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Reasons for Justice, Rights and  
Future Generations

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## **Abstract**

This article focuses on some very “fundamental threats” to future generations’ leaving, and considers whether most essential interests of future persons not to be harmed can be construed as rights, and in particular as human rights, as much as present persons’. The framework refers essentially to a conceptual grammar of justice. Moreover, it is suggested to articulate rights through the lens of “disposability” and “non-disposability” principles. Finally, the article shows the reasons for separating what we owe to future persons under the challenge of those threats for humanity, i.e. a matter of justice, from our right to hand down our cultural heritage, and eventually from paternalistic imposition upon future generations of our irreversible choices (even eu-genetic pre-design of future persons identity).

## **Keywords**

Law – Justice – Rights – Legal Philosophy – Moral Philosophy

**Summary:**

1. Introduction: reason and history, law and moral reasons.
2. Distance in time, fundamental threats and justice.
3. Justice and reason.
4. The issue of rights for future generations.
5. Intervention and principles of disposability.
6. Non disposability of the future and the critical case of liberal (eu)genetics.

## *Reasons for Justice, Rights and Future Generations*

Gianluigi Palombella

### 1. Introduction. Reason and history, law and moral reasons.

Future generations are the beneficiaries of the heritage of the past, which simply forms part of their present. We are not born in a state of nature, we cannot choose the culture and material civilisation we inherit. As Karl Marx wrote in the “18 Brumaire of Louis Napoleon”, the tradition of all dead generations weighs like a nightmare on the brains of the living<sup>1</sup>. Great scholars of the “science of history”, such as Vico<sup>2</sup> or Dilthey<sup>3</sup>, testify, however, that this *condition humaine* is not our curse, but our natural *quality*: history and its related contingencies are a *source* of autonomy and freedom: the historical animal finds itself in someone else's script, but this is exactly the reason why it can write its own part of history. This is how it is possible to distinguish, by contrast, the *stillness* and the immobility of nature.

This concept of history resurfaces only vaguely in modern tradition of reason and morale, from Bacon to Hume, to Kant. Kant's reliance upon the inscrutable plans of nature when he makes reference to future generations means in fact that they end up beyond the scope of our justice commitments<sup>4</sup>, in the hands of providence. They escape the control of reason, which in turn suffers the sense of history and claims its own universality, since it cannot be affected by contingency, space and time.

However, it is indeed this 'limit', this character of reason, that enables to 'imagine' future generations. It allows us, beyond the historical sentiment or the empathy for our descendants, to the pursuit of moral reasons, to raise issues of justice that transcends both our historical sentiment and our rhetoric of solidarity.

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<sup>1</sup> The complete sentence, at the starting of the I chapter, is as follows: “Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living”. See it in the translation by Daniel De Leon, in Project Gutenberg, On Line Books Page, at <http://digital.library.upenn.edu/webbin/gutbook/>

<sup>2</sup> G. B. Vico, *The New Science*, transl. by Thomas Goddard Bergin and Max Harold Fisch, Ithaca, Cornell Un. Press, 1984. .

<sup>3</sup> W. Dilthey, *The Formation of the Historical World in the Human Sciences*, ed. with an introduction, by Rudolf A. Makkreel and Frithjof Rodi, Princeton, N.J. : Princeton University Press, 2002.

<sup>4</sup> I. Kant, *Idea for a Universal History from a Cosmopolitan Point of View* (1784), transl. by Lewis White Beck, in Id., *On History*, Indianapolis, The Bobbs-Merrill Co., 1963, Eighth Thesis.

The "Declaration on the responsibilities of the present generations towards future generations"<sup>5</sup>, expresses this "responsibility" both as a precondition and an objective<sup>6</sup>. A number of normative documents highlight the extent of such responsibilities<sup>7</sup>. International law takes future generations into account in the many provisions concerning the protection of the environment and of human rights, so much so that one might think, as Richard Falk wrote, that the rights of future generations have reached the 'status of international law customary rules'<sup>8</sup>.

Behind a general convergence towards the dignity of human beings and future generations<sup>9</sup>, we are still uncertain about the ground and the *moral status* of such a responsibility.

Of course, if we do not want to deal with the normative issue of justifications, we might prefer to rely on factual circumstances, without asking questions of justice: human beings have repeatedly shown that they have a stable, 'natural' impulse to protect future generations. As Richard Epstein<sup>10</sup> wrote, a *genetic connection* induces us to protect them. It is certainly what evolutionary biologist Richard Dawkins defines a *genetic interest*, a 'selfish gene' that tends to be widespread in the natural world and that ensures the survival of our DNA<sup>11</sup>.

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<sup>5</sup> 29<sup>th</sup> session of the "General Conference of the United Nations Educational, Scientific and Cultural Organisation" meeting in Paris from 21 October to 12 November 1997.

<sup>6</sup> «Mindful of the will of the peoples, set out solemnly in the Charter of the United Nations, to 'save succeeding generations from the scourge of war' (...) Concerned by the fate of future generations in the face of the vital challenges of the next millennium, \ Conscious that, at this point in history, the very existence of humankind and its environment are threatened, (...) Asserting the necessity for establishing new, equitable and global links of partnership and intragenerational solidarity, \ Recalling that the responsibilities of the present generations towards future generations have already been referred to in various instruments (...) \ Bearing in mind that the fate of future generations depends to a great extent on decisions and actions taken today, and that present-day problems, including poverty, technological and material underdevelopment, unemployment, exclusion, discrimination and threats to the environment, must be solved in the interests of both present and future generations, \ Convinced that there is a moral obligation to formulate behavioural guidelines for the present generations within a broad, future-oriented perspective (...)».

<sup>7</sup> Lastly, the European Constitutional Treaty says, in the Preamble: "Convinced that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope"; art. 1-3 affirms that "(the European Union) shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child". In the preamble, Part II, the Chart of Rights proclaims: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations". Art. II-97 concerning Environmental Protection: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

<sup>8</sup> R. Falk, *Human Rights Horizons. The Pursuit of Justice in a Globalized World*, New York- London 2000, p.193.

<sup>9</sup> Article 3 of the Unesco Declaration, entitled "Maintenance and perpetuation of human kind", states: "The present generations should strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person. Consequently, the nature and form of human life must not be undermined in any way whatsoever".

<sup>10</sup> Richard Epstein, *Justice Across the Generations*, in Peter Laslett, James S. Fishkin (eds.), *Justice Between Age Groups and Generations*, New Haven 1992, p. 89.

<sup>11</sup> Richard Dawkins, *The Selfish Gene*, II ed., Oxford- New York 1989, pp. 19-20; Richard Dawkins, *River out of Eden : a Darwinian View of Life*, London 1995, p. 105. See Shorge Sato, *Sustainable Development and*

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

On the other hand, the defining traits of our responsibility are vague. In the next pages, I will analyse the issue of whether there are, in fact, issues of justice. I do not intend to provide a conclusive analysis, but only to recall some of the problems and confront them with some of the possible, plausible solutions. I shall put forward three main ideas: first of all, that it is possible, although not necessary or 'exclusive', to define our responsibility towards future generations by justifying it in terms of rights; secondly, our thinking can profit from two guiding principles, which I call the principle of disposability of the present and of non-disposability of (other people's) future; thirdly, the issue of justice has its own defining features and helps to refrain from the ethical *paternalism* that leads us to impose some of our choices upon our descendants. As regard the first point, I build on the general premise I developed elsewhere according to which rights are concerning the interests of individuals which are recognized as a reason for our responsibilities<sup>12</sup>. In treating the idea of *future generations'* rights, though, I share and recall some views of Ahron Adam Bruhl's article<sup>13</sup>, as far as they opted for the "interest theory" of rights as the best suited to address future generations and defend the rights' theory against objections resulting from the s.c. "non-identity" problem (essentially by separating the two concepts of "well being" of a person and the wrongful act of harming someone's right). This line of reasoning is nonetheless here adopted within a slightly different framework: I focus on some very fundamental threats to future generations' leaving, and consider the right of future persons that their most essential interests not be harmed as a basic human right: the latter in turn cannot be considered structurally nor morally divisible from that of the present persons. The framework therefore refers essentially to a conceptual grammar of justice. As regard the second point, the disposability and non-disposability principles I suggest are defined in order to make available a first general criterion for us to respect future persons' human rights. As regard the third point, I essentially separate what we owe to future persons under the challenge of those threats for humanity, i.e. a matter of justice, from our right to hand down our cultural heritage, and eventually from paternalistic (if not worse) imposition upon future generations of our irreversible choices. In the same vein, I will also refer to Juergen Habermas's reflections on the eu-genetic design of future persons.

