

Human Rights

The Commons and the Collective

..... Laura Westra



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Foreword

Some of the most important things in life have no physical presence. They do not exist in the “natural” world. These things are fabrications of the human mind or, sometimes, of many human minds. Psychologists and sociologists refer to such entities as mental constructs and social constructs, respectively.¹

We can take this idea one step further. People “live” in consciousness and “know” certain things to be true or real. However, although formal knowledge may masquerade as “reality” in our conscious minds, all knowing is, to some degree, socially constructed. Some social constructs have been erected to describe corresponding real-world phenomena. For example, people from both capitalist democracies and failed communist states would agree that *the economy* refers to that set of activities central to the production, distribution, and consumption of goods and services in a specified region or country. However, capitalism and communism are themselves elaborately different social constructs; each perceives various components of the economy (finance capital, the physical means of production, markets, producers and consumers, mechanisms for distribution, and so on) and their social context (regulatory regimes, tax policies, trade treaties, private property, the public good, the role of the state and of ordinary citizens, and so on) through vastly different lenses. It is possible to give all of these elements alternative configurations and weights – the important point is that economic actors and activities exist in some form or another to serve the material needs of every society *whether or not* the people have constructed any formal concept of the economy.

Other social constructs are entirely made up: there is no corresponding structure in the natural world for capitalism or communism, for example. These ideological frames were given birth entirely through words, language,

and decades of social discourse. They acquired sturdy (or not so sturdy) legs in the actual practices of economic entities, institutions, and whole nation-states, which reflected the beliefs, values, and assumptions of their adherents and acolytes. Abstractions they may be, but the ideologies implied by the terms *capitalism* and *communism* carry formidable intellectual weight. And who can dispute their life-changing effects on people and societies once let loose in the real world? Little wonder that any debate of their relative merits and weaknesses is as much charged by visceral emotion as by logical discourse.

Which brings me back to my central point. Despite their abstract or even ethereal quality, many pure social constructs contribute more to the depth and substance, to the joys and horrors of human life than do physical objects we can touch or feel (and with which we so frantically try to surround ourselves). Think for a moment about such notions as the land ethic, private property, democracy, and civil rights. And what about gay liberation? Again, none of these ideas per se has any physical manifestation; absent the human intellect, they would not exist. Yet each concept has a shared meaning for any educated person in Western society; these concepts profoundly influence how we act out our lives in both the biophysical and social worlds; they have dramatically formative influences on the lives of countless individuals and whole subgroups in society.

These are by no means trivial observations. What I am describing here is a truly unique quality of *Homo sapiens*. All other organisms respond to the biophysical world *as they find it*, their actions dictated by instinct, predictable stimulus-response mechanisms, and simple trial-and-error learning. By contrast, humans create abstract concepts of such power that they actually determine how we perceive reality. Indeed, we experience both social and biophysical stimuli through socially constructed perceptual frames that help to shape both our individual reactions and group responses.

The human manipulation of reality is a universal phenomenon. All cultural narratives, worldviews, religious doctrines, political ideologies, and academic paradigms are largely social constructs. Each construct is an uneasy blend of facts and beliefs, assumptions and values. The whole is massaged and polished by social discourse and elevated to the status of received wisdom by tacit agreement among members of the social group creating the construct. The resulting perceptual frames are, of course, culture-specific – people from different cultures may therefore respond to the same political events, natural catastrophes, or other stimuli in dramatically differing ways.

Most importantly, *social constructs can carry sufficient weight to determine the fates of entire societies.*²

In theory, there are no limits to the diversity and form of alternative perceptions of reality, but this by no means implies that all alternatives are equally valid. In the words of Neil Postman, “You may say, if you wish, that all ‘reality’ is a social construction, but you cannot deny that some constructions are ‘truer’ than others. They are not ‘truer’ because they are privileged, they [become] privileged because they are ‘truer.’”³ Karl Popper makes much the same point: “What the scientist’s and the lunatic’s theories have in common is that both belong to conjectural knowledge. But some conjectures are much better than others.”⁴ What do Postman and Popper mean when they declare that there are “truer” or “better” conjectures?⁵ Assuming that the purpose of a given construct is to enhance human well-being, the simplest answer in the case of constructs pertaining to physical phenomena (e.g., an aircraft design or the blueprint for a bridge) is that a “truer” construct will “map” better to the reality it purports to represent; it will be substantiated or reaffirmed by repeated observation over time. Devices, behaviours, and activities based on the construct will produce predictable beneficial results. At the very least, the construct should not jeopardize the health and safety of agents who act as if it were true. In short, the airplane will fly reliably, and the bridge will bear traffic without incident.

We can apply similar criteria even when assessing more abstract constructs (e.g., a law or regulation, a paradigm or ideology). If adopted, will the social construct “work” to further human purposes? Will it enhance individual or social well-being? Will it improve the quality of life of targeted groups or society at large? Will it enhance prospects for cultural survival in the face of rapid global change? Truer or better social constructs will generate positive responses to all these questions.

Global Change and the Social Construction of Human Rights

The contemporary world is a world of contradictions and contrasts, of extraordinary beauty and desecrated landscapes, of unprecedented wealth and chronic poverty, of material abundance and spiritual desolation. It is also an “ecologically full” world of 7 billion people, all with rising material expectations. In fact, ours is a world in *overshoot* whose human inhabitants each year consume more than the ecosphere produces and generate more wastes than the ecosphere can assimilate. Although half the human family does not yet have enough of the basics for a decent life, the global economy is already

bloated. Humanity is living, in part, by depleting and dissipating so-called natural capital (both self-producing and nonrenewable resources) that took millennia to accumulate in the ecosphere.

Despite the obvious ecological conundrum, the world community has scripted a cultural narrative based almost exclusively on continuous material growth and market dynamics. The assumption is that working from this construct will “solve” the problems of landscape degradation, poverty, and social inequity while enhancing human well-being (happiness). Anyone remotely in touch with the state of the world may fairly conclude that this global economic construct isn’t working.

- Growth-driven “development” is degrading the biophysical basis of human existence at an accelerating rate: the oceans are acidifying, deserts are spreading, tropical forests are disappearing, biodiversity is declining, fisheries are collapsing, soils are eroding, aquifers are falling, surface waters are polluted beyond life and use, et cetera, et cetera. The climate system and major ecosystems are approaching tipping points beyond which they may well “flip” into new equilibrium states that may not be compatible with human economic or ecological needs.
- The greatest share of national and global income growth flows to upper-income groups who need it least. The richest 20 percent of the world’s population takes home 76.6 percent of the world’s income; the poorest 20 percent subsist on 1.5 percent.⁶ Because high-income consumers are driven by consumption, the world’s most serious ecological problems (e.g., climate change) can be traced mainly to this group.
- Although recent economic growth has raised millions out of poverty (particularly in China), the absolute number of poor has never been greater. In impoverished parts of Africa, Asia, and Latin America, about 1.2 billion people still lack access to potable water, and 2.6 billion have no sanitary sewage. Almost a billion people live on less than a dollar per day, and most are calorically deprived. About 2.6 billion people or 40 percent of the human population live in poverty at less than two dollars a day, and most are otherwise malnourished. Over twenty-six thousand children die every day from poverty (meaning hunger, water-borne, and other preventable illnesses).⁷
- In this light, further income growth for the rich is an egregious misallocation of wealth and a waste of the world’s resources. Beyond a certain

point – a point long past in the development of high-income countries – there is no significant positive relationship between various objective indicators of population health (longevity, infant mortality, postoperative survival, etc.) and rising incomes.⁸ The same goes for subjective indicators, measures of “felt” well-being. In the United States, for example, Robert Lane describes “the strange, seemingly contradictory pattern ... of rising real income and a falling index of subjective well-being.”⁹

- The income gap both between and within countries is widening. In 1960, the richest 20 percent of the world’s people, living mostly in industrialized countries, took home thirty times the income of the poorest 20 percent; by 1997, they took home seventy-four times as much.¹⁰ The problem is by no means confined to developing countries. By 2000, the richest 5 percent in the United States owned 60 percent of the nation’s wealth. That is, the top 5 percent had more wealth than the remaining 95 percent of the population combined. (The United States now has the widest income gap of any high-income nation.)
- Ironically, one of the most significant contributors to declining population health and increasing civil unrest in poor and rich countries alike is income disparity. Countries with increasing inequality and deepening social divisions tend to show markedly higher rates of alcohol-related deaths, accidents, homicide, crime, violence and probably drug use.¹¹ Yet we actively promote national and global political economies that systematically and dramatically increase inequity. More than 80 percent of the human population lives in countries where income differentials are increasing, including Canada and the United States.¹²

Sustainability and *sustainable development* may have become watchwords among political leaders, international development agencies, and humanitarian nongovernmental organizations, but it is clear that the prevailing approach is a multidimensional failure.

