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SITUATING JUSTICE IN THE ENVIRONMENT: THE CASE OF BHP AT THE OK TEDI COPPER MINE

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Introduction

The rubric of sustainable development has now gained wide theoretical and political acceptance in the global community (Blowers, 1993). But so far agreement has only been secured around a very loose notion of sustainability, and there remains a considerable divergence of political and theoretical opinion concerning how the (seemingly) conflicting demands of ecology and social development are to be reconciled in the variety of existing national contexts (Breheny, 1992). The Rio Declaration and Agenda 21 (1992) certainly provided a broad set of political principles that are intended to guide the global community in its task of ensuring ecological and social sustainability. However, after Rio, each nation must now confront the specific question of how to decide between those industries and activities that are sustainable and those that are not, when conflicting social and ecological interests are at stake. Deciding such matters inevitably raises the prospect of changing both the use and allocation of social and ecological resources. Any fundamental change to resource allocation will have social distributional consequences (Stretton, 1976), and the issue of justice therefore becomes a critical element of any sustainability formulation. If sustainability demands, inter alia, altering human social development to secure its ecological footing, then it must be recognized that this change will impinge upon the social distribution of environmental

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well-being both within and among nations. Some theorists and policy activists (especially in the United States) have referred to this specific political–ethical question as one of *environmental justice* (Sarokin and Shulkin, 1994).

In recent years there has been growing debate within a range of social science (e.g., Brechin and Kempton, 1994; Capek, 1993; Harvey, 1996; Heiman, 1996; Lake, 1996; Low and Gleeson, 1997; Pulido, 1994, 1996) and public policy (e.g., Boerner and Lambert, 1995; Cooper and Palmer, 1995; Doherty and de Geus, 1996) literature around the political and theoretical dimensions of environmental justice. This paper contributes to this debate by exploring the potential for a politically grounded theory of justice in and to the environment. Our goal is to not to provide a definitive statement on environmental justice, but rather to indicate the importance of contextualization as a starting point for an integrated ecological ethics. More specifically, we argue for a situated analysis that nevertheless retains the postulate of a neo-Kantian universal ethic as the foundation for global institutions that could integrate and safeguard the principles of justice and ecological responsibility underpinning most notions of sustainability.

In the first section we explain our point of departure from understandings of environmental ethics that presuppose a global ontological framework. Our argument is that broad and inclusive visions of environmental justice are possible, though always open to new political challenges and shifts in the arrangement of human societies and in environments themselves. However, our point of departure from most versions of "big picture" ethics is to insist that frameworks for justice are to be found in examples of actual environmental conflicts rather than in discourses that purport to fix political–ethical outlooks through the abstract contemplation of moral issues. We show this by locating the question of justice in a particular conflict of interest, that between the Australian mining giant Broken Hill Proprietary, Ltd. (BHP) and the traditional landowners of an area on the Ok Tedi river in Papua New Guinea (PNG). In the second section we use this empirical context to confront the problem of universality versus culture-bound conceptions of justice. We explicate the dialectics of justice and the need to allow such dialectical debate to occur and to result in decisive outcomes. Finally, we address the question of the need for global institutions of governance that would permit such a development.

A Point of Departure

Let us first clarify what we mean by environmental justice. Setting aside for the moment the question of the nature of justice, let us consider how to use the term in connection with the environment. There are two ways in which this connection is commonly made. First, it is made with reference

to the distribution of environmental quality. Some people enjoy healthy and beautiful environments; others suffer hazardous, filthy, and ugly environments. The question arises of who deserves, who has a right to, who needs what environment. This usage is an extension of distributional justice with a particular spatial component. Geographers have for many years argued about geographical justice or spatial equity (Smith, 1979). The environmental justice movement in the United Staates has defined its concerns in this way (Heiman, 1996; Sarokin and Schulkin, 1994). The connection between social justice and local environments has been the subject of debate at least since the mid-nineteenth century, and the struggle to rectify the environmental injustices of cities of the Industrial Revolution inspired the founders of the town-planning movement (e.g., Hall, 1988; Hayden, 1982; Howard, 1946). So environmental justice is about the distribution of environments to humans.

The second way in which the connection between justice and the environment is made is in ethical debates about the relationship between humans and the rest of the natural world. This is not fundamentally a spatial question except in the obvious sense that all beings are extended in space. It is the question raised by many different strands of ecological thought. Singer (1975, 1979) and Regan (1983), for example, discuss animal rights; Naess (1989) discusses in ethical terms the place of humans in ecological systems. As Hayward's (1994) discussion of "rights and justice in ecological perspective" makes clear, questions of ecological justice arise when we reconsider what it means to be human in the light of ecological thought. In contradistinction to *environmental justice*, we will use the term *ecological justice* to refer to this connection. In an earlier paper (Low and Gleeson, 1997), we made the distinction in terms of justice *in* and justice *to* the environment. The former refers to environmental justice, the latter to ecological justice.