## **2. Distance in time, fundamental threats and justice**

**2.1.** The importance of the issue of justice within the framework of our historical sentiment or our biological interests can be better understood if we analyse the issue of the time *extent* of our responsibility. Up to when does it have to extend itself? Although we admit our responsibilities towards our descendants, when it comes to future generations, we tend to

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*the Selfish Gene: A Rational Paradigm for Achieving Intergenerational Equity*, in "New York University Envtl. Law Journal", (503), 2003, pp. 503-30.

<sup>12</sup> In my, *L'autorità dei diritti*, Roma-Bari 2002.

<sup>13</sup> The article deals as well with other questions which are not addressed here. See Aaron-Andrew P. Bruhl, *Justice Unconceived: How Posterity has Rights*, 14, "Yale Journal of Law and the Humanities", Summer 2002, 393

believe that our influence is uncertain and that it decreases *proportionally* to the time distance that separates us from them. This hypothesis is clearly untrue. History and biology may not be sufficiently helpful when the fate of generations that are hundreds of years away is involved. We must take into account, at least, our capacity to generate *irreversible situations*<sup>14</sup>. The immense distance in time does not hamper our capacity to condition the future (though it may seem far), on the contrary, it even renders this capacity more evident and dramatic. If in the Pleistocene native Americans had not caused the extinction of certain mammals, the course of Incas civilisation, 12,000 years later, might have been different<sup>15</sup>: at least if it is true, as Jared Diamond wrote, that the easy victory by Pizarro, the Spanish conquistador, in 1532, was favoured by bacteria, diseases, horses, steel weapons and vessels<sup>16</sup>.

In general, our influence over the future goes far beyond our close descendants; today, in particular, it manifests itself in three fundamental threats for mankind: the risk of pervasive and catastrophic environmental damage caused by global warming, the greenhouse effect and the depletion of the ozone layer; the risk of mass extinctions or massacres, going as far as the annihilation of our civilisation, due to the desertification caused by nuclear energy; the alienating development of bioengineering and genetic manipulation or the creation of an artificial man<sup>17</sup>. An acknowledgment of these fundamental threats does not only provide a final answer to the issue of the time extent of our responsibility, but it also defines the most concrete starting point from which we can discuss the issue of future generations.

**2.2.** These three fundamental challenges lead us first of all to face the problem of the minimum we owe, in moral terms, to human beings : a matter of *justice*, which places itself prior to ethics and before its borders, if we assume that ethics incorporates the values and visions of the “good”, related to our different perceptions of posterity, of the public good, of private happiness and so forth. These challenges are priority issues, concerning the elementary respect for human beings as such. Indeed, the point is not whether something is good or acceptable in our scale of values, but whether it is fair towards other human beings, even when they belong to generations that do not exist yet; it is not a question of whether something is demanded by our philosophies of the good, but regardless of the controversies they generate, of whether it is necessary in terms of justice, whatever doctrine of virtue or happiness we assume today. Indeed, it is not a problem considered urgent only in a given cultural environment<sup>18</sup>, but it is an issue that concerns the very existence of mankind itself or the 'dignity' of its members.

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<sup>14</sup> With reference to the risk of irreversibility, its catastrophic consequences, the principle of precaution see, see most recently Cass Sunstein, *Irreversible and Catastrophic*, 91 Cornell Law Review, (841), May, 2006. With reference to the "Catastrophic Harm Precautionary Principle", see *ivi*, p. 846.

<sup>15</sup> Theodore P. Seto, *Intergenerational Decision Making: An Evolutionary Perspective*, 35, Loyola of Los Angeles Law Review, November, 2001 (235), pp. 238 ff.

<sup>16</sup> Cf. Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies*, New York (Norton & C.) 1997 (the author won the Pulitzer Prize with this book, in the general non-fiction category, in 1998).

<sup>17</sup> These are threats discussed by F. Cerutti, in his book *Global Challenges for Leviathan*, *forth.* 2007.

<sup>18</sup> We could apply a distinction similar to Michael Ignatieff's with reference to the ethically neutral nature of human rights. See. M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton 2001: “Human rights are universal, not in the sense of being a vernacular of cultural prescriptions, but rather as a language for the bestowal of moral power. Their role is not that of endowing culture with a substantive content but of seeking to condition all actors in such a way that they can liberally fashion that content” (p. 75).

Hence, my view is evidently prescriptive and my basic assumption is that issues of justice have a status that differs from that of the values defining our personal happiness: they imply taking the others into account with the duty of abstaining from injustice, and involve thresholds of equilibrium and reasons for respect, whose distinguishability from ethical issues (in their strictest meaning) follows an uninterrupted path from Aristotle to Kant's pure practical reason, to Mill's harm principle, to John Rawls' priority of the right, to Ronald Dworkin's equal concern and respect, just to mention a few examples.

However, it is not sufficient to declare that future generations have rights to a decent life, because what should be proven in the first place is indeed *if* they have rights. Even the general discourse of the respect to which human beings are entitled risks failing because of certain characteristics that distinguish future generations from present ones, first of all their *invisibility*, or rather their current *non existence*. It is not sufficient to invoke a general concept of intergenerational equality when we talk, for example, about the danger of global heating<sup>19</sup>, because the point is under which circumstances and with which means future generations could play the hypothetical role of accusers of present generations, since the latter have equally urgent and vital needs. Nor it is sufficient to invoke the issue in purely generic terms: many people are willing to admit that we have moral ties, in terms of beneficence<sup>20</sup> or solidarity towards future generations, but not in terms of 'justice'.

While beneficence or solidarity are ethical sentiments and depend upon the totally free and variable choices and purposes we set for ourselves, acts of justice cannot depend on our preferences, but should be able to prevail over them as well. While solidarity or beneficence presuppose a particular willingness, justice implies necessarily an obligation; while ethical-political choices range within several possible alternatives at our disposal, issues of justice are not at our disposal. In conclusion, I will therefore support the thesis that, through this perspective, fundamental issues concerning future generations are by us “non-disposable” issues.

### **3. Justice and reason**

Issues of justice are independent upon our contingent interests. Ideal deciders who find themselves in the procedural condition of the original position, as defined by John Rawls, behave as rational beings and are driven by their own interest: although their personal motivations are self-interested, the state of deciders in the original position impose a fair concern for each and all persons, since personal interests cannot be known in advance and therefore are not in a condition to prevail. The pursuit and arguments of justice do not depend on our *de facto* interests, but rather on the respect we pay both to our interests and to those of others (in procedural terms, this means we should not be able to know how *our* interests may differ from *those of others*). In this situation, Rawls acknowledges that the issue is not reaching a 'consensus'<sup>21</sup> and in fact there is nothing to negotiate<sup>22</sup>, but it is rather a

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<sup>19</sup> There is a rich literature available on the subject.. See, for example, James Wood, *Intergenerational Equity and Climate Change*, 8, “Georgetown. International Env'tl. Law Review”, 293 (it contains also a definition of the greenhouse effect and illustrates the thesis according to which future generations must be entitled to be *represented* in court and at negotiating tables when protocols for environmental protection are under discussion).

<sup>20</sup> For example, H.T. Engelhardt Jr. (*The Foundations of Bioethics*, Second Edition, New York-Oxford 1996, pp. 109-110) believes that this is an attitude that cannot be imposed, because the others are entitled neither to beneficence, nor to solidarity, which cannot be numbered among justice issues.