And the situation shows every sign of worsening. The latest UN projections suggest the global population is headed toward 10 billion by the end of the century.¹³ Climate change is accelerating; sea levels are rising; deserts are spreading; water shortages loom for hundreds of millions of people. We have passed the production peak for conventional petroleum and must now rely on more remote and dirtier sources of most fossil fuels (renewable

energies are not yet significant substitutes for oil, gas, and coal). After a century of decline, commodity prices have begun to climb as demand exceeds supply and outstrips the gains from technological efficiency. Food prices in particular are at a historic high.

One cause *and* effect is that the competitive scramble for the world's remaining bounty has begun in earnest. For example, land is critical to identity, livelihoods, self-reliance, and food security. Wealthy, overpopulated land-poor countries ranging from Saudi Arabia to China and South Korea are therefore spreading their ecological footprints globally by leasing or buying up vast tracts of land in poorer countries, particularly in Africa for the production of food, fibre, and biofuels, which are shipped home.¹⁴ Ironies abound. While Saudi investors spend \$100 million raising wheat, barley, and rice on land leased to them by the Ethiopian government for export back home, the World Food Program spends even more (\$116 million) to provide "230,000 tonnes of food aid between 2007 and 2011 to the 4.6m Ethiopians it thinks are threatened by hunger and malnutrition."¹⁵ Meanwhile, subsistence farmers and existing communities are being displaced from their traditional lands and homes to satisfy the demands of foreign corporations and national states. And with vast sums of money involved, shady deals and corruption are inevitable. The government of Madagascar fell to a military-backed popular uprising in April 2009 as word spread that it had signed away rights to 1.3 million hectares of oil palm and cropland to Daewoo Logistics of South Korea for ninety-nine years.

And this is where Laura Westra's work comes in. Like many of her other writings, this book raises critical issues that have largely been ignored or deliberately repressed in mainstream debates concerning the dynamics of global ecological and geopolitical change. Can there be any more important question in international politics and law than how the global community will go about socially constructing and reaffirming the framework of individual and collective rights and responsibilities that will govern how individuals, corporations, and states interact with one another and the broader "environment" in the tumultuous decades ahead? What individual rights should remain sacrosanct, and what responsibilities should go with them? What collective rights must be constructed and honoured by all to ensure the integrity of the global commons, and how might these new rights stint the existing rights of individuals? (The private ownership of land and "natural capital" upon which many others depend for their livelihoods or well-being raises many questions in an increasingly crowded and resource-poor world.)

Clearly, the global community must develop the means to achieve balance between individual and collective interests and to recognize the critical points where individual and community rights converge.

We have already noted that the human capacity to construct alternative social realities is a unique human attribute and, fortunately, we have several other uniquely human qualities to bring to bear on the task: high intelligence and the capacity for logical thought, the capacity for moral judgment, the ability to plan ahead, and an unequalled capacity to express capacity for other people (and even other species).

If these were the only things in play, then planning a just sustainable future would be relatively easy. Logic rails against unlimited material growth on a finite planet. Indeed, our best science tells us that we are already pressing up against potentially disastrous climate tipping points. At the very least, the precautionary principle argues that we should therefore scale back on aggregate economic activity. In these circumstances, gross social inequity, already morally reprehensible, would become intolerable. Wealthy countries would naturally plan for controlled economic contraction to create the ecological space necessary for justifiable growth in low-income countries (and should be willing to do so on compassionate grounds).¹⁶ Properly executed, policies for wealth redistribution could actually improve the quality of life in both rich and poor countries.¹⁷

In any case, there is certainly enough to go around (at least in the short term). Consider food: the nearly one billion poor suffering from chronic caloric deprivation are “balanced” by a billion relatively wealthy people suffering from excess weight or obesity (and don’t forget that in rich countries such as the United States and Canada half our grain crops are fed to livestock). Of course, a smaller steady-state, carbon-neutral economy would lower the risks of climate change and stop the conversion of wild habitats for agriculture and other human-dominated land uses.¹⁸ Biodiversity may actually start to recover. And, of course, intelligence and logic dictates that the world community come together to implement a human program for population control and reduction.

Intelligence, sound planning, moral logic, and compassion – it’s not hard to envisage how the application of these qualities could ultimately produce an economically equitable, socially just, and ecologically secure global community. But these are not the only factors at large in today’s world. Humans share with all other species a natural predisposition to expand, a tendency that is being reinforced by a well-entrenched social construct, the

global growth paradigm. To complicate matters, the past half century has seen powerful interests engage in the deliberate construction of a global economic ethic that exalts short-term greed, selfish individualism, and private property rights as a means to further growth while disparaging altruism, kindness, community, and consideration of the common good. And, as if that weren't enough, the same corporate and political interests have engineered the emergence of a new age of unreason. In many countries, particularly the United States, politics is dominated not by logical consideration of the ecological, socioeconomic, and moral crises confronting citizens everywhere, but rather by faith-based ideologies (e.g., neoliberal economics and market capitalism), religious fundamentalism, climate-change denial, anti-intellectualism, and myriad other forms of magical thinking. Together, these factors have contributed to a world rife with conflict, suspicion, distrust, and (understandably) growing despair.

It is also a world seemingly paralyzed from taking action to save itself. This is particularly tragic when we recognize a singular fact: ours is a globally interconnected world of mutual interdependence bristling with nuclear weapons. An all-out economic – or military – competition for remaining stocks of vital resources will produce no winners. No person, corporation, or nation-state can go it alone, can achieve sustainability in isolation from the whole. (We would do well to remember that the first-class suites on the Titanic sank just as quickly and just as deep as the meanest steerage cabins.) In short, there has never been a greater need for clarity concerning the rights and responsibilities of individuals, corporations, and nations to ensure the continued integrity of, and popular access to, the common pool of resources and life-support functions upon which we all depend. We are dealing here with questions that affect the basis of life and the right to life itself. Perhaps for the first time in history, individual and “tribal” interests have converged with humanity's collective interests.

Laura Westra explores this ground with dogged vigour. Hers is a plea for recognition (among other things) that such basic rights “are actually and temporally prior to all other rights,” that one has “no need for freedom of speech, of religion, or the right to vote or equality before the law” if one lacks basic subsistence and physical security. The idea that a civilization should be judged on the basis of how it treats its most vulnerable members is about to be tested as never before. We must succeed in protecting the ecological rights of ordinary people against the unwarranted incursions of powerful vested interests. The critical questions are as follows: Will our raucously divided

world community be able to negotiate the logical, moral, and legal constructs necessary to enshrine fundamental ecological rights in the name of the common good? And if such agreements are struck, will there be time to massage, polish, and exercise these rights until they are seen as inviolable? Will governments and the corporate sector enforce and respect them?

The failure to construct an adequate framework of critical “rights to life” would be no ordinary failure. One possible outcome would be global descent into political chaos and irreversible ecological decline at the cost of millions – even billions – of human lives and the loss of untold non-human species. Even if by some miracle the world were otherwise to pull through the ecological crisis, achieving sustainability without a framework that guarantees human dignity through access to vital necessities would be a hollow achievement.

But there is something else: the collapse of this initiative would mean the failure of the global community to exploit the very qualities that allegedly elevate our species above common brutishness – high intelligence, foresight, moral character, and compassion. “*Homo sapiens* will either rise above mere animal instinct and become fully human, or wink out ignominiously, a guttering candle in a violent storm of our own making.”¹⁹ It would be tragic irony if, in the twenty-first century, this most intelligent and self-aware of species, this most technologically sophisticated of human societies, succumbs to the unconscious urgings of a myopic, narrowly self-interested, and brutally primitive tribalism. Civilization would cease to exist. It may even mean the end of *Homo sapiens*, arguably Nature’s most daring evolutionary experiment.

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NOTES

- 1 See Berger and Luckmann (1966).
- 2 See Tainter (1998); Diamond (2005).
- 3 Postman (1999, 76).
- 4 Popper (1972).
- 5 In this context, it is helpful to think of a social construct as a hypothesis (i.e., conjecture) that is to be tested by application in the real (social or biophysical) world. In effect, acting out any social construct represents an uncontrolled experiment.