Many texts on environmental ethics begin by posing questions that assume a societal, or even global, frame. These "big questions" commonly address the capacity of the earth's resources to support its human population, the capacity of the biosphere to absorb human wastes, the rapidly increasing rate of extinction of non-human species, the exploitation of the environment of the poorer nations to maintain the lifestyle of the richer, the systematic discounting of the interests of unborn generations, the massive injury to the forests and seas, the industrial use of animals. Against these observations are counterposed abstract ethical formulations (e.g., Callicott, 1985; Drengson, 1980; Fox, 1990; Hardin, 1968; Naess, 1989). Conclusions are then drawn about the kind of society and morality we have to develop to prevent these things happening: the society of "our common future" (Brundtland Report, 1987).

Ultimately, our political and environmental ethics must address this "big picture" because so many ecological and social problems have a systemic or structural basis. We need political–ethical frameworks that can

help humanity to address those threats that it faces collectively. The question, though, is where to begin the process of constructing such meta-ethical formulations. Should we begin by thinking about the issues that confront humanity and the world environment as a whole, together with the abstract conceptions of justice through which such issues are to be approached? Put differently, can we start the process of building ethical frameworks by trying first to comprehend the whole global drawing board? We shall argue for a different approach.

Lipietz (1992:33) has observed that one of the salient characteristics of liberal productivism is "the disappearance of the very idea of an explicit choice of society deriving from democracy." Like many others on the Left, Lipietz proposes an alternative paradigm. But how is such a paradigmatic change to be accomplished given the hegemony of the existing political–economic framework? If the dominant global paradigm excludes such a choice, as well as the possibility of its implementation through democratic control of the state, the formulation of an explicit alternative will be insufficient. Put simply, the alternative framework may be doomed if it cannot define its points of political engagement with the existing social formation.

Wittgenstein demonstrated by means of numerous thought experiments that abstract philosophy frequently leads to unresolvable paradoxes and contradictions. Similarly, abstract considerations of justice rapidly lead to contradictory alternatives. Michael Walzer (1983) and Jon Elster (1992) are among those who have argued that different conceptions of justice are used in practice in different life situations. Brennan (1988) warns against the decontextualized use of meta-ethical principles in dealing with environmental issues. This observation raises the issue of universalism versus moral relativism. If there is no single conception of justice, can there be a universal conception of justice? We shall argue that a situated ethics need not lead to moral relativism, nor does it necessitate the abandonment of universalism, properly understood.

Our point of departure, then, is not the big picture of our common future, but examples of actual and public conflicts over the environment, examples such as the attempted dumping of the oil rig *Brent Spar* in the North Sea, French nuclear testing in the Pacific, and the mining by BHP in PNG. Needless to say, these are only recent examples of the sort of environmental conflicts—and sometimes disasters (Love Canal, Bhopal, Chernobyl, the drying of the Aral Sea)—that have been occurring with increasing regularity over the years. Justice—or injustice—lies at the heart of such conflicts, revealed as sociopolitical conflict over the distribution of environmental degradation and economic benefit between communities and nations. In opposing all instances of environmental injustice, we argue that it is best to focus first on actual disputes and then attempt to show how the social–institutional conditions can be created for a range of conceptions of justice to enter into the good resolution of these conflicts.

The broader struggle against social forms that produce environmental injustice—e.g., biospheric destruction and the maldistribution of environmental risk—must begin as engagements with specific ecological conflicts in which questions of environmental and ecological justice are intertwined.

There are a number of more positive reasons for such an approach. For one thing, there are already protagonists and institutions. There is already a politics. The question of who will be the "agent of change," which puzzles some Marxists, since "the proletariat" (seemingly) resigned from the role, does not need to be resolved. It is answered in action by whoever takes up the challenge. The protagonists of the environment are not predictable by category (race, culture, class, or gender). We do not have to resolve the question of the interests of a vanguard group. The group that succeeds politically will be that alliance of forces with many perspectives and interests that is able to consolidate around the issues of environmental and ecological justice. But the ethics of institutional forms must also be constantly subjected to philosophical scrutiny.

Next, as soon as some agent defines an outcome as unjust or unfair, the question of justice arises and will have to be resolved. Only by resolving cases and reflecting on their outcomes can we learn what we have meant by justice. This is the nature of what Beck (1992) calls "reflexive modernity." Justice will always be a contested concept. The important thing is for the means of contesting it to be available. The effect of precedent and example is extremely powerful. In discovering justice through the practice of examining and resolving conflicts, we create the possibility of change for the better. The struggle for justice in particular cases can thus become the vehicle for change of the big picture. Institutions that develop out of the need to interact fairly with people and nature will become the vehicle for further institutional creations to implement or facilitate their operation.