<sup>21</sup> J. Rawls, *Justice as Fairness : A Restatement*, Erin Kelly ed., Cambridge 2001, pp. 16-17.

matter of identifying rational principles, taking common intuitions into account (the so-called 'reflective equilibrium'<sup>23</sup>).

Rawls dealt relatively marginally with the issue of future generations<sup>24</sup>. In order to take our sense of common *responsibility* towards future generations into account, Rawls integrates the original position theory with the assumption that individuals do know that they are contemporaries, but they do not know to which generation they belong, as well as with the principle that each generation 'saves something' in order to preserve future generations, according to the criteria or measure that individuals of the same generation would like the previous ones to have followed<sup>25</sup>. It is therefore a mental experiment that *shapes and justifies* our beliefs. The extent of *just saving* can be determined in different ways, according to the different stages of economic development. This principle relates essentially to primary goods, given its dependence upon Rawls' central thesis of justice that sees the equal distribution of primary goods as freedoms, opportunities and standards of *self-respect* as well as the non equal distribution of income and wealth, if it benefits those who are less favoured<sup>26</sup>.

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

Indeed, evidence that the recourse to rational and justice justifications, in all their forms, is already a kind of 'virtuous' choice as such, is highlighted by the fact that the principle of time irrelevance does not depend in itself on Rawls' 'contractarianism': also in moral utilitarianist theories, such as Giuliano Pontara's, this is a fundamental element. Indeed, it was the teaching of Henry Sidgwick<sup>27</sup> to exclude that 'the time when a person exists' can play a moral role as far as questions of general happiness are concerned.

The moral irrelevance of the futureness of generations is also supported by common intuitions, which always integrate theories in confirming our reasoning. If we trigger a bomb that will only explode in thirty years' time, this does not mean that we are less responsible towards the children who will be hit by the explosion, even though they are not born or known to us at the time being. Rawls wrote that the simple position in time gives

<sup>22</sup> Also G. Pontara, *Etica generazioni future*, Bari 1995, pp. 77 ff.

<sup>23</sup> John Rawls, *A Theory of Justice*, Oxford (rev. ed.) 1999, p. 18 e Id., *Political Liberalism*, New York (Columbia University Press) 1996, p. 8

<sup>24</sup> Rawls, *A Theory of Justice*, cit., § 44 (and pp. 251-8).

<sup>25</sup> J. Rawls, *Justice as Fairness*, cit. p. 160. And J. Rawls, *The Basic Structure as Subject*, in A.L. Goldman e J. Kim (eds.), *Values and Morals*, Dordrecht 1978, pp. 58-9. Rawls reaches this conclusion not in his first analysis of the intergenerational problem, illustrated in *Theory of Justice* of 1971 (see *Theory of Justice*, cit., p. 254), but subsequently.

<sup>26</sup> In any case, these theses do not make reference so much to each individual's fate, but to the way in which the social structure must be organised, which means that *fairness* is to be referred to the role of institutions. Rawls' two principles of justice were reformulated in the essay *The Basic Liberties and their Priority*, Tanners Lectures on Human Values, vol. III, Salt Lake City (University of Utah Press), 1982 and developed in *Political Liberalism*, cit., "lesson 1".

<sup>27</sup> H. Sidgwick, *The Methods of Ethics*, New York, 1907, p. 381 and G. Pontara, *Etica e generazioni future*, cit., pp. 36-7.

no reason to prefer a given moment to another<sup>28</sup>. Therefore, if it is true that the time of birth is only a haphazard, then this event cannot *exclude or even limit* our responsibility on the argument that the latter should decrease with the growth of the distance between us and future generations.

Economists do resort to the concept of decreasing responsibility to distribute and define our commitments towards future generations for reasons of equity, so as to reduce the burden of our present sacrifices to the benefit of those who will only live in a distant future: we create a balance between our current sacrifices and the subsequent benefits for future generations by defining a 'discount rate' proportional to the time distance<sup>29</sup>. But a distinction *must* be made: if *futureness* does not relieve us from our responsibilities, which sacrifices, which means, which limitations to our lives must be chosen from time to time remains an open issue: it is a matter of means, indeed, of task sharing, which however must be distinguished from, and does not affect at all the responsibility assumption.

Justice cannot be subordinated to differences based on the time when each of us lives and therefore it must be considered independently from it. This does not mean that we can ignore the many problems raised by the time distance of future generations, but it shows that we should face such issues by assuming that the entitlement of future generations to justice cannot be different from ours and cannot lead us to exclude them from what applies to us, just because of their "futureness".

We should, as Brian Barry wrote, be aware of the fact that what we do for future generations does not represent optional benevolence on our part, but is demanded by elementary considerations of justice<sup>30</sup>.

#### **4. The issue of rights for future generations**

**4.1.** According to Thomas Jefferson a generation has no *right* to bind the succeeding generation to its laws, because each generation has the *right* to define their own laws autonomously, without depending on a people of dead; each generation should recognise a *self-evident truth*: "that the earth belongs in usufruct to the living": consuming that usufruct means depriving future generations of their share of natural resources, something that no authority or right of other people can justify. In the same way, forcing them to pay a long

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<sup>28</sup> Rawls, *Theory of Justice*, cit. p. 420. See also *ivi*, p. 294: "There is no reason for the parties to give any weight to mere position in time.(... ) Although any decision has to be made now, there is no ground for their using today's discount of the future rather than the future's discount of today. The situation is symmetrical and one choice is as arbitrary as the other."

<sup>29</sup> Coleman Bazelon, Kent Smetters, *Discounting in the long Term*, in "Loyola of Los Angeles Law Review", November, 2001, 207, p. 207: "Discounting addresses the problem of translating values from one time period to another. The larger the discount rate, the more weight an analyst places on costs and benefits in the near term over costs and benefits in the future. When evaluating policies that span generations, choosing a discount rate can have an overwhelming effect on the analysis. That choice, in turn, reflects the analyst's beliefs about the distant future" . See also Paul R. Portney & John P. Weyant (eds.), *Discounting and Intergenerational Equity*, Washington DC (Resources for the Future) 1999.

<sup>30</sup> "It is surely at least something to be able to assure those who spend their days trying to gain support for measures intended to improve the prospects of future generations that such measures do not represent optional benevolence on our part, but are demanded by elementary considerations of justice" (Brian Barry, *Sustainability and Intergenerational Justice*, in Andrew Dobson ed., *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice*, Oxford, OUP, 1999, p.117).

term debt would be an unacceptable 'taxation without representation'<sup>31</sup>. Madison was against urging people to change the constitution and replied that future generations had a *title* that can extend to the earth in its natural state only: this same right did not extend to man-made resources and to all the improvements enjoyed by future generations. Since long-term debts as well are often incurred for the benefits of posterity, it seemed sensible to Madison that they should not exceed the extent of improvements made by the previous generation.

This correspondence contains some elements that are essential to illustrate our issue: the matter of the rights of posterity on natural resources, the autonomy of each generation from the paternalism of previous generations, the equity of the relationship between the living and future generations with reference to 'debts' and 'improvements' received.

Can we therefore assume that the issues of justice may be settled in terms of rights? First of all it is necessary to clarify that rights are mainly relevant to *justify* what we owe to future generations. We could assume, for example, that some global common goods have a value in themselves, which implies contingent and *consequent* obligations towards future generations. In this case, the underlying concept is that it is our *duty* that justifies our responsibility. However, our duty may have many justifications, which might not coincide with, and not depend upon the fact that others have a right to it. Indeed, as Onora O'Neill<sup>32</sup> wrote, our ethics is impoverished by our exclusive focus on rights and it misses most of its traditional contents. Raz also insisted upon our duties, our common values and a 'pluralistic' ethics<sup>33</sup>. Such a plurality also depends on the fact that there are *duties*, such as the respect for goods we see as values in themselves, which are not matched by other people's corresponding rights<sup>34</sup>. After all, there is no risk of logical inconsistency in presuming that our moral life is richer than it would be if it depended exclusively on a single reference centre and that it is animated by values, ethical duties (in a word by a plurality of inspirations) that are not exclusively referable to the single pillar of our and other peoples' *rights*<sup>35</sup>.