- For example, neoliberal growth-based economics and globalization theory are both elaborate social constructs that are currently playing out (destructively?) in the real finite ecosphere.
- 6 Shah (2010).
 - 7 Ibid.; World Bank (2008).
 - 8 Siegel (2006); Victor (2008).
 - 9 Lane (2000).
 - 10 UNDP (2005).
 - 11 Wilkinson (1996); see also Wilkinson and Pickett (2009).
 - 12 UNDP (2007).
 - 13 Of course, the population may never reach such heady heights because of the various constraints detailed here.
 - 14 These countries, with their expanding populations, will soon need the land, particularly if climate change and market competition further threaten local food supplies. Cotula et al. (2009).
 - 15 "Outsourcing's Third Wave," *The Economist*, 21 May 2009; see also "Fears for the World's Poor Countries as the Rich Grab Land," *The Guardian*, 4 July 2009.
 - 16 At present, global markets and money wealth enable the residents of high-income countries such as Canada and the United States to access three to five times their equitable share of global biocapacity.
 - 17 A socially just sustainability implies that everyone would be better off. See Wilkinson and Pickett (2009).
 - 18 *Steady-state* refers to a constant sustainable throughput of energy and material through the economy within the productive and assimilative capacities of supportive ecosystems. A steady state is not to be confused with a static state. The steady state can be dynamic, constantly changing and innovating. Sunrise sectors of the economy would be free to grow as obsolete or sunset industries are phased out.
 - 19 Rees (2002, 267).

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Introduction

After teaching environmental ethics and the politics of environmental racism for many years, it became increasingly obvious to me that environmental ethics was the locus of an ongoing battle between different positions and arguments, little of which filtered down to public policy or actual legal regimes to make a difference on the ground. My research indicated the urgency of the situation confronting millions of people affected by environmental causes ranging from climate change and the extreme weather events it engendered (for example, drought and famine in the southern continents and melting ice in the Arctic and its devastating consequences on the lives and survival prospects of peoples in the Far North), to the ongoing thrust of globalization and trade and its disastrous effects on local and indigenous communities, to the proliferation of hazardous chemicals in the developed world.

Moral exhortation, while necessary, appears to be insufficient to stem the tide of ongoing collective harms. The triumph of capitalism over the rights of the commons started a long time ago in agrarian England. But I argue that what we are facing today is the final enclosure movement, for the commons today are no longer available to the collective, for most of the natural world has been either inquinated and commodified or turned into private exploited property.¹ The early enclosure movement was the result of capitalism, but some today question whether earlier forms of capitalism can be equated with the modern notion of globalization. Richard Westra argues that “neoliberal state policy is undermining the very conditions for the existence of capitalism.”²

At any rate, neoliberalism and globalization now dominate global governance, and they have been accompanied by increasing breaches of human rights law. The vital importance of law to attempts to redress harms persuaded me to return to school for a second PhD in law, which resulted in the publication of *Ecoviolence and the Law*.³ As I continued to research the effects of

environmental injustice on human rights, I chose areas where injustice appeared to be most obvious and to engender the gravest harm. What emerged from my research was the realization that the rights of communities and collectives – especially those of traditional, land-based groups – were the ones most at risk. Starting with the largest collective, that of unborn and future generations, I worked on three case studies and produced a trilogy on environmental justice: *Environmental Justice and the Rights of Unborn and Future Generations* (2006), *Environmental Justice and the Rights of Indigenous Peoples* (2007), and *Environmental Justice and the Rights of Ecological Refugees* (2009).

What these case studies indicated was that, although there were numerous domestic and international legal instruments for the protection of individual rights, there were fewer for the collective. That was the reason for undertaking the present work: to research and sum up the status of the collective in regard to the commons and to discover whether there were any avenues that promised some timely progress in the defence of both, given the urgency of the multiple issues that affect basic collective human rights.

This book is not intended as a comprehensive review of all domestic and international legal instruments or related jurisprudence pertaining to the commons and the collective. It simply draws upon instruments and case law to present an argument about the need to protect collective rights and the “commons,” upon which they depend for survival.

Starting with the principles, both legal and moral, that mandate the protection of the collective, Chapter 1 discusses the meaning of communities and the collective, setting the stage for a wide-ranging discussion of principles and relevant instruments. Chapter 2 highlights the discrepancy between various instruments, declarations, and UN reports on the public interest and the defence of the common good and the worst issues affecting basic rights today: climate change and world hunger. Unlike ethical arguments that, for the most part, use abstract examples with little or no ties to reality, and because law and public policy *must* be involved in ethical issues, these examples are necessary to tie my argument regarding principles to actual issues. A similar approach informs Chapter 3, in which the argument presented in Chapter 1 regarding the difference between communities and the collective is fleshed out through a discussion of the pivotal importance of traditional communities to the collective and these communities’ rights, protected as they are, at least in principle.

Part 2 reverses the order of Part 1. Whereas Part 1 addresses principles first and then introduces actual issues as examples, Part 2 proceeds directly

to a discussion of what is available today for the protection of human rights. Chapter 4 considers the right to development, the common heritage of mankind, and public health law, all of which are intended to reach beyond the protection of individual rights. Chapter 5 considers the relationship between state obligations and democracy and the importance and role of the latter, as the most desired form of governance today, against a background of unequal power and imperialistic nationalism.

Chapter 6 returns to the basic principles proposed in Chapter 1. It examines these principles as they pertain not only to power but also to the responsibility of states, the role and history of the United Nations, and the many obstacles to the protections of basic collective rights. The power and primacy of globalized trade and economic regimes add to these difficulties. Finally, Chapter 7 reconsiders the development of recent case law and the re-emergence in recent legal scholarship of older doctrines such as *parens patriae* (parent of the nation) and the public interest. The need to return to such moral or legal principles also underlies the proposal for a world law and for a renewed international constitutionalism based on the *Charter of the United Nations*.

The conclusion of this book in theory, then, is that we must return to robust moral and legal principles, nonderogable norms and doctrines that stand above conventions and positive law in general. In practice, however, I conclude with a plea to re-examine not only the UN's *Charter* but also its organs, its reports, and its initiatives, all of which are strong and desirable but are often not enforced because of politics rather than principles. This discrepancy seems to be the basis of the dysfunctionality of the current international law regime and its domestic counterparts. Hence, that is where transformative changes must start.

PART 1

Basic Collective Rights for Law
and Morality – The Theory

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1

Individual Rights and Collective Rights in Conflict: The Ecocentric Perspective and the Commons

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Many centuries ago, capitalism arose in agrarian England as economic motive and competitiveness replaced traditional values during the enclosure movement. Enclosures provided the most famous redefinition of property rights: they eliminated the commons, with no regard for human rights.¹ Philosopher John Locke defended the right to property above all, although he predicated his defence on ensuring that enough land would be left to be held in common. But he also espoused the defence of improvements as needed to impose value on nature, an argument that supported the policies of his master, the Earl of Shaftsbury.

Through Locke's friendship with Thomas Jefferson, Lockean arguments filtered into the American Declaration of Independence. But these enclosure movements, brutal though they were in their effects on the people, also started what eventually became known as the tragedy of the commons.² What we encounter today – the primacy of the economic motive over and above human rights, including the right to a safe and healthy habitat – is the final enclosure movement. It is once again mostly the poor and dispossessed of the world who are shut out of the natural global commons.

The benefits that would have once accrued to the poor are no longer available: whatever is left of the commons has become someone's property and is used as such. Even the simplest "natural goods" – for example, clean air, pure water, safe sunlight, and safe foods – are no longer freely available, and all are unavailable to the poor. Drinking water must be bought; sunscreen is needed to protect us from the sun; removing housing from hazardous industrial operations is expensive; and food in areas of famine and that which is safe and organically grown is marginally more available but often laced with toxic substances. All are commercial goods. As E.M. Wood points out, the very notion of improvement as originally conceived is problematic: "We might like to think about the implications of a culture in which the world for 'making better' is rooted in the word for making monetary profit."³

What was at stake then, as it is now, was first and foremost the existence of the most basic human right: respect for human life, for human security and subsistence.⁴ This was at issue long before questions of religious or sexual rights. Dispossessed farmer-tenants in seventeenth-century agrarian England had no way of supporting themselves or their families. Today, many of us, especially in developed Western democracies, can in fact support ourselves, but our life and health are nevertheless under attack.

Likening the effects of unsafe, unhealthy habitats to an attack is particularly apt because the simile emphasizes two main points connected to the law, one historical, the other moral. I describe what I term ecoviolence – that is, violence perpetrated in and through the environment and human rights.⁵ Alan Boyle asks,

Should we continue to think about human rights and the environment within the existing framework of human rights law in which the protection of human rights is the central focus – essentially a greening of the right to life, private life, and property – or has the time come to talk directly about environmental rights – in other words a right to have the environment itself protected? Should we transcend the anthropocentric in favor of the eco-centric?⁶

One can only applaud the reasoning behind the question raised by Boyle: the protection of human rights when they are isolated from their ecological basis is increasingly insufficient as the effects of climate change reduce whole cities and areas to rubble, or even eliminate them altogether (see *Native Village of Kivalina v. ExxonMobil* (2008)). Or perhaps we need to ask ourselves which human rights are protected when the unfortunate inhabitants of these areas are forced to flee and become environmentally displaced persons, a group that includes hundreds of thousands of persons, all of whom (at this time) have no protection under the law.⁷

Similarly, what of the local and indigenous communities whose inhabitants are either harmed within their own territories or forced to relocate by the pressures of unwanted and unconsented development?⁸ As well, what of the rights under the present laws of all those in developing countries whose resources are no longer there because of desertification or have been eliminated and replaced with products desired by those in affluent countries? What about the many others who are the victims of economic oppression and the neoliberal policies of globalization?

