, albeit with highly innovative

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<sup>17</sup> See also Waldron (1984).

<sup>18</sup> From this specific viewpoint, assumption does not change also if we take Hans Kelsen’s pure theory into account. A similar shortcoming can be found in Hans Kelsen insisting upon reducing individual rights to their technical and legal characteristics, to what he calls the subjectivation of law with reference to individual rights. Such subjectivation consists in identifying the holder of a right as the person who can express the will to bring a legal action to claim the fulfilment of a corresponding obligation (Kelsen, 1961, p 83).

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elaborations, to the theses according to which when we recognize a right — especially rights considered as priorities in our constitutional systems — we intend to protect a good, or an interest attributed to individuals, safeguarded by the legal order not only through the acknowledgement of fixed claims and of corresponding obligations, but also through a range of evolving individual active or passive positions, which allow for an evolutionary protection or implementation of that interest and the achievement of that “good.” This thesis is defined in the terms of a “dynamic conception” and was developed by Joseph Raz (1986, chap. 7; 1995) and Neil MacCormick (1976, pp. 305–317). In a further contest, related to constitutional principles, the idea of fundamental rights itself<sup>19</sup> shows such evolving potential, becomes a principle of “optimisation” under circumstances relevant from time to time, as writes Robert Alexy (2002, ch. 3, p. 47ff) (in the context of the German system). In other words, the interest we are talking about concerns “goods” granted to individuals that relate not only to their autonomy and their freedom of choice, as Hart highlighted, but are to protect also any other substantial good of an economic or social nature (MacCormick, 1976, pp. 309, 313; 1984, pp. 145, 148).

Giving up the belief that rights are “only” a recognition of autonomy paves the way to the idea that rights exceed the capacity of their holders to decide about other people’s obligations or to claim legal protection. This evidently leads to an extension of the concept, and the latter thus does not exclude at all the possibility that future generations’ fundamental interests may be vested into rights.<sup>20</sup> As far as the adequacy of the Interest Theory as a theoretical reference for the “rights” of future generations is concerned, it can be said that the “Interest Theory separates rights from powers of enforcement, clearing the way for the attribution of rights to beings unable or un-authorized to press their own case. Just as children and the insane can have representatives enforce their rights for them, so can future persons” (Bruhl, 2002,

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<sup>19</sup> I have developed a conception of fundamental rights in terms that I consider “dynamic” and related to the “good” that they safeguard, in my book *L'autorità dei diritti [The Authority of Rights]* (Palombella, 2002).

<sup>20</sup> The application of the “dynamic” theory of rights to address the rights of future generations. to which I refer was made by Bruhl (2002, p. 393).



p. 425). It also becomes clear that some basic rights legally ought to be protected, through corresponding obligations or subsidiary guarantees which should be dynamically open, i.e., not necessarily those doctrinally defined once and for all in advance. Rights are often expressed in terms of norms of principle that identify an interest or a category of goods and subjects, without necessarily defining the rules of fulfilment, or the individual relations that should enable the concrete safeguard of that interest, or the primary guarantees (the corresponding obligations) or the auxiliary guarantees (the legal remedies). This situation emerges in many of the so-called fundamental rights. From this point of view, it also applies to cases where law itself somehow affirms future generations' rights: their interest does not necessarily correspond once and for all to certain predefined obligations, nor is it the subject who bears that obligation identified in advance – if not in merely abstract terms. This does not mean, however, that future generations cannot have interests (and therefore rights) in juridical terms.

In fact, future generations' rights often come to the fore through normative principles, generally identifiable within the framework of the higher law of constitutional systems, and international documents. This circumstance, i.e., the presence of commitments legally assumed as principles of justice and “rights” for future generations, remains in any case legally meaningful. It is equally important to acknowledge that the structure and definition of rights do not contain any real conceptual obstacle to the attribution of rights to persons belonging to future generations. Indeed, the “substance” of a right cannot be found in the contingent measures adopted to protect it and these same measures are just a consequence to be promoted and adjusted for the pursuit of rights' guarantee and optimisation.

## **V. Identity and Rights**

However, although no apparent obstacle exists from the point of view of a general definition of rights, there are other hindrances external to such definitions. A classic problem, raised with unprecedented clarity by Derek Parfit, referred to the non-identity of subjects. Whoever comes into existence does only exist because the generations that

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preceded her made certain choices, which brought to her conception and determined her identity. Those choices do not enrich or deprive a “presupposed” individual of anything, but create “another” person. With different choices, there would be other individuals and other identities. This prevents us from assuming that we can worsen the fate of someone (individually taken), who otherwise would simply not exist (Parfit, 1984, chap. 4 and pp. 351–379): future victims of the depletion of resources could only exist in this way; therefore we cannot violate their rights to live in different conditions (even if we assumed that they have such a right) because future persons would not be there nor be themselves under different conditions. Protecting future persons from the genetic consequences of radioactive waste, or conceiving persons who are as healthy as possible, neither means safeguarding the right of a person nor not harming it, but simply leads to the creation of “other” individuals.