Although this is true<sup>36</sup>, a plural, not reductionist ethics does not exclude justifications relating to rights, although it is *not* monopolised by them. Even where a *correlativity* relation is visible, it is not impossible to tell where someone's *rights* justify someone else's obligations, thereby reducing these latter to an instrument of effectiveness (and not to the foundation or reason of such a relation), rather than the opposite. The reason why we must assist our children, wrote Neil MacCormick<sup>37</sup>, is simply that it would be unfair to deny to them what they are entitled to: they have a right to be assisted by adults and that right is the reason why adults have an obligation to assist them.

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<sup>31</sup> See Thomas Jefferson's letter to James Madison of September, 6 1789 (from Paris) and Madison's letter to Jefferson of February, 4 1790. (In *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826*, James Morton Smith ed., New York and London (Norton & Company, Inc.) 1995.

<sup>32</sup> See O. O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, Cambridge CUP, 1996, pp. 136-53.

<sup>33</sup> J. Raz, *The Morality of Freedom*, Oxford, (OUP), 1986, pp. 193-216.

<sup>34</sup> J. Raz, *Right-based Morality*, in J. Waldron (ed.), *Theories of Rights*, Oxford (1984)1995, VII ed, p 195.

<sup>35</sup> See J. Raz, *Right-based Morality*, cit., p 182.

<sup>36</sup> I supported a moral not reductionist view in my article *Dei diritti e della loro relazione ai doveri e ai fini comuni*, in Aa. Vv., *Filosofia del diritto*, a cura di U. Pomarici, Torino 2007.

<sup>37</sup> N. MacCormick, *Children's Rights: A Test Case for Theories of Rights*, "Archiv für Rechts- und Sozialphilosophie", 62.,1976, p. 313.

One may infer from this that the existence of such right is not affected by the fact that nonetheless controversies legitimately arise about which obligations should follow and by whom they should be fulfilled.

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

A first general remark is that rights protect people's choices and so entitle them to receive benefits that correspond to their actual interests: therefore the identification of interests appears both an indispensable and a *non existent* precondition in case of future persons: whose preferences and needs are unknown to us. A possible reply to this concern is that when human rights - seen as primary goods for the survival of human beings - are at stake and therefore the question relates to the three above-mentioned threats, it should be evident that future persons' interests are identifiable, *in principle*, because their *essential* nature precedes the exercise of the faculty of choice and it is an elementary condition for creating values, as well as a precondition for defining any further interest.

From this viewpoint, also the objection that the attribution of rights to future generations is a form of ethical paternalism is not acceptable: of course, choosing the interests of future generations is in principle a paternalistic attitude if it reduces their faculty of choice by arbitrarily attributing specific interests to future persons<sup>38</sup>. With reference to the three fundamental threats and their direct effect on the elementary conditions for human survival, granting 'human' rights to future generations cannot presuppose any ethical paternalism, since it expresses, rather, the opposite option, i.e. the concern not to violate, as far as possible, those same rights that safeguard the essential preconditions for exercising the faculty of 'agency' and based on which it is possible to speak an ethical language, define preferences, interests and values.

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<sup>38</sup> According to J. S. Mill the ruling principle which prevents us from "paternalism" is the following: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. (...) the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (J. S. Mill, *On Liberty*, in Id., *Utilitarianism and On Liberty*, (ed. by M. Warnock), London 1962, p. 135. See also the discussion on John Stuart Mill anti-paternalist position by G. Dworkin, *Paternalism*, in "The Monist", 56, n. 1 (1972), pp. 64-84..

Many believe, moreover,<sup>39</sup> that speaking of rights is not appropriate, that future generations cannot have rights now (strictly speaking) but only when (and if) they come into existence, and that even if they could be entitled to rights, they would be unable to exercise them: this would make such rights empty and senseless. Eventually, even if we admitted that they do have rights, certainly these rights would not be provided with any judicial protection.

However, this is in contrast with the common intuition mentioned before: according to the above principle of time irrelevance, there should be no difference, from a moral viewpoint, if the individuals in question exist now or in a hundred years' time. And again, the current unavailability of judicial protection is never considered a sufficient reason to deny that all persons have a right not to be tortured, even though they are still unable to protect themselves<sup>40</sup>. We normally presume that even individuals who cannot claim their rights autonomously are entitled to them, such as certain categories of disabled, children or insane subjects. In these cases, we admit that other people may seek judicial protection on their behalf. Therefore claiming that future generations cannot have rights because they cannot invoke them against us in court is not a conclusive argument. There are many ways for them and their interests to be represented to day, as it really happens, say, in some international agreements. And fairly so: conversely, in fact, we are actually able to put future persons in danger, on a planet so different that it would be almost impossible to live in, if compared to the conditions enjoyed by the previous generations on earth.

**4.2.** More generally, the issue of the rights of future generations is related predominantly to the *conception* of rights we support: what does having a right mean? Certain definitions of rights are incompatible with the hypothesis that future generations may be entitled to them. Let us think, for example, of one of the theories of rights that derives from the natural law doctrine of 1600 and 1700; rights are defined through the paradigm of the 'sovereignty of the will' of its holder: a definition centred upon the freedom and power to act in order to safeguard one's interests, according to the logic that characterises private law, at its peak of modern development. Another example is that of the choice or will theory, supported by Herbert Hart over the past few decades. In a way generally considered illuminating, Wesley Hohfeld had written<sup>41</sup> that the term 'right' refers in fact to one or more individual positions (and relations) (claim, liberty or privilege, power and immunity), or groupings of atomic relations, thereby contributing to clarify the general notion of individual rights. Hart, on the contrary, focussed on the unifying element that characterise rights, something that cannot be traced back to one or more of the relations analysed by Hohfeld and that represents the deep meaning or the *raison d'être* of rights themselves. In this way, he could identify the *rationale* of having a right in the fact that the holder of a right is in a position to have the control and the choice over the juridical situations that are connectable to rights, in particular, “over another person's duty so that in the area of conduct covered by that duty

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<sup>39</sup> See H. Jonas, *Das Prinzip Verantwortung*, Frankfurt am M. (Suhrkamp) 1984, esp. pp. 47-56; pp. 84-106 and *passim*. R. Nozick, *Anarchy, State, Utopia*, Oxford 1974: on “entitlements”, pp. 150 ff. and the chapter on “Distributive Justice”, pp. 150-231 (in the former responsibility tends to replace limitations of responsibility that would derive from the logic of rights; in the latter, the unconditional disposability, of what we are entitled to, preclude all obligations not to consume it to the benefit of posterity).

<sup>40</sup> Pontara shares this same view, *op. cit.*, pp. 95 ff.

<sup>41</sup> W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. by W.W. Cook (1919) reprint, New Haven, CT (Yale University Press) 1964.

the individual who has the right is a small-scale sovereign to whom the duty is owed”<sup>42</sup>. Naturally, considering the holder of a right as an individual endowed with power to decide, and thus a sort of small-scale sovereign, means relating the same idea of rights to the affirmation - and to the exercise - of autonomy. From this viewpoint, the rights that future persons have (towards us) appear inadmissible. Attributing rights to future generations cannot mean granting a decisional and choice power on our corresponding behaviours<sup>43</sup>. This is exactly the conceptual path that seems to be denied by the insurmountability of a ‘natural’ obstacle.

Since it is all too evident that future generation cannot have rights *in this sense*, this same limitation correctly eliminates any plausibility - if we exclude merely rhetorical ones - to the formula of the ‘pact between generations’, a contract between us and our descendants. What is hidden here is an undeclared paternalism, which presupposes an autonomy that presently does not exist. The idea itself of a ‘pact between generations’ (which is even unconceivable with reference to remote generations) recalls a wrong and misleading category of rights: those created by bilateral relations. The (possible) rights of future generations are rather those that are *not* created by contract and are therefore not negotiable between the parties.