Yet in these and most other cases where environmental rights may be invoked because of the impact of environmental degradation on human beings, the question is not whether to give primacy to the ecocentric viewpoint at the expense of the anthropocentric perspective. Science today clearly indicates that – at the level of basic human rights – the two are one and the same.⁹ In other words, protecting human rights *starts* with protecting the ecology of our habitat, for we are, as Aldo Leopold puts it, part of the commonality of life: “All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts ... the land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively, the land.”¹⁰

Hence the question posed at the start of this chapter is based on a false dichotomy: environmental rights *are* human rights, as Judge Christian Weeramantry of the International Criminal Court argued in 1997.¹¹ Moreover, until this fact is entrenched in law and reflected in both instruments and jurisprudence, there is no hope that the respect for human rights advocated by Boyle and most legal scholars will prevail. This is a question I discuss in most of my work to date. In this book, there is another question I want to raise, for I believe that the discussion and the answers that may emerge will offer a fuller understanding of Weeramantry’s argument. Are environmental rights individual or collective rights? Boyle does not address this question, and those who do discuss collective rights for the most part do not do so in the context of the environment, let alone that of ecocentrism. Collective rights in general are part of what some term third-generation or solidarity rights.¹²

According to Karel Vasak, “the last generation of Human Rights would be of more collective nature.”¹³ And according to Marlies Galenkamp, they will include “the right to development,” “the right to environment, the right to peace, the right to co-ownership of the common heritage of mankind and the right to communicate.”¹⁴ At this time the important issues are the right to the environment and the common heritage of mankind, for the right to development is often that of corporations and neoliberal states, not that of local and indigenous communities, which, most often, have not been fully informed about, let alone asked to consent to, the so-called development imposed on them that brings harms rather than benefits. Rodolfo Stavenhagen argues that indigenous peoples “must be regarded as the victims of the so-called right to development which states attach to themselves and with which they are destroying any number of peoples within the borders of their territory.”¹⁵ Here, Stavenhagen criticizes this one aspect of collective rights

from three separate angles, the globalist, the statist, and the nationalistic. The existence of the rights of states points to the presence of a collectivity that already exists in law and has rights. State rights stand alongside minority rights, peoples' rights, and indigenous rights.¹⁶ Another collectivity – the multinational corporation – likewise possesses great and undisputed rights that should be disputed, a point I argue below.

Neither states nor multinational corporations are biological entities, although they are certainly legal entities and are, in fact, composed of biological individuals. Hence they are, *prima facie*, potentially in conflict with the rights of the biological individuals of which they are composed. The simplest examples are wars for the former and hazardous industries for the latter. A state's interest (and right) may well be to wage a war of conquest that requires the use of soldiers, whose individual survival will be at risk. In the case of a multinational corporation, an operation for the production of chemicals, for instance, will put at risk individual workers and people who live in the surrounding area.¹⁷

When these two collectivities are eliminated from the present discussion, what remains are minorities and indigenous communities, and the argument I propose is appropriate to both. When viewed from the perspective of basic rights and an ecocentric point of view, collectivities and individuals are two aspects of the same cosmopolitan rights. Most of the existing scholarship on either collective rights or community rights, such as those of indigenous peoples, does not start from an ecocentric perspective, nor does it demand it in support of its arguments.¹⁸ But some scholars do acknowledge the increasing presence of community or collective rights in the law. For instance, in his seminal work on indigenous peoples' rights, James Anaya characterizes human rights as mainly "individual's demands of freedom, equality, participation and economic and physical security vis-à-vis the state" but recognizes that "concepts of group or collective rights have begun to take hold in the new articulation of human rights norms."¹⁹

At any rate, two basic questions emerge. What is the status of collective rights in relation to individual human rights, and can and should the policies of aggressive Western liberal governments regarding individual rights be reconciled with the existence of collective rights? The first question can be extended further for clarity. What are collective rights, and are they the same as communitarian or group rights? The clarification portion of the first question can be answered more easily than the question itself. The rights of communities and groups (and indigenous peoples, who represent the

paradigm case in this category) are part of the collectivities here envisioned, yet they do not exhaust that category, even though they are often spoken of as if they represent the sum total of collectivities. As the growing case law related to such rights indicates, these groups are increasingly present in international and domestic law (see the following chapter) because they provide the best introduction to the questions under consideration. But the general term *collectivities* exceeds the concept of communities. An answer to the first question will help to clarify an even more basic question: what is the basis and nature of human rights, whether individual or collective? Dwight Newman's definitive argument embodies and supports my own conclusion, but by a different path. Newman writes: "My argument is that certain individual interests that ground duties are meaningful interests and can be fulfilled only on the precondition that certain collective interests are also rights. We can put this statement in simplified terms: if we accept certain individual rights, we presuppose certain collective rights."²⁰

A somewhat compatible position is evident in Roger Brownsword's discussion of basic human rights in the concepts of human dignity as empowerment or human dignity as constraint: "In practice, though, whereas the former [human dignity as empowerment] tends to be closely associated with human rights movements aimed at giving individuals the opportunity to flourish as self-determining authors of their own destinies, the latter [human dignity as constraint] (as expressed by the dignitarian alliance) combines a (Kantian) view of what is distinctive about what defines life as civilized (and, thus, respectful of human dignity), in a particular community."²¹ The main difference between the two positions on the relationship between dignity and human rights is that Newman speaks of collective rights whereas Brownsword refers to communitarian rights. I believe that the former rather than the latter better represents the universalism of both Kant and the understanding of human rights I defend. It bears repeating: communitarian rights are already more visible in both moral and legal discourse, given their connection to cultural and indigenous communities.

But I am seeking at this time to establish a connection between universal collective rights and universal individual human rights so that the limits (if any) of the latter may be defined through a fuller understanding of the former. The starting point for this discussion, including the argument leading to the answer to the first question, is the understanding of human rights that will form the basis for the connection between them and collective rights understood as universal.

Universal Principles and Human Rights

For the most part, talk about human rights, outside the realm of armed conflicts, centres on religious or sexual rights or the right to secede or to acquire national status on the part of groups. The most fundamental right – the right to life – the basis of all others has been quietly forgotten: it has become, if not obsolete, at least politically incorrect because of its possible conflict with other rights. Yet, unless we return to the defence of the most basic rights of all, as Henry Shue terms them, it will not be possible to protect humankind globally and indict those who breach those rights and punish them with a severity appropriate to the crimes.

I do not view other rights violations as unimportant. I simply emphasize that our right to make any and all choices – be they political, religious, or personal – starts with our being not only alive but also in a condition that renders us capable of thinking, acting, and pursuing various goals. As Shue argues, “part of what it means to be able to enjoy any other right is not to be prevented from exercising it by lack of security or subsistence. To claim to guarantee people a right that they are in fact unable to exercise is fraudulent, like furnishing people with meal tickets but providing no food.”²² He continues, “Basic rights are the morality of the depths”; they represent “everyone’s minimum reasonable demands upon the rest of humanity.”²³ Subsistence rights include the bare necessities we all need, beginning with “unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter.”²⁴ Although some of these subsistence rights are at least present in the language of the *Universal Declaration of Human Rights*, neither the *International Covenant on Economic, Social and Cultural Rights* (1966) nor the *International Covenant on Civil and Political Rights* (1966) specifies that the triad of safe air, water, and food – that is, elements supportive of life – is an actual right.²⁵

In addition, although we may tend to think of the two international covenants as necessary to improve the lives of citizens in developing countries, Shue’s triad is empathetically not present as a right of citizens of affluent, technologically advanced democracies, any more than it is a clear right in the impoverished Global South. The role of poverty in depriving people of their rights and thus of basic justice worldwide is amply documented. As Thomas Pogge writes, “severe poverty has consequences: 790 million persons are not adequately nourished, while one billion are without safe water and 2.4 billion without basic sanitation; more than 880 million lack access to basic health services; about one billion are without adequate shelter and two billion without electricity.”²⁶ Epidemiological data also document the lack of less

than healthy air, water, and food in the Global North or West, where particulates in the air, ozone layer depletion, and unsanitary water and food laced with hormones, chemicals, and other additives promote a wide range of diseases, including a cancer epidemic in citizens far removed from poverty.²⁷