The argument is evidently disarming, although it cannot be discussed thoroughly in this essay. That notwithstanding, we can recollect the idea that human beings have a right to a life that is worth living and that we would deprive them of something if we gave birth to persons in conditions of degradation or diseases and disabilities in which their rights (under the conditions that have emerged) cannot be safeguarded. This idea<sup>21</sup> points to our responsibilities towards the generations that come immediately after us. As far as my consideration of justice is concerned, focus should be shifted in order to include far away generations as well.<sup>22</sup>

Evidently, as Aaron-Andrew P. Bruhl pointed out, the issue of non identity refers to the overall wellbeing of persons, which we cannot worsen (given the non-identity notion, we cannot worsen the overall

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<sup>21</sup> For the concept that there are (would be) persons created whose rights cannot be protected, see M. Tooley’s *Abortion and Infanticide* (1984). As far as Parfit is concerned, see James Woodward (1986, 1987). Of the many issues relating to this problem, I would mention those dealt with by Dan W. Brock (1995; Buchanan et al., 2001, chap. 6) and by Roberts (1998).

<sup>22</sup> G. Pontara (1995) addresses the contrast between theories of rights and Parfit’s objections. As to distant (in time) persons, again Pontara (1995) and A.-A.P. Bruhl (2002). See generally the essays included in Sikora and Barry (1978) and especially the essay by M. Warren, *Do Potential People Have Moral Rights?* (1978).

life of someone who will otherwise not exist). Therefore, we can only compare life obtained to the alternative of non-existence. Through these examples, we end up neglecting, in fact, the foundation of our common intuition: the fact that we can harm persons, even if they will come to life in the future.<sup>23</sup>

The right not to be harmed can be seen as independent upon any assessment of the ability of someone's behavior to worsen our overall wellbeing: A right does not necessarily concern a general and unidentifiable, elusive "whole" like the wellbeing of a person, but rather a specific interest or good. The safeguard of a right, hence the unlawfulness of a specific harm, is the central issue, regardless of the fact that others can consider the harm irrelevant for the harmed person, or not existent, when they deem it incapable of worsening the overall well-being of that person taken as a whole.

In any case, it may be true that a final theory, capable of resisting objections, cannot be formulated, as Parfit himself was aware of. I suggest we should analyze facts from the viewpoint of present generations: future persons have a right to prevent us from behaving in such a way as to cause the desertification of the planet, eliminating resources that as human beings they are equally entitled to, or causing genetic harm to them, without this being subordinated to our (paternalistic) assessment of the possible worsening of their overall well-being.

The issue of justice does not relate to the ethical appreciation of what is good for someone, i.e., of what is preferable in life and of the conditions in which a life worth-living fulfils itself. These issues, concerning the evaluation of an overall well being, "good life," are naturally dependent upon legitimately different evaluations, therefore if they were imposed upon somebody, they would be, in turn, an undue interference, and in principle a potential source of injustice. Likewise,

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<sup>23</sup> With reference to a conception made despite the certainty that the child would be seriously disabled, see P.J. Markie's *Nonidentity, Wrongful Conception and Harmless Wrongs* (2005, pp. 302–303): "In wrongful conception cases, the necessary connection between the mother's action and the son's existence keeps her act from being straightforwardly harmful. It is not the case that if she had acted differently, his life would have been substantially better. Yet, her act still harms him obliquely by creating a wrong that makes him worse off. If he had not been disabled and lacking in opportunities, his life would have been substantially better."

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the relation between generations (seen in terms of justice) should focus on the minimum elements of a universal definition of what is needed for the survival of human beings, both present and future, and should aim at limiting, as much as possible, the paternalism that marks all efforts to determine which values are important and what is the good for future persons. The issue at stake only concerns what we have the obligation to preserve, because future persons have an essential right not to be deprived of it by us. I therefore agree that “we cannot know future persons” interests in much detail at all, which can make representation more difficult. Instead, we have to fall back on the most general knowledge about what is usually good for humans, much as we do in the case of infants” (Bruhl, 2002, p. 426). This answer can be considered a general guideline.

## **VI. Concluding Remarks and a Principle of (Non) Disposability**

Future generations demand that present generations should identify, from time to time, admissible limits for their intervention on the future: it is essential that present generations are warned and aware of their influence, because such awareness is part of their responsibility. If we consider fundamental threats to posterity, like global warming and nuclear desertification, measures to reduce those risks tend to preserve goods that are fundamental for humanity, instead of conditioning its existence with irreversible choices.

While our efforts to protect goods threatened by global warming or nuclear desertification aim at preserving the minimum conditions for survival, many other choices and many other issues could be characterized, instead, by a high degree of paternalism, thereby provoking an evident conditioning effect, which consists in imposing a defined set of values, dictated by our prevalent contemporary ethics.

Think of the puzzle of preserving the cultural heritage of mankind: one can also question the limit that our society must respect when passing over its ethical, political, cultural and social goods. Our influence over the future provides future generations with all that represents our ideas of the good: however, the logic of this beneficial vision remains a delicate

issue. If preserving the cultural heritage of human kind amounts to a recognized common value, nonetheless our interventions implementing our ethical and religious irreversible choices should be limited. This holds true, for example, in preventing the Taliban from destroying the ancient monumental testimonies of previous civilizations. It is not our own, contingent and particular notion of the good that deserves to survive at the expense of the wider heritage of our predecessors.