On the other hand, coming back to Hartian theory, Hart admitted, without hesitation, that his thesis is not all inclusive, since it cannot encompass rights related to primary human needs, human rights or more in general, fundamental rights. The same primary goods to which Jefferson and Madison made reference to possessed this essential characteristic, although their conceptual categories were modelled through reference to ‘proprietary’ rights and related notions. Therefore, we need more suitable tools.

However, several theories of rights could be used to overcome the difficulties encountered by referring to the criterion of autonomy and to rights as ‘choice’ (or will).

**4.3.** In the European continental area<sup>44</sup>, the theory of law developed by Rudolf von Jhering shifted the focus on *interests protected* by the legal order. This traditional conception can be connected, albeit with highly innovative elaborations, to the theses that state that when we recognise a right - especially rights considered as priorities in our constitutional systems - we intend to protect a good, or an interest attributed to individuals, safeguarded by the legal order not only through the acknowledgement of fixed claims and of corresponding obligations, but also through a range of evolving individual active or passive positions, which allow for an evolutionary protection or implementation of that interest and the

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<sup>42</sup> H. L. A. Hart, *Legal Rights*, in Id., *Essays on Bentham. Studies in Jurisprudence and Political Theory*, Oxford (Clarendon Press) 1982, pp. 183-4. See also, *Are there any Natural Rights?*, in J. Waldron (ed.) *Theories of Rights*, cit., p. 82..

<sup>43</sup> From this specific view point, assumption does not change also if we take Hans Kelsen's pure theory into account. A similar shortcoming can be found in Hans Kelsen insisting upon reducing individual rights to their technical and legal characteristics, to what he calls the subjectivation of law with reference to individual rights. Such subjectivation consists in identifying the holder of a right as the person who can express the will to bring a legal action to claim the fulfilment of a corresponding obligation (H. Kelsen, *General Theory of Law and State* (1945), transl. by Anders Wedberg, New York (Russell & Russell) 1961, p. 83 ).

<sup>44</sup> See R. Orestano, *Diritti soggettivi e diritti senza soggetto. Linee di una vicenda concettuale*, in “Jus”, 1960 XI, fasc. II , pp. 149-196 and also Id., *Azione, Diritti soggettivi, Persone giuridiche*, Bologna, 1978.

achievement of that “good”. This thesis is defined in the terms of a 'dynamic conception'<sup>45</sup> and was developed by Joseph Raz and Neil MacCormick<sup>46</sup>. The idea of fundamental rights itself<sup>47</sup> becomes a principle of “optimisation” under circumstances relevant from time to time, as writes Robert Alexy (in the context of the German system)<sup>48</sup>. In other words: the interest we are talking about concerns “goods” granted to individuals that relate not only to their autonomy and their freedom of choice, as Hart highlighted, but also to any other substantial good of an economic or social nature<sup>49</sup>.

Giving up the belief that rights are “only” a recognition of autonomy cleans the way to the idea that rights exceed the capacity of their holder to decide about other people's obligations or to claim legal protection. This evidently leads to an extension of the concept, which does not exclude at all the possibility that future generations' fundamental interests may be vested into rights<sup>50</sup>. As far as the adequacy of the *Interest Theory* as a theoretical reference for the “rights” of future generations is concerned, it can be said that the “Interest Theory separates rights from powers of enforcement, clearing the way for the attribution of rights to beings unable or un-authorized to press their own case. Just as children and the insane can have representatives enforce their rights for them, so can future persons”<sup>51</sup>. It also becomes clear that some basic rights legally ought to be protected, through corresponding obligations or subsidiary guarantees which should be dynamically open, i.e. not necessarily those doctrinally defined once and for all in advance<sup>52</sup>. Rights are often expressed in terms of norms of principle that identify an interest or a category of goods and subjects, without necessarily defining the rules of fulfilment, or the individual relations that should enable the concrete safeguard of that interest, or the primary guarantees (the corresponding obligations) or the auxiliary guarantees (the legal remedies). This situation emerges in many of the so-called fundamental rights. From this point of view, it also applies to cases where law itself somehow affirms future generations' rights: their interest does not necessarily correspond once and for all to certain predefined

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<sup>45</sup> See the article by B. Celano, *I diritti nella Jurisprudenza anglosassone contemporanea, da Hart a Raz*, in “Analisi e diritto”, 1, Torino 2002, pp. 1-58. Among other useful reconstructions, which also introduce series of fundamental essays on rights, see: Carlos Nino, *Introduction a C.Nino* (ed.), *Rights*, Aldershot 1992, pp. xi-xxxiv; J.Waldron, *Introduction to J. Waldron* (ed.), *Theories of Rights*, Oxford (1984)1995, VII ed, pp. 1-20; R. West, *Introduction: Revitalizing Rights*, in R. West (ed.), *Rights*, Aldershot 2001, pp. xi-xxxi;

<sup>46</sup> J. Raz, *Legal Rights* (1984), in Id., *Ethics in the Public Domain*, Oxford (Clarendon Press) 1994 and also J. Raz, *The Morality of Freedom*, Oxford (Clarendon Press)1986, cap. 7. N. MacCormick, *Children's Rights: A Test Case for Theories of Rights*, “Archiv für Rechts- und Sozialphilosophie”, 62, p. 1976.

<sup>47</sup> I have developed a conception of fundamental rights in terms that I consider “dynamic” and related to the “good” that they safeguard, in my book *L'autorità dei diritti*, cit. .

<sup>48</sup> R. Alexy, *A Theory of Constitutional Rights* (1986), translated by J. Rivers, Oxford 2002.

<sup>49</sup> N. MacCormick, *Taking the “Rights Thesis” Seriously*, in Id., *Legal Right and Social Democracy*, Oxford 1982, p. 145 and pp. 148 ff. MacCormick, *Children's Rights: A Test Case for Theories of Rights*, cit. pp. 309 ff., pp. 313 ff.

<sup>50</sup> The application of the “dynamic” theory of rights to address the rights of future generations is made by Aaron-Andrew P. Bruhl, *Justice Unconceived: How Posterity has Rights*, cit., p. 393.

<sup>51</sup> Aaron-Andrew P. Bruhl, *Justice Unconceived: How Posterity has Rights*, cit., p. 425.

<sup>52</sup> As Celano aptly wrote, *op. cit.*, p.49: “Per stabilire se sussiste un diritto, o in che cosa consista un diritto, dunque, occorrerà, tipicamente, costruire o vagliare nessi giustificativi (argomenti sostanziali). Chi adotti la concezione dinamica tenderà a proporre o valutare (quanto alla loro coerenza o ragionevolezza) ipotesi di giustificazione di certi diritti (o insiemi di diritti), o delle loro implicazioni. La concezione dinamica è, sotto questo aspetto, solidale con un profondo mutamento quanto al fuoco privilegiato dell'indagine in tema di diritti, e all'approccio teorico praticato (...): dal perseguimento di indagini di carattere analitico-concettuale al perseguimento di indagini su questioni sostanziali, affrontate da un punto di vista normativo.”

obligations, nor is it the subject who bears that obligation identified in advance - if not in merely abstract terms. This does not mean, however, that future generations *cannot* have interests (and therefore rights) in juridical terms.

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

4.4. However, although no apparent obstacle exists from the point of view of a general definition of rights, there are other hindrances external to such definitions. A classic problem, raised with unprecedented clarity by Derek Parfit, refers to the non-identity of subjects. Whoever comes into existence does only exist because the generations that preceded her made certain choices, which affected her conception and determined her identity. Those choices do not enrich or deprive a 'presupposed' individual of anything, but create 'another' person. With different choices, there would be other individuals and other identities. This prevents us from assuming that we can *worsen* the fate of someone (individually taken), who otherwise would simply not exist<sup>53</sup>: future victims of the depletion of resources could only exist in *this* way; therefore we cannot violate their rights to live in different conditions (even if we assumed that they have such a right) because future persons *would not be there nor be themselves* under different conditions. Protecting future persons from the genetic consequences of radioactive waste, or conceiving persons who are as healthy as possible, neither means safeguarding the right of a person nor not harming it, but simply leads to the creation of 'other' individuals.