The first step in strengthening the principles that will sustain laws to protect basic rights is leaving behind any form of reasoning that is purely consequential in favour of a deontological approach. We need to adopt universal principles that will impose the obligation to ensure respect for life's infinite value, in the Kantian sense. Respect for life, Onora O'Neill contends, means rejecting the infliction not only of direct harm but also of indirect injury to the natural world.²⁸ She argues that such injury may be gratuitous (that is, undertaken simply because it is "convenient for the powerful") or systematic (taken for granted as a normal way to conduct business or govern society).²⁹ Either case results in deep injustice through the destruction of natural environments: "In the first place, their destruction is unjust because it is a further way by which others can be injured: systematic or gratuitous destruction of the means of life creates vulnerabilities, which facilitate direct injuries to individuals. Destroying (parts of) natural and man-made environments injures those whose lives depend on them. Secondly, the principle of destroying their reproductive and regenerative powers is not universalizable."³⁰ Thus O'Neill does not advocate abstract cosmopolitanism but rather that justice should prevail globally in a practical sense, by "identifying compatible institutions and practices."³¹ Although O'Neill does not clearly state it, *we all* depend on natural systems in various ways: to be deprived of them is a severe attack on life, health, and our natural function.³² This attack now extends not only to a plurality of others everywhere but also to future generations, whose ability to survive, thrive, and have their rights protected must also be respected.³³ Our interconnectedness, to all living things and processes today and in the future, ensures that this dimension of our obligations cannot be avoided, and it represents the basis of ecological concern.³⁴

Whoever the humans of the future may be, they will share our finiteness and vulnerability; therefore, in Kantian terms, "inclusive principles of indifference to and neglect of others also cannot be universalized."³⁵ Shue adds: "The infant and the aged do not need to be assaulted in order to be deprived of health, life or the capacity to enjoy active rights. The classical liberal main prescription for the good life, do not interfere with thy neighbor, is the only poison they need."³⁶ We can add all debilitated, malnourished, or weakened

infants, adults, and aged, and all of us who are continually exposed to unsafe living conditions.

GROUNDING HUMAN RIGHTS

When health is absent
 Wisdom cannot reveal itself,
 Art cannot become manifest
 Strength cannot fight,
 Wealth becomes useless
 And intelligence cannot be applied.

– Herophilus (325 BC)

The connection between environmental degradation and human life, health, and normal function expressed by Herophilus rests on the inviolability of human rights. Although a detailed analysis of all existing arguments in support of these rights is beyond the scope of this book, I draw on some of them to support my own thesis that human rights extend beyond the right of the human person to the generic right to life, including our habitat. My approach is Kantian, in line with the arguments by O'Neill, Shue, and Pogge.

The foundational arguments proposed by Alan Gewirth help to shed light on the basic connection between humans and their habitats. Gewirth argues that human rights are not based primarily on human dignity and that this Kantian principle is only partially right.³⁷ He prefers to base “human rights on the necessary conditions of human action,” for morality is intended to give rise to moral action.³⁸ Gewirth adds that “human rights are the equivalent to ‘natural’ rights, in that they pertain to all humans by virtue of their nature as actual or prospective agents.”³⁹ He cites five reasons in support of his claim: (1) “the supreme importance of the conditions of human actions”; (2) action is “the common subject matter of all moralities”; (3) *action* is more specific and less vague than *dignity* or *flourishing*; (4) action ultimately secures fundamental moral status for persons; and (5) “action’s necessary conditions provide justification for human rights – as every agent must hold that he has a right to freedom and well-being as the necessary conditions of his ‘actions.’”⁴⁰

Deryck Beyleveld and Roger Brownsword argue that the basic or generic needs that represent the preconditions of all action, including moral action, are freedom or voluntariness and well-being or purposiveness. The former are procedural, while the latter are substantive.⁴¹ They view freedom as an

instrument to well-being. I propose inverting this order. Life, health, and the mental ability to comprehend and choose precede the exercise of voluntariness and are not only necessary for it but also sufficient when all these conditions are present.

In essence, this is the argument presented here: basic rights, as defined by Shue, represent the minimum all humans are entitled to, and they are prior to all other rights, both conceptually and temporally.⁴² For Gewirth as well, life and the capacities named above can be interfered with or threatened.⁴³ Thus, to say we have rights is to say equally that the preconditions of these rights represent something we are entitled to, not only in morality but also in law. In other words, any legal instrument that supports the existence of human rights *ipso facto* ought to proclaim the requirement that their preconditions be equally supported and respected.

Some argue that the dignity of human beings is only partially the grounds for human rights and that dignity itself is based on agency. This argument, however, allows for the introduction of at least one further point in favour of extending human rights to life and health. The introduction of preconditions means the introduction of conditions that are not only conceptually but also temporally prior to agency; therefore, the protection of these preconditions entails the acceptance of potential consequences in the protection of agency.

Arguments about potentiality are discussed rather cavalierly in the extensive literature on abortion, and they have re-emerged more recently because of the presence of the rights of the child (to be) in utero. For instance, Deborah Mathieu writes: "Thus even if the foetus is not considered a person in the moral or legal sense, there are still important interests of a person which must be weighed against those of the pregnant woman: the interests of the future child. A pregnant woman should act for the sake of the child that the foetus will become. Her obligations, in other words, are to her future child, not to her foetus."⁴⁴ Given that the potential for developing certain genetic conditions has been used to explain or justify abortion, it is hard to see why the future should be viewed as suspect when it is used to proscribe abortion in cases where concern for the child's future health is not an issue.⁴⁵ Beyleveld and Brownsword argue that it is not necessary to support the presumed dignity of the embryo from conception: "It is the consideration of the possibility that the zygote might be an agent (and have dignity) even though there is little evidence of this."⁴⁶ The authors continue by citing the possible rights of the pregnant woman in this respect. To destroy the fetus by removing it from its first natural habitat, however, clearly violates the preconditions of its eventual

agency, even if, with the authors, we accept “the view that agency is the ground of human dignity.”⁴⁷

If we consider Peter Singer’s position that rights should be grounded in sentience foundational, or even if we consider David DeGrazia’s notion of nociception, we have more than dignity or even dignity-as-agency, in which the Gewirthian principle of proportionality maintains that agents have “duties to all living creatures (human or non-human) on a proportional basis.”⁴⁸ A discussion of the detailed arguments for and against abortion or the use of embryos would take us too far afield. Yet even this brief analysis indicates that the presence of life ought to be the most important category to render beings worthy of respect and consideration, aside from their present or possible mental states.

Kant defends the infinite value of life, for people’s generic capacities to be human, and all that they may entail, are not eliminated by adverse conditions, such as regular drunkenness. Nonhuman animals have been deemed to have purposiveness.⁴⁹ The same could be said of fetuses, for the development of their nervous systems are comparable to animals at various stages, and they certainly do not have nociception as an indication of the capacities they will possess later in their development.⁵⁰ If duties, at minimum, are owed to all beings capable of sentience and agency in various proportions, then the duty is not specific, but it can be owed to all life and to its preconditions – that is, to the habitats whose fittingness supports our own. In other words, by extending the meaning of *dignity* from its modern sense of *dignitas* to its classical Greek sense of “within the natural laws of the universe,” Kant’s imperatives can be placed within the more far-reaching imperatives of the principle of integrity.⁵¹ In this case, anything that conflicts with the dignity of natural universal laws is *prima facie* suspect: it requires, at minimum, serious justification beyond preferences or economic advances.⁵²

In fact, these extended rights, or the preconditions of the rights themselves, are everyone’s entitlement, and those who deliberately or negligently impose harms should be considered either guilty of crimes, directly or indirectly, or complicit in their commission.

BASIC RIGHTS?

Unless we define basic rights in functional terms, as Shue does, we are almost certain to make implicit or even explicit arguments that “basic rights” are more important than other rights. By

distinguishing a core group of “basic” rights that are alleged more important than other rights, one almost unavoidably devalues the remaining human rights.

– Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2003

The concept of basic rights is controversial, and Jack Donnelly lists several proposals beyond that of Shue.⁵³ Most of them include various civil or political rights, as well as life, survival, and subsistence.⁵⁴ But there is a difference in kind between Shue’s basic rights and most of the additions found in the formulations of other scholars. The difference is that Shue’s basic rights are actually and temporally prior to all other rights: you have no need for freedom of speech or religion, the right to vote, or equality before the law if you lack subsistence and security, the latter being understood as physical safety. The presence of basic rights does not, therefore, depreciate all other rights: it demonstrates the interdependence of all rights and emphasizes the need for preconditions for the actualization of all others. In addition, the temporal aspect is needed to anchor rights that will develop in the future of each human being. The child needs to be safe and to subsist to *eventually* claim the right to vote, to be a citizen of a country, or to have the right not to be tortured or taken prisoner unjustly.