This general normative assumption might be better articulated. We could deal with the characters of our actions aimed at conditioning the future by referring to two principles, which I propose to call the principle of the disposability of one's present and the principle of the non-disposability of (other people's) future, in the reasonable forms they may assume from time to time.

With reference to the threats I previously mentioned, the principles of disposability of the present and non-disposability of the future lead to a series of relatively consistent corollaries: the disposability of the present rests on our rights, but at the same time it also prescribes something with reference to future generations: it prescribes that also the future generations — as we are allowed to do — can dispose of their present to an extent which in principle is not qualitatively different from ours; the universalization of the principle of disposability, in fact, cannot be stopped by the “futureness” and as such it bases on time irrelevance. It implies that our attitude towards our present takes account of the availability of one's present extended to our descendants as well. This conceptual frontier is a question of justice, which is less exposed to discretionary ethical orientations when it concerns the fundamental threats for humankind survival.

Of course, this does not mean that all problems are solved. The disposability of the present is in fact a relative concept, for which no trans-temporal control parameters can be used. Each generation has the disposability of the present it received by chance. This principle risks being redundant: after all, it is not clear what it means to have or not to have the disposability of one's present, since we would lack some universal measure of an ideal kind.

However, when we speak of the nuclear threat or of global warming such threats have a potential that signals a qualitative and extreme

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point of non-return. It is rather a radical deletion of the essential and elementary possibility to live, it is about the conditions of residual species on the planet. As I said, since the principle of the disposability of the present is not conditioned by time, it can be universalized and it prescribes that each generation should dispose of its present. This principle may reveal its weakness for the fact that any generation obviously has the disposability of a present, whatever it is. Indeed, as we have already stressed, it is essentially counterintuitive to claim that a world threatened by the catastrophe of global warming or by the effects of nuclear disasters is such that “one can dispose of it.” I believe that it is correct to assume that, here, the principle of the disposability of the present would be radically violated. It does not demand, in this case, some nuanced specification of which qualities a decent idea of our and future “present” should have, according to preferences and different conceptions of the good life. The point concerns the possibility that individuals will be born in conditions impossible or aberrant to our notion of natural living of human beings on the planet: such a notion incorporates an open relation between human life and nature’s potential, it implies standards of eco-compatibility that were shaped by the evolution of world’s own laws, over the past thousands of years.

However, the principle of disposability of the present should better have a reverse side, one that emerges as the negative part of it. I would take it as the principle of non-disposability of (other people’s) future: it can define a sort of frontier, which reinstates the independence from other individuals, and the basic idea of justice that as mentioned supra resembles the Kantian *raison d’être* of justice. The principle of non-disposability of the fate of someone in the future is treated extensively by Jürgen Habermas (2003), in discussing the applications of “positive eugenetics.”<sup>24</sup> Here Habermas concluded that any individual has a right to the contingency of her/his origin, something that should not be

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<sup>24</sup> Habermas makes reference to the “external or alien determination of the natural and mental constitution of a future person, prior to an entry into the moral community. Intervention into the prenatal distribution of genetic resources means a redefinition of those naturally fixed ranges of opportunities and scope for possible decision within which the future person will one day use her freedom to give her own life its ethical shape” (2003, p. 79).

seized since it should be not at the disposition of others. In this frame, human artificial positive eugenic intervention represents, for him, an insidious form of ethical paternalism. However, the discourse on the nature of this good and on the limits to artificial intervention through genetic biotechnologies cannot be treated here. Non disposability of someone else's future also resembles the full-fledged idea of liberty as non-domination that was explained some decades ago by Philippe Pettit (1997; 2009): our liberty does not only mean being free from arbitrary interference into our own sphere of life, it also requires that no one else be put in the position to potentially choose to do so. For a justice oriented conception of our duties to future generations, then, we need compliance with moral and legal norms that have to make such dominating whim not permissible (that is, illegal).

Issues of justice, in the meaning explained, should not be overlooked. They are not in the disposability of the sovereigns or of the will of the People. They should be granted a non-disputable legal protection. If we see our relation with future generations in terms of human rights, then issues of justice shall get protection against the prevalence of other principles, against the contingencies of value choices and the powers of political majorities. If the safeguard of future generations is seen simply as a matter of solidarity or care for fellow human beings, then it would compete, in a position of weakness, with all other expectations of happiness on the part of the contemporaries. If we think that future individuals are holders of rights, our obligations towards them are not abstractly lower or higher than the ones we have towards our contemporaries. Of course, this does not support considering human rights of future generations more important than those of present generations. Rather, it defines mankind as an indivisible whole, in which the past and the future affect priorities and forms of intervention, but not the substantial elements of our responsibilities. In this way, however, we succeed in extending the minimum content of human rights not only to the present, but also to the future: it is an effect provoked by their rational universality, because since they refer to the whole of mankind, they cannot be discriminated against, from a moral viewpoint, for "time" reasons.

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