The argument is evidently disarming, although it cannot be discussed thoroughly in this essay. We can recollect the idea that human beings have a right to a life that is *worth living* and that we would deprive them of something if we gave birth to persons in conditions of degradation or diseases and disabilities in which their rights (under the conditions that have emerged) cannot be safeguarded. This idea<sup>54</sup> points to our *responsibilities* towards the

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<sup>53</sup> D. Parfit, *Reasons and Persons*, Oxford (OUP), 1984, chap. 4; and esp., pp. 351-79 .

<sup>54</sup> For the concept that there are (would be) persons created whose rights cannot be protected, see M. Tooley, *Abortion and Infanticide*, New York (OUP) 1984. As far as Parfit is concerned, see James Woodward, 'The Non-Identity Problem,' in "Ethics" 96, 1986, pp. 804-831.; Id., *Reply to Parfit*, in "Ethics" 97, 1987, pp. 800-816. Of the many issues relating to this problem, I would mention those dealt with by Dan W. Brock, *The Non-identity Problem and Genetic Wrongful Handicaps*, in "Bioethics", 9, 1995, pp. 269-275. and Id., 'Reproductive Freedom and the Prevention of Harm,' in Allen Buchanan, Dan W. Brock, Norman Winkler, *From Chance to Choice: Genetics and Justice*, ch. 6, Cambridge (CUP), 2001. Melinda A. Roberts, *Child Versus Childmaker: Future Persons and Present Duties in Ethics and the Law*, Lanham Mar. (Rowman & Littlefield Publ.) 1998.

generations that come immediately after us<sup>55</sup>. As far as my consideration of justice is concerned, focus should be shifted in order to include far away generations as well<sup>56</sup>.

Evidently, as Aaron-Andrew P. Bruhl points out, the issue of non identity refers to the *overall wellbeing* of persons, which we cannot worsen (given the non identity notion, we cannot worsen the overall life of someone who will otherwise not exist). Therefore, we can only compare life obtained to the alternative of non existence. Through these examples, we end up neglecting, in fact, the foundation of our common intuition: the fact that we can harm persons, even if they will come to life in the future<sup>57</sup>.

The right not to be harmed can be seen as independent upon any assessment of the ability of someone's behaviour to worsen our *overall wellbeing*: A right does not concern a general and unidentifiable, elusive "whole" like the wellbeing of a person, but rather a specific interest or good<sup>58</sup>. The safeguard of a right, hence the unlawfulness of a specific harm, are such regardless of the fact that others can consider the harm irrelevant for the harmed person, or not existent, when they deem it incapable of worsening the overall well-being of that person taken as a whole.

In any case, it may be true that a final theory, capable of resisting objections, cannot be formulated, as Parfit himself was aware of. I suggest we should analyse facts from the viewpoint of present generations: future persons have a right to prevent us from behaving in such a way as to cause the desertification of the planet, eliminating resources that as human beings they are equally entitled to, or causing genetic harm to them, without this being subordinated on our (paternalistic) assessment of the possible worsening of their overall well-being<sup>59</sup>.

The issue of justice does not relate to the ethical appreciation of what is good for someone, of what is preferable in life and of the conditions in which a life worth-living fulfils itself:

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<sup>55</sup> The problem is addressed also by G. Pontara, *Etica e generazioni future*, cit., with reference to the contrast between theories of rights and Parfit's objections.

<sup>56</sup> The same problem is recalled in G. Pontara, *Etica e generazioni future* cit., and in A.-A. P. Bruhl, *Justice Unconceived*, cit. See generally the essays included in R. I. Sikora and B. Barry, *Obligations to Future Generations*, Philadelphia (Temple University Press) 1978, and esp. the essay by M. Warren, *Do Potential People Have Moral Rights?*, *ivi*, pp. 14-30.

<sup>57</sup> With reference to a conception made despite the certainty that the child would be seriously disabled, see P.J. Markie, *Nonidentity, Wrongful Conception and Harmless Wrongs*, in "Ratio" (new series), XVIII, 3 September 2005, pp. 302-3: "In wrongful conception cases, the necessary connection between the mother's action and the son's existence keeps her act from being straightforwardly harmful. It is not the case that if she had acted differently, his life would have been substantially better. Yet, her act still harms him obliquely by creating a wrong that makes him worse off. If he had not been disabled and lacking in opportunities, his life would have been substantially better".

<sup>58</sup> As A.-A. P. Bruhl wrote in *Justice Unconceived*, cit., pp. 418-19. Although we could not harm a future person's life, we harm a specific good he possesses: and this is intuitively convincing. If the owner of a factory pollutes the river, and years after owing to industrial pollution, an individual, Carl, is conceived with genetic damage, although we cannot say we caused any harm to 'his' being - which could only be what it is - he has received a harm by the wrongful act of the owner: "Carl's right that the owner not act in the proscribed manner is separate from any evaluation of Carl's overall well-being (if such a thing exists)" (*ivi*, p. 421).

<sup>59</sup> I do not think that these theses are necessarily incontrovertible; however, many other theories are as relatively weak or prone to objections as the rights theory. Pontara concludes, like Parfit, that the problem of non-identity does not allow to speak in terms of rights. He also rejects Parfit's suggestion to replacing the focus on harm and person with that on the comparison between the real and the ideal situation in which mankind and its environment should find themselves (see Pontara, *Etica e generazioni future*, cit., pp. 103-147).

these issues, concerning the evaluation of an overall well being, “good life”, are naturally dependent upon legitimately different evaluations, therefore if they were imposed upon somebody, they would be, in turn, a source of injustice. Likewise, the relation between generations (seen in terms of justice) should focus on the minimum elements of a universal definition of what we owe to human beings, both present and future, and should aim at limiting, as much as possible, the paternalism that marks all efforts to determine which values are important and what is good *being* for future persons. The issue at stake, instead, is only what we have the obligation to do, because future persons have an essential right to receive it from us. I therefore agree that “we cannot know future persons' interests in much detail at all, which can make representation more difficult. Instead, we have to fall back on the most general knowledge about what is usually good for humans, much as we do in the case of infants”<sup>60</sup>. This answer can be considered a general guideline.

**4.5.** My next remark concerns the plausibility of attributing rights on goods that can only be enjoyed collectively. The 'goods' we are talking about specifically relate to the three threats to humanity I mentioned previously: global warming, nuclear desertification, the genetic manipulation/creation of human beings. This issue also concerns so-called third-generation rights, which include beyond civil, social and political rights, peace, environment and development rights. It was said that no right is to be attributed on goods that cannot be enjoyed individually, since they have a common nature in which every person participate in an indistinguishable manner, thereby rendering impossible the identification of a portion of those goods that can be attributed separately to each individual, regardless of whether it is clean air, or the culture of a tolerant society<sup>61</sup>.

However, it is perfectly plausible that certain goods can be considered a right for individuals, because despite the fact that they are public and not merely private, they are of interest for each individual and can therefore be expressed in terms that relate to this,<sup>62</sup> as the *foundation* of the value of those goods and therefore of their protection: although the only way to guarantee this right is to defend a public good (and notwithstanding, as a consequence, the special forms of jurisdictional safeguard to be provided for).

Jeremy Waldron believes that public goods as such can be the object of a right, even if admittedly protecting them for a single person means protecting it for all individuals collectively. But *other* goods, that he calls “communal”, cannot. The latter can be enjoyed and produced only by human beings taken as a group, and never separately. Their *rationale*, hence their value as goods, transcends the simple aggregation of individual interests and cannot be broken down into or reduced to them: the benefit of a tolerant society, for example (that according to Raz is a public good), or solidarity or fraternity: goods “whose nature and value make sense only on the assumption that others are enjoying and participating in it too”<sup>63</sup>. Peace can also be added to the list of “communal goods” exactly for the same reasons. Waldron, however, is not certain, instead, that other so-called third generation rights mentioned above, such as development and the environment, should be

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<sup>60</sup> Aaron Andrei Bruhl, *Justice Unconceived*, cit., p. 426.