All other proposed bundles of rights have, within each bundle, rights that are basic in the sense that they are prior in time and absolutely required before the rest of the bundle can be claimed or even understood. This is the reason why only Shue’s interpretation of basic rights is valid, whereas all other attempts to seek a basic formulation are mixed or assume an already developed adult who is possessed of normal function, understanding and, in many cases (see for instance the language of the *International Covenant on Civil and Political Rights*), education, rather than a bare, unspecific human being. This requirement of basic rights is particularly relevant because I argue that collective rights (rather than merely communal or cultural rights), as collectives, are not limited to specific groupings, whether based on age, education, or ethnic background.

Yet Donnelly objects to Shue’s list: “If one cannot *obtain* one’s subsistence, one will die and thus be unable to enjoy any rights at all. But one can subsist without a *right* to subsistence. For example, mid-nineteenth century workers enjoyed no such right: if they were starving they could not advance

effective or even widely acknowledged subsistence claim rights, claims against the state. Nonetheless many of them subsisted and exercised a variety of (legal) rights."⁵⁵ The same argument would apply to slaves in the southern parts of the United States before emancipation: they subsisted; they had a security of sorts, as long as they pleased their masters. Therefore, the third category of freedom Shue proposes as part of his basic rights would be equally necessary for slaves and for indentured workers during the period to which Donnelly appeals. Both human dignity as empowerment and human dignity as constraint would require all three basic rights for human beings.⁵⁶ In fact, these requirements should today exist clearly for people in developing countries, who appear to lack all three basic rights in many cases.

Yet both the argument based on human dignity and the one based on agency proposed by Gewirth, which I accept, require all three basic rights. Unless individuals can procure what they need to subsist, and unless they are free from attacks on their physical or biological existence, their freedom to will, choose, and act, their essential humanity based on agency, cannot be exercised. This freedom may be there potentially, in the sense that someone who is starving and unable to think an issue through – let alone stand and, say, vote – may still have the capacity to do so once fed and recovered. But the practices (thinking, choosing, willing, doing) that are foundational to our humanity and basic to our dignity as humans can only be actualized through the presence of the basic rights listed by Shue.

One counterargument is that even those who are incapacitated, seriously ill, or comatose (thus, incapable of any human activity) still possess the dignity of being human, and this appears to be correct. But the *exercise* of all other rights requires the initial presence of the basic categories Shue proposes, although the potential ability to exercise all the other rights is, or should be, innate. Once basic rights are understood in this sense, it is easier to view their reach as collective, especially because the harms discussed above are, for the most part, collective harms.

Poisoning a person (especially when the motive for that crime is understood) or preventing a person from developing in a normal way (perhaps by depriving a child of normal nourishment) are also crimes identifiable in domestic instruments and punishable by law. In contrast, collective harmful exposures and deprivations seldom rise to the level of international law.⁵⁷ Collective harms therefore tend to go unpunished unless, perhaps, a specific community is harmed, a case can be made for the loss of cultural integrity, or a case can be made for racial discrimination of an indigenous group. The

crime still remains hard to prove, but at least there are existing legal criteria to deal with these issues to some extent, although they are still treated, at best, as torts not crimes. But no legal instrument exists to prevent such wholesale harms before they happen, for these harms often consist of an accumulation of legal hazardous exposures, the sum of which becomes the instrument of the attack on these peoples' lives and health.⁵⁸

It is worthy of note that while such an attack on indigenous people may at least be noted and studied and will, perhaps eventually, receive some form of redress, even such a limited recognition is not available to nonindigenous local populations who are similarly affected, such as the population of the Windsor-Sarnia area in Ontario, Canada, where heavy industrial pollution has grave health effects.⁵⁹

In sum, Henry Shue's understanding of basic rights best supports the development of measures to protect the preconditions of human rights presently accepted and defended in international law. In addition, this interpretation of Shue's basic rights also clarifies the connection between individual and collective rights while also supporting communitarian rights as foundational to the Kantian understanding of the dignity of human beings, universally understood and applied.

Do Collective Rights Presuppose a Constitutive Community?

The key assumptions underlying the communitarian way of thinking are twofold: first, the presence of a constitutive community and two (and related) the presence of a common good.

– Marlies Galenkamp, *Individualism versus Collectivism*

John Finnis, author of *Natural Law and Natural Rights*, holds a similar position to Marlies Galenkamp, for he relates communities to the common good: "sharing of aim rather than a multiplicity of interactions is constitutive of human groups, communities and societies."⁶⁰ This "sharing of aims" leads to the consideration of the common good. Finnis discusses "our unity in human community" in four parts, and his analysis limits community and even common good to specific societies and collectives.⁶¹ In brief, he argues that "part of our unity in human community, then, is physical and biological ... Secondly ... part of our unity in human community ... is the unity of intelligence in its capacities, its workings and its product knowledge ... Thirdly,

part of our unity in human community ... is the cultural unity of shared language, common technology and so on ... Part of our unity in human community ... is the unity of common action."⁶²

It is clear that points three and four can refer only to specific communities, and Finnis' reference to "communities of which one is a member" conforms to my understanding. However, the focus of this book – the universal collective of humankind in relation to human individual rights – is not what Finnis has in mind. Before turning to the types of communities discussed by Finnis (indigenous, local, and ethnic), this chapter explores the possibility of a common good and, in general, a commonality that can be viewed as universal or cosmopolitan in the political (Kantian) sense. I argue that only the first two aspects of community discussed by Finnis are appropriate from the perspective of this book. In fact, they are sufficient to support the development of this book's argument.

For the most part, the rights and goals of single communities are insufficient to support universal rights (excluding the traditional indigenous and local communities mentioned), and their often conflicting goals and practices need to be assessed from the universal standpoint of justice. In *Rights, Regulation and the Technological Revolution*, Roger Brownsword remarks that "in a world of global governance, no nation state is a regulatory island."⁶³ In fact, those groups that are termed societies or communities by Finnis fit better within the category Brownsword terms club cosmopolitanism.⁶⁴ As Brownsword clarifies, "By 'club cosmopolitanism' I mean a certain kind of regulatory ideal that is characteristic of a group (sometimes a trade association, sometimes a cultural club) that defines itself by reference to a set of value commitments (such as the value of access to markets and free trade, or more generally the value of freedom)." Such groups are by no means all oriented to economics or trade, for the cultural possibility that Brownsword envisages fits well within the goals and lifestyles of traditional indigenous and local communities, whose principal goal is to retain their own culture and to be allowed to transmit it to their children and future generations.⁶⁵ In contrast, the collective rights of humankind include respect for indigenous peoples' cultural integrity and their traditional lifestyles, but they are not limited by them: they strive, instead, for a universal cosmopolitanism. Brownsword defends a universal constitutive cosmopolitanism that is committed to respecting "fundamental values while, at the same time, according room and respect for legitimate local differences."⁶⁶

I propose a somewhat different approach, for I see the rights of indigenous communities as integral to a truly universal cosmopolitanism, given that the basic values recommended here as foundational start precisely with the biological integrity of individuals, which is or should be the basic right of all humans, once its role in support of the ability to think, choose, and decide (Finnis' second point) is recognized as the precondition for that ability.⁶⁷ Instead of an either/or approach to the two forms of cosmopolitanism that Brownsword envisages, I propose that universal collective rights should start with the basic values of traditional communities and extend them to all humans, regardless of their background, religion, or location and, most of all, regardless of their preferences when these basic values conflict openly with the basic general good of all.

If, as I argue, human rights that are universally defensible must be (1) basic (in the sense defended by Shue) and in support of human biological integrity, and (2) minimally dependent on ecological integrity to ensure that (3) normal development such as the human capacity to think, understand, and choose is actualized according to the potential of each human being, then the characteristic approach of traditional indigenous communities is itself basic to collective cosmopolitan rights.

Collective Rights and Cosmopolitanism

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting, it summons to duty by its commands, and averts from wrongdoing by its prohibition ... We can not be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it.

– Cicero, *De Republica*, Book 3, xxiii

In Cicero we find one of the earliest expressions of natural law after the Stoics, whose position was far less close than was Cicero's to human law and governance. At any rate, this early statement of cosmopolitanism discloses its main tenets: (1) it is based on the eternal laws of nature; (2) these laws are the basis of absolute principles, which cannot be changed either by authority (the senate) or by popular demand; and (3) our right reason is sufficient to

inform us about our obligations. This passage also implies that morality and law are not mutually exclusive.⁶⁸

Of course, the earliest expression of cosmopolitanism can be found in Diogenes “the Dog,” who originated the philosophy of the Cynics in 300 BC. Diogenes was the seeker of the wise man. He lived an ascetic life while despising the niceties of society; he praised virtue and wisdom above all and was perhaps the first conscientious objector to consumerism and the primacy of trade and economics.⁶⁹ However, Cicero believed that the law of reason was applicable primarily to lands and peoples ruled by Roman law, which would appear to limit the universality of his principles. Even so, natural law in general ensures that all human beings have rights, understood in a cosmopolitan sense, and it provides the best basis for that conclusion.