<sup>61</sup> Clean air is a public good of the this kind according to N. MacCormick, *Rights in Legislation*, in P. M. S. Hacker, J. Raz (eds.), *Law, Morality and Society*, Clarendon Press, Oxford 1977; as it is a tolerant society according to Joseph Raz, *Right-based Morality*, in Waldron (ed.), *Theories of Rights*, cit.

<sup>62</sup> See J. Waldron, *Can Communal Goods be Human Rights?*, in Id., *Liberal Rights*, Cambridge 1998<sup>2</sup>, pp. 339-369.

<sup>63</sup> Ivi, p. 358.

considered “communal goods” and not “public goods”. In the first case, they could only be seen as rights for groups (such as language, cultural tradition, etc.), in the second case they could be considered, strictly speaking, human rights, which can be directly attributed to single individuals.

On the contrary, Edith Brown Weiss believes that there are “planetary rights”, which can be referred to the time relation between generations using natural and cultural resources<sup>64</sup>: it is a *patrimony* not owned by any specific person (whose interests would remain in any case unknown to us), but that belongs to each generation collectively considered: of course this does not exclude that the collective patrimony may contain goods that can be enjoyed separately and individually.

Therefore, if at least some goods that have a public or planetary nature can be subject to rights, then it is necessary to define whether such rights must be attributed to future generations collectively or to each future person individually. I think that the issue of justice towards future generations would better be seen not in terms of rights for future generations as a group, but rather as rights of the individual persons belonging to those generations. The subject we are analysing, i.e. justice towards future generations, presupposes in any case that *there will be future generations*; therefore it deals neither with the opportunity nor with the possibility that such generations do not come into existence, an issue that has caused, in turn, further controversies. Since there will be in any case *persons* belonging to future generations, the threats posed by the impoverishment of basic and human resources to their survival relate to goods that, despite their planetary nature and evident “public” character, are intimately related to individuals as direct interests. The fact that for both logical, justice, universalisation reasons, individuals’ rights to a worth-living planet simultaneously concern also *each other member of mankind* does not exclude their nature as individual rights: this simply depends on the fact that they are human rights, i.e. rights that in legal documents, in the common conception and in moral theories, are attributed by definition to all those who bear the characteristics assumed as identifying a “human being”.

## 5. Intervention and principles of disposability

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

Relevant choices, of course, are both those “irresponsible” ones- focussing only on the present and not taking future consequences into account - and those resulting from our care of future generations. The second group of choices may also be unfair, especially if they end up imposing to future generations consequences they cannot reverse or reject.

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

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<sup>64</sup> E. Brown Weiss, *In Fairness to Future Generations*, Tokyo- New York 1992<sup>2</sup>, pp. 95 ff.

by the prevalent contemporary ethics. The *puzzle* of preserving the cultural heritage of mankind certainly depends upon the limit that our society must respect when passing over its ethical, political, cultural and social goods. Our influence over the future provides future generations with all that represents *our* ideas of the good: however, the logic of this *beneficial* vision remains a delicate issue; for example, it does not resist the objection that among the “beneficial” attitudes conveying the values and cultural present choices to future generations one may *also* include the cannon shots with which the Talebans destroyed the ancient testimonies of previous civilisations. In this case as well, apparently, the conviction emerges that it is our own notion of the good that deserves to survive, despite the fact that evidently it contrasts with the general idea of preserving at best the natural and cultural heritage of mankind. Normally, we follow or should follow the criterion that our choices conveying ethics, cultures and traditions to future generations are always admissible, albeit inevitable, unless they generate irreversible consequences: in these cases, to say it in a few words, we should abstain.

**5.2.** The history and theory of modern constitutionalism taught us to which extent paternalism and the predetermination of future raise recurrent perplexities. Even the pretension of modern constitutions to impose themselves as foundations for the social life of generations of far future reveals its weakness when the autonomy of living beings is considered. Indeed, the case of the *constitutional legacy* represents and simulates certain difficulties<sup>65</sup> of intergenerational justice itself. Why should we be bound by the norms dictated by the dead? Even more complex is the question of what entitles us, the living, to impose a predefined ethical pattern as well as our specific choices upon generations to come. The correspondence between Jefferson and Madison I mentioned before in relation to the right to change the constitution, at each generation, is often reduced to the oxymoron that opposes constitutionalism to democracy, symbolically represented by the paradox of Ulysses' self-binding in the sea of sirens<sup>66</sup>. This constitutional “precommitment” is indeed a preventive commitment that tends to stand firm also when future preferences change; it can be seen as a strategy aimed at preventing something deemed very similar to a sort of self-destruction. However, the reversible and inviolable ways in which future generations can exercise the constituent power remain always available: even though they must duly respect the constitutional legacy, nonetheless if a constitution was perceived as an undue limitation, the reversibility and violability of legal norms would certainly not deprive future generations of their power over it.

This stresses even more clearly the harm caused, instead, by our *irreversible* choices; it highlights the meaning and the dramatic importance of the fundamental challenges we have discussed so far. Compared to fundamental challenges, the constitutional one finds itself on a completely different level that *does not relate to justice* and does not affect the level where I placed the intergenerational relation. It remains an issue related to ethics and political choices, not to the violation of justice. The constitutional legacy is not *a wrongful act* towards posterity. One thing is to transmit a series of “norms” and values, an ethic and a notion of

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<sup>65</sup> I dealt with this issue in my book *Costituzione e sovranità. Il senso della democrazia costituzionale*, Bari (Dedalo), 1997.

<sup>66</sup> Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality*, Cambridge (CUP), 1979 (rev. ed. 1984) and with reference to the problems and the paradoxes of the “precommitment” implicit in the constitutional discourse, also Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago- London 1995, and Id., *Precommitment and the Paradox of Democracy*, in *Constitutionalism and Democracy* (Jon Elster & Rune Slagstad eds.), Cambridge 1988.

good life through a constitutional structure and history, another thing is to degrade *irreversibly* the conditions for the survival of future generations on the planet. *This* is an issue of justice: no ethical *proposal* is made: instead, our descendants are deprived of the conditions for survival or of the essential autonomy in their preferences. Justice does not concern a debate about which value conditions should be seen as the core of one's existence, but it rather deals with the integrity of what some human beings cannot deprive others of.

The obligation we, the descendants, have to take seriously the fundamental charter we received from our predecessors is the consequence of an ethical-political appreciation of the intrinsic value of our predecessors' achievements. That obligation, however, can only make the possible exercise of our inalienable right to change it even more cautious, specifically in our interest. It is indeed the reversible character of legal norms- which separates them from the inalterable laws of nature- that reassures about the impossibility for us to violate through the constitutional legacies the rights of future generations. The issue of justice emerges, instead, with reference to the threat to hand over to our descendants a world degraded beyond any possibility of recovery and to deprive our descendants of elementary life conditions and opportunities forever.

**5.3.** We could deal with the characters of our actions aimed at conditioning the future by making reference to two principles, which I propose to call the principle of the *disposability of one's present* and the principle of the *non disposability of (other people's) future*, in the reasonable forms they may assume from time to time.

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

Of course, this does not mean at all that all problems are solved. The disposability of the present is in fact a relative concept, for which no trans-temporal control parameters can be used. Each generation has the disposability of the present it received by chance. This principle risks being redundant: after all, it is not clear what it means to have or not to have the disposability of one's present, unless reference is made to the non disposability of a completely hypothetical or ideal present that we assume should have become reality.

However, when we speak of the nuclear threat, of global warming and of genetic manipulation, such threats have a potential that transcends the problem of the variable and disputable quality of a given present in which future generations will live. It is rather a radical doubt about the essential and elementary possibility to live, about the conditions of residual species on the planet. The principle of disposability of the present does not demand, in this case, that a particular ideal “present” should be ensured and measured from time to time according to a series of subjective variables, just like it does not presuppose a metaphysical notion of any other present that did not materialize. There could be individuals born in conditions aberrant to our notion of natural living of human

beings on the planet: such a notion incorporates an open relation between human life and nature's potential, it implies standards of eco-compatibility that were shaped by the evolution of world's own laws, over the past thousands of years.

Since the principle of the disposability of the present is not conditioned by time, it can be universalised and it prescribes that each generation should dispose of its present. This principle may reveal its weakness for the fact that any generation *has* the disposability of a present, *whatever it is*. Indeed, as we have already stressed, it is essentially counterintuitive to claim that a world threatened by the catastrophe of *global warming* or by the effects of nuclear disasters is such that “one can dispose of it”. I believe that it is correct to assume that, here, the principle of the disposability of the present is radically violated.

## **6. Non disposability of the future and the critical case of liberal eugenetics**

The risk of creating an artificial man possesses specific traits in comparison to the other threats to mankind. The discussion stirred by Habermas a few years ago in an essay on the future of human nature can help us at least to define the terms of the problem and possibly to test the principle of disposability as described before, as well as the hypothesis of the foundation of justice towards future generations on the basis of their rights as members.

If a eugenic programme was launched, the programmer's and parents' intentions would transfer themselves heavily on the life of a new individual, thereby oppressing the essential, uncontrollable "casual" innovation capacity of nature. Imposing a "historical" stratagem over the intrinsic innovative capacity of nature means to cross the threshold that prevents the past from continuing in a pre-determined fashion in the free future that should belong to someone<sup>67</sup>. The programming individual imposes her intentions upon the life history of one of her peers<sup>68</sup> and her intervention causes irreversible effects: these are unilateral acts where no reciprocity or expression of autonomous equality is possible, nor is it possible the “social elaboration” that each person makes with regard to normal interfering factors, social or environmental circumstances in which she is thrown and that shapes indeed a person's life after her birth. Asymmetry between the powers attributed to the protagonists, the programming subjects, and the individuals who are the "object" of programming, emerges as the reason to assess and rethink the meaning of a unilateral intervention over future individuals. The point is that someone else becomes the *co-author* of a person's life since, as Juergen Habermas writes, life is subtracted to the contingency of its initial conditions. This prevents each person from being retrospectively in a position to assume “the *sole* responsibility of her own life”<sup>69</sup>. In this case, the “deontological shell” that protects the inviolability of the personal sphere would be entered into. An issue of moral control over our biotechnological practices also emerges.

In defending his thesis, which is deeply critical towards the possibility of liberal and “positive eugenetics” (and in reply to Dworkin and Nagel), Habermas stresses that the issue is not how to *free* the decisions of *parents* from binding and oppressive regulations, but rather how to defend individuals and their fundamental rights from their peers. It is the issue of the effect of fundamental rights on third parties, of their horizontal effectiveness, not simply of their importance as a vertical limit for state powers. However, individuals' right not to suffer acts of eugenic predetermination (beyond the therapeutic prevention

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<sup>67</sup> J. Habermas, *The Future of Human Nature*, Cambridge (Polity Press), 2003, pp. 58 ff.

<sup>68</sup> Ivi, p. 60.

<sup>69</sup> Ivi, p. 82.

of malformations *et similia*) on the part of parents faces an obstacle close to the problem of non-identity, which also resurfaces under different terms in Habermas' discourse: "Of course, parents' rights to determine genetic features of their children would only conflict with the basic rights of another person if the in vitro embryo were already 'another', who possessed completely valid basic rights"<sup>70</sup>. However even if that genetic intervention "would not harm the rights of an existing person", nonetheless, would "risk to reduce the status of a future one"<sup>71</sup>.

It is difficult to understand precisely how to identify this specific harm that affects the status of a future person and to determine whether it concerns or not an individual's hypothetical rights. Habermas makes reference to the "external or alien determination of the natural and mental constitution of a *future* person, prior to an entry into the moral community. Intervention into the prenatal distribution of genetic resources means a redefinition of those naturally fixed ranges of opportunities and scope for possible decision within which the future person will one day use her freedom to give her own life its ethical shape"<sup>72</sup>.

Reducing "the status of a future person" is a vague expression: it probably indicates the belief (in this case Habermas') according to which if it was not for the fact that the embryo is not still conceived as an existing person, genetic manipulation should certainly be considered a violation of its rights. However, if one can conceive an infringement of the "non-dependence on others", committed through genetic manipulation, the fact that it is a person "only existing in the future" does not prevent us from speaking either of harm or of responsibility: the time factor in itself does not exclude the responsibility for violating someone else's right and even though the subject and the object of the "programming" cannot co-exist at the same time, this is not a reason for excluding that one can violate the rights of someone who will come into existence at a subsequent time.

The problem is, in this case, whether it is actually a harmed good, whether the fact that someone pre-calculated and planned the mix of genetic possibilities represents a damage in itself and what is the object of the damage.

Indeed, since nobody has the faculty to dispose of her own origins and genome, no one can deprive us of it. This faculty does not exist and cannot be numbered among those protected by the principle that safeguards each of us as to the disposability of our present. However, given this "non disposability", under which justification should other people dispose of someone else's origins?

Habermas claims that if someone else redefines my 'genetic margins', he arbitrarily decides the ontological limits of my being and of my being able to be and to do, thereby depriving me of the range of alternative *chances* from a genetic point of view that are (scientifically) counted among the possibilities offered at the origin. The harm to the status of a future person is not, however, receiving a genetic patrimony that differs from the hypothetical one he would have got by chance, but the impossibility for that person, aware and adult, to trace his identity only back to his own choices and no one else's. Although its central claim is not the violation of a right, Habermas critical attitude towards liberal genetics ends up to the conviction that in any case pre-personal human life must be treated as *non disposable*. There is evidently a negative obligation towards it that, regardless of other people's rights,

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<sup>70</sup> Ivi, p. 77.

<sup>71</sup> Ibid.

<sup>72</sup> Ivi, p. 79.

risers on the ground that the contingency of our origin and the integrity- independence of self have an intrinsic value.

At any rate, it should be noted that both these 'goods' can be harmed, also with reference to a person that will only exist in the future. From the point of view of existing persons, the non disposability of the contingency of one's own origins can be perceived as a presupposed right: the right to the contingency of origins is in the patrimony of persons and of species. Someone else's intervention to take us away from that contingency is only exceptionally justifiable; otherwise it remains the expression of ethical paternalism, generically motivated by the alleged purpose of a supposed *elevation* of the genome: however apart from the therapeutical intervention (regardless of how controversial are its limits), no other purpose should be imposed by us upon others and therefore be able to prevail over the non disposability of the origins or on the "right" to one's own "contingency" and independence in being the sole author of one's self. The principle of non disposability of (other people's) future can define as a sort of frontier, together with the independence from other individuals. In this frame, artificial intervention represents an insidious form of ethical paternalism. However, the discourse on the nature of this good and on the limits to artificial intervention through genetic biotechnologies cannot have a unambiguous conclusion yet.

## **7. Conclusion**

In these pages I supported the view that when issues of justice towards future generations are involved, the intentions and visions of the good of previous generations should not prevail. Issues of justice, in the meaning explained, should not be overlooked nor eliminated. They are not in the disposability of democracies and should be granted a non disputable legal protection. If we see our relation with future generations in terms of human rights, then issues of justice shall get protection against the prevalence of other principles, against the contingencies of value choices and the powers of political majorities. If the safeguard of future generations is seen simply as a matter of solidarity or care for fellow human beings, then it would compete, in a position of weakness, with all other expectations of happiness on the part of the *contemporaries*. If we think that future individuals are holders of rights, our obligations towards them are not abstractly lower or higher than the ones we have towards our contemporaries. Understandably, the relevant reference applies in this case only to *human rights* and not to other conceptual and historical categories of liberties, powers, entitlements and rights that legal orders provide for living human beings. Of course, it does not support the idea of considering human rights of future generations more important than those of present generations. Rather, it defines mankind as an *indivisible* whole, in which the past and the future affect priorities and forms of intervention, but not the substantial elements of our responsibilities. In this way, however, we succeed in extending the minimum content of human rights not only to the present, but also to the future: it is an effect provoked by their rational universality, because since they refer to the whole of mankind, they cannot be discriminated against, from a moral viewpoint, for 'time' reasons.