Thomas Pogge, however, views (1) individualism, together with (2) universality and (3) generality, as one of the three basic aspects of cosmopolitanism. Although the second and third postulates are compatible with the position discussed so far, the first postulate, although not wrong, appears to put a somewhat different emphasis on our present understanding of cosmopolitanism: “*Individualism*: the ultimate units of concern are human beings or persons rather than say, family lines, tribes, ethnic, cultural or religious communities, nations or states.”⁷⁰

Although it is correct to say that communities or cultural groups possess rights in virtue of the individuals of which they are composed, as Brownsword argues, it seems as though extreme individualism may run counter to the main goals of cosmopolitanism, as Pogge understands it, specifically institutional cosmopolitanism, which he contrasts to the interactional cosmopolitanism proposed by Shue.⁷¹ Pogge writes, “The institutional approach thus counts a person’s human right to physical integrity as fully satisfied if her physical integrity is reasonably secure.”⁷²

But current governance approaches already claim that persons are reasonably secure or well protected, and that claim – which has resulted in widespread harm to physical integrity, notably economic oppression, hunger, and deprivations that Pogge himself describes – is the main reason for this book.⁷³ Pogge, however, acknowledges that “our present global economic regime produces a stable pattern of widespread malnutrition and starvation among the poor (with some 20 million persons dying every year from hunger and trivial diseases), and there are likely to be feasible regimes that would not produce similarly severe deprivations.”⁷⁴

Perhaps Pogge’s argument that current global institutional settings are not favourable to human rights can be accepted, but given the monumental

difficulties involved in changing not only understandings of human rights but also global institutions, it may be best to start by clarifying obligations and trust that such a changed mindset may, in time, engender a new institutional framework for governance.

Given the “basic rights” orientation being proposed, the first step to changing mindsets is *not* to agree with Pogge’s discussion of ecology:

Now we think that this fourth reason goes beyond my institutional cosmopolitanism because there is no recognized human right to a clean environment. Why should people not be free in a degraded environment if they choose? In response, perhaps they should be, but for now they won’t have had a choice. The degradation of our natural environment ineluctably affects us all. And yet most people are effectively excluded from any say about this issue.⁷⁵

Pogge concludes that this understanding of the issue (i.e., no recognized right to a clean environment) “suggests replacing ecology with a deeper and more general fourth reason, which might be labeled ‘democracy.’”⁷⁶ Unfortunately, this replacement simply cements the present faulty regimes (with their flawed democracies) of global governance and, I would argue, runs counter to the true meaning of a natural law based on cosmopolitanism. As Cicero said, neither the senate (state governments or other institutions or nonstate actors) nor the people (democracies) can free us from the absolute moral obligations that arise from right reason.

It is for this reason that I want to propose a global understanding of basic human rights – or “morality of the depths,” as Shue terms it – that is collective.⁷⁷ Individual rights, freed from either Kantian or earlier traditional moral societies and elevated to ultimate choices without the constraints provided by moral absolutes, could certainly allow the choice (mostly present today) to live and die polluted, without respect for natural laws or for the biological integrity of others who will be affected by the so-called democratic choices we make.⁷⁸ Placing individual rights, coupled with democracy, above the absolutes of natural law does not, therefore, support cosmopolitanism; rather, it reinforces the present immoral institutions that Pogge criticizes at length. In other words, when the primacy of individual rights (particularly when combined with present democratic institutions) is not tied to a collective understanding of what constitutes a basic right for all, such that it evokes an equally basic obligation, then individual rights may or may not fit within cosmopolitan theory. The collectivity I have in mind is universal and

general, and it should include specific traditional, ethnic, or religious communities, provided their traditions are consonant with an absolute respect for the basic rights of all. In this sense, then, the existence of basic collective rights represents the limit to all democratic choices of individuals who wish to exercise and defend their rights. Finnis discusses human rights precisely in this context, and his approach is particularly relevant to the natural law perspective of cosmopolitanism.

Nevertheless, despite the present effort to turn the relationship between individual and communitarian or collective rights on its head – in a sense, negating the progress made by individuals in the affirmation of their rights from the Enlightenment on – the possibility of using the concept of collective rights in ways that is the exact opposite of what I propose exists today. For instance, after the attacks on New York on 11 September 2000, the US administration laboured steadily to promote the “collective right” of self-defence against terrorism by allowing unprovoked attacks and wars and by eliminating many well-established individual civil and political rights. This nefarious aspect of collective rights, and their use for specific purposes by various groups, is discussed in Chapter 5. Perhaps the use of collective rights by a powerful state would fit the notion of club community proposed by Brownsword. Under the guise of protecting the common good, collective rights are used to advance the specific interests of those who would promote illegal and immoral activities under the mask of protecting common human interests instead.

Collective Rights: Chosen Goods versus the Common Good

[The United Nations enumeration of rights is] simply a way of sketching the outlines of the common good, the various aspects of individual well-being in community. What the reference to rights contributes in this sketch is simply a pointed expression of what is implicit in the term “common good,” namely, that each and everyone’s well-being, in each of its basic aspects, must be considered and favoured at all times by those responsible for co-ordinating the common life.

– John Finnis, *Natural Law and Natural Rights*

Finnis’ point is to reconcile what he terms the modern manifesto – that is, Joel Feinberg’s conception of human rights – to the common good.⁷⁹ Dwight

Newman cites Finnis in his defence of moral rights held by collectivities.⁸⁰ He defines collectivities as being based on moral rights: "A collectivity is a collection of persons such that we would still identify it as the same collectivity were some or all of the persons in the collectivity to change (provided that the collectivity identify themselves in some non-trivial way as members of this collectivity)." He adds, "a moral right is an entitlement or justified claim whose justification does not depend on whether any legal or political system is willing to recognize the right."⁸¹ Moreover, Thomas Aquinas stated that a legal or political system that attempts to deviate from the common good according to natural law is not a legitimate government – that is, one that ought to be obeyed. It is, instead, a tyranny: "A tyrannical government is not just, because it is directed not to the common good, but to the private good of the ruler."⁸²

In fact, it is each citizen's obligation to rebel against such a government, for it does not follow natural law, and it seeks to impose a form of violence rather than practise lawful governance.⁸³ Thus a basic understanding of natural law and cosmopolitanism supports the difference I outline between popular or even institutional choices and rules based on the common good or public interest: natural law separates citizens' choices, even when the citizens are in democratic regimes, from the moral realm.⁸⁴ Yet the common good, or the good of collectivities, is far more than a theoretical position, for it is based on basic rights: it is therefore both a high moral ideal and the lowest common denominator among the interests shared by all humankind.⁸⁵

The common good is a high moral ideal because it is based on absolutes of morality, on principle, rather than on a specific regime or ideology. But the common good is also the lowest common ground, in the sense that basic rights do not attempt to define all the rights that correspond to the legitimate interests of all people. By remaining basic as related only to (1) the preconditions of agency and (2) the requirements of survival needed inescapably by all human beings (all of humankind, not only those who can claim developed personhood), whatever their age, location, race, religion, or ethnicity, it remains a common good for all, with no need for additional defence.

It is clear that Shue's definition of basic rights does not include all acceptable choices or disparate lifestyle preferences: it is intended to ensure that the capabilities of all agents are protected so that their eventual choices are neither pre-judged nor pre-selected. The only limit placed upon them is that any and all acceptable choices must be such that they support (or do not conflict with) the common good – that is, the good of all humankind. In a sense, they are preparatory rights, for they are intended to ensure that a specific

interest in living polluted (as per Pogge's example above) is not permitted to prevail. If such an interest were supported, it would contribute to the inability of some vulnerable agents to develop their own normal capacities for agency, possibly depriving them of any human rights whatsoever.⁸⁶

Another version of Pogge's example may be found in Joseph Raz's example of a public good: unpolluted air.⁸⁷ Raz argues that even if unpolluted air indeed represented a good for all persons, consumers and those employed by the polluting industries would have contrary interests: unanimous consent would not exist.⁸⁸ Such examples could be multiplied. It is a fact that we are globally in a dire situation because of climate change and the ecological harms that ensue, as well as the ability of corporate power to subvert the public interest. Raz's point is confirmed. For the most part, and through various methods of deceit, persuasion, and lack of interest on the part of voters, the global common interest in safe living conditions has been countered by various aggregate preferences.

Once collective interests are understood as being embodied in the common good, however, it can be argued that they not only are uncontroversial goods but are also based on absolute principles. Hence no specific regime or institution can deprive human beings of these rights and the good they represent. The common good is based on "the irreducibly collective nature of certain interests."⁸⁹ In fact, the interests of all individuals *necessarily* depend on the fulfillment of collective rights.

Neoliberalism and Globalization versus the Common Good

Delegitimization of neoliberalism takes place not only via visible crisis – like the ecological and financial one – or by means of the enormous social polarization in many countries, but in addition through the continuing conceptual and practical criticism undertaken by intellectuals, scientists and crucial media, social movements and NGOs.⁹⁰

– Ulrich Brand and Nicola Sekler, "Postneoliberalism"

We are, or should be, in the era of postneoliberalism, given the global crisis that has emerged over the last few decades. Yet the classic treatment of human rights in international law, for instance, by Jack Donnelly, paints a contrasting picture regarding "equal and inalienable rights": "Internationally recognized

human rights require a liberal regime."⁹¹ He echoes Ronald Dworkin's discussion of the government's ideal role in support of liberalism: "[governments] must not constrain liberty on the ground that one citizen's conception of the good life ... is nobler or superior to another's."⁹²

Donnelly notes that the start of human rights discourse can be traced to a "tactic of the bourgeoisie to protect its own interests," but the discourse has since extended globally to all people as "universal inalienable personal rights" continue to gain ground.⁹³ Yet if we view a specific vision of human dignity as central to the understanding of human rights and superior to modern government's choices, and if we acknowledge that Western governments were the original locus in which human rights were developed by their practices, forcing the need for human rights, then we must also accept that Western liberal governments cannot be praised for the invention of human rights. "Because," Donnelly writes, "prior to the creation of capitalist markets economies and modern nation states, the problems that human rights seek to address, the particular violations of human dignity that they seek to prevent either did not exist, or were not perceived to be central social problems."⁹⁴ But if modern markets "created the new range of threats to human dignity," and – as we know – markets are at the core of the global operation of liberalism, then it is hard to see why we should embrace the original source of the problem, and hope that that very source might be capable of yielding a solution to the problem that is created.⁹⁵

Richard Falk puts it well: "Superpowers use space and oceans to establish their earth-girdling security systems and expose the planet as a whole to enormous risks. Also, global patterns of industrialization result in disparate disproportionate claims on energy and other earth resources by non-Third World societies. As well, dangerous environmental hazards result and are 'exported' to Third World pollution sanctuaries or are 'externalized' to inflict various degrees of harm on the planet as a whole."⁹⁶ This passage illustrates particularly well the notion of mass violence, especially ecoviolence, as I term it.⁹⁷ The very notion of violence as described by Falk, and the detailed discussion in Reinhart Kössler's article especially, clearly demonstrates the collective reach of the phenomenon. It is not a specific violence directed with intent at a particular person or persons: it is a mass violence inflicted negligibly, or through wilful blindness, on persons against whom the perpetrators feel no special enmity. Still, "the infliction of violence is deemed to be humiliation for the victim ... He is palpably placed in a position of inferiority in terms of physical power, bodily integrity and also moral worth."⁹⁸ The results of the

infliction of violence on a grand scale via environmental degradation “exported” to developing countries (or simply to nonwhites and other minorities in Western countries) are a manifestation of an obvious arrogance, for the racially discriminatory activities of neocolonial powers assume and, in fact, demonstrate their own superiority as the bodily integrity of aliens is attacked and their moral worth is brought into question, not in words but through actions that say “you are not like us,” you are not worthy of the same respect for your human dignity.

It bears repeating: the common good, the general interest of humankind, is not and should not be limited to the wish fulfillment of the most powerful. True cosmopolitanism is all-inclusive; it is about the basic rights of everyone. Specific communities and individuals must measure their interests, hence their rights, according to this golden standard: are their wants and needs such that they can be extended to the total collectivity of humankind? It is not my intention to create two categories – the moral haves and the moral have-nots – but unless a principled position supports the interests, say, of a specific community, that community will not be part of the moral collectivity that is intended to expect at least support for life on earth.

Perhaps this position runs counter to the modern liberal attitude of complete tolerance, even respect, for all choices. But the basic question remains: will preferences x (foundational to a community as cx) or choice y on the part of another community (cy) be such that they do not negate or eliminate any basic aspect of the common good? But if cx or cy preferences are such that they impose grave harms on the human collectivity through the environment, or from their actualization, then the latter cannot be defended on cosmopolitan grounds, for it is only a limited group that benefits, while the common good is under threat.

It is only when the effects of certain communities’ choices, or those of powerful aggregates, reflect and engender wide-reaching harms that we need to understand those choices as placing the community or aggregate beyond the moral community. And only groups or aggregates can produce the envisaged harms: a single individual cannot pollute on a grand scale or undertake projects that spell disaster for other communities or regions, thus committing crimes against humanity or even genocide. Hence a dumbing down of the common good, reducing it simply to the most popular choices of the majority, will not do.

If this approach seems to take too high a moral road and to depreciate democracy in the process, review the results of neoliberalism since the end

of classic colonization. As Jacques Depelchin, for instance, describes it, neo-liberalism is the origin of "global warming, global pauperization, global de-humanization."⁹⁹ Nor is genocide as defined by the *Convention Against Genocide* and as codified by the jurisprudence of the International Court of Justice the result of an occasional deranged individual or regime.¹⁰⁰ The phenomenon is increasingly visible today, from Congo to Darfur to Palestine, although it is, technically, still limited by the intent requirement.¹⁰¹

THE PUBLIC GOOD AND STATE STEWARDSHIP: BEYOND CONSENT?

Let me focus on and contrast just two ethics – one prioritizing private rights, the other the public good: one prioritizing the autonomy of individuals, the other the good of the community; one putting a premium on informed consent, the other largely discounting or dispensing with consent, informed or otherwise.

– Roger Brownsword, "Rights, Responsibility, and Stewardship"

Theoretically, it is possible to contrast a community of rights based on the individual agency of persons, in the Gewirthian sense, and the public good, if one understands the latter in purely utilitarian terms. But if the understanding of the public good defended here is re-examined, it is clear that public good is the expression of the basic rights of the collectivity or the general and ecological conditions required to ensure that all persons are able to develop normally and reach the status of thinking and willing agents without impediment. With this understanding, the difference between the public good and a community of rights based on individual agency appears blurred for two main reasons. First, the conditions that define the basic public good are applicable to a whole collectivity rather than simply to an individual's basic right as an agent. Safe ecological conditions cannot be provided only to one person's habitat, but they are necessarily general to whole areas or regions. When these conditions are present, each person will develop normally, as is their (individual) right. But the preconditions of that development and of their agency can only be present in a general way or not at all: they cannot be limited to one person and his or her rights. Second, the good of the community, from this perspective, is not a separate goal; therefore, it cannot be considered in opposition to the community of rights envisaged by Brownsword.

An example may be useful. Assume that a corporation obtains a “legal” consent for an operation that will benefit it first, as well as its shareholders and the bureaucracy or government of the country for which its activities are planned. Assume that one or more of the local people would consent for personal reasons (such as the promise of a job). Even then, if the operation is such that it would affect the normal development of people in the community and produce neurotoxic effluents to the detriment of not only present individuals but also those not yet born, then all the legal consents combined cannot possibly justify the irreversible attacks on the collectivity, regardless of whether they are deliberate or unintended.¹⁰²

Essentially, the very respect and primacy due to the individual agency of everyone in the moral community would require the primacy of the common good. The latter would demand that hazardous activities be eliminated, despite the legality of these activities and the presence of consent on the part of both officials and of some of the persons put at risk by the activities. Yet it would be difficult to call such a decision utilitarian, given that it is based on respect for individual agency and freedom from harm rather than on the aggregate utility, without consideration of those who benefit and those who do not.

Kant himself says one cannot be moral and consent to sell or give away one’s humanity – that is, individual agency and life. Neither selling oneself into slavery nor selling one’s organs is permissible. No doubt, giving away one’s ability to be fully human in several senses would not be consistent with the moral community’s mandate of respect.¹⁰³ In such situations, the importance of the state’s obligation to protect its citizens cannot be overstated. Brownsword writes: “It is arguable that rights-holders need to make some allowance for the State’s responsibility as steward for the community or, more precisely as steward for those essential conditions without which the community cannot survive or function.”¹⁰⁴ In fact, it should be mandatory for states to factor the recently researched scientific aspects of any and all operations they are prepared to license or otherwise permit into their regulatory framework, for the protection of the life and health of all citizens is their responsibility, not that of the industries in question.¹⁰⁵

If one remains within the ambit of the moral community of rights, and if one accepts human agency as a fundamental justification for such rights, then one must also consider how the effects of chemical and other industrial exposures will affect the capacity of humans to be part of that moral community.¹⁰⁶ Deryck Beyleveld and Roger Brownsword are explicit on this point, for they recognize the existence of partial agents: “Apparent partial agents are

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