Finally, at the core of a situated ethics is the act of judgment. Judgment, as Benhabib (1992) explicates, requires universal norms, but it is the relationship between universals and the particular that we need to reconsider. The act of judgment understood as embodying "enlarged thought" is about weighing up the contradictory requirements of different principles of justice in their application to particular cases. With reference both to Kant and Arendt, Benhabib (1992:132) argues that "[j]udgment is not the faculty of subsuming a particular under a universal but the faculty of contextualising the universal such that it comes to bear upon the particular."

Let us review briefly our example of a situation in which questions of environmental and ecological justice arise, that of the Ok Tedi mining operation of the Australian multinational corporation BHP, and then see how the approach works.

Ok Tedi: An Environment of Injustice

Since the mid-1970s the Australian mining corporation BHP, in close cooperation with the government of PNG, has developed one of the biggest open-cut copper and gold mines in the world. The PNG government has taken a 30% equity stake in the mine. The mine is at Mount Fubilan in the northern mountains near the source of the Tedi River—Ok Tedi (Figure 1). Ok Tedi is part of PNG's biggest river system, the Fly River, which flows into the Gulf of Papua. The mine has gouged an enormous crater in the mountain, has destroyed the local rainforest, and discharges about 80,000 tons of limestone sludge per day into the upper reaches of the Ok Tedi. The sludge contains many chemicals and minerals, including copper particles in concentrations of up to 18% of the waste.

Since mining began in the mid-1980s, over 250 million tons of waste have been dumped into the river. During the wet season, when river levels rise very quickly, an impervious blanket of mine sediment is deposited

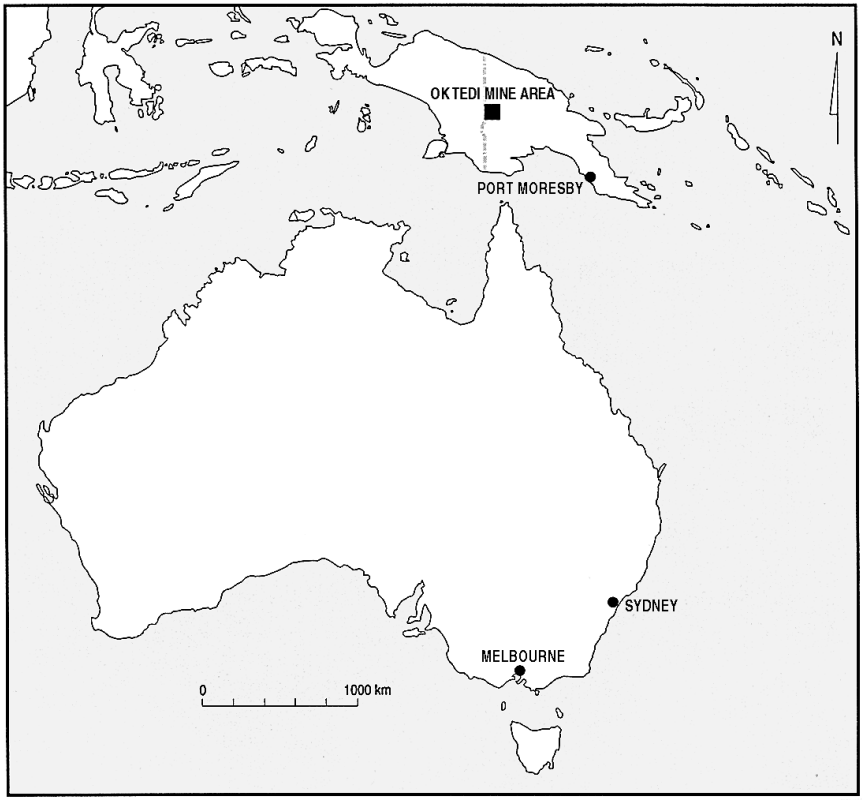

Figure 1 Location of Ok Tedi Mine

on the forest floor downstream. In places this blanket is more than a meter thick. For about thirty square kilometers along the river flood plain, the forest has died. The government of PNG has admitted that the environmental damage cannot be repaired.[1] The mining will continue for at least another fifteen years and over a billion tons of sludge will be dumped.

The environmental damage is large, almost certainly irreversible, and largely unpredictable. The ecology of the Fly River system has been changed by the sediment, and if claims that the river system is now biologically dead are exaggerated, the future effect of the dumping is largely unknown. There has been no independent environmental monitoring of the environmental damage. The only assessment is done by consultants paid by the mining company. It is known, however, that fish have vanished from some parts of the Ok Tedi, that the area of rainforest dying from the sediment will extend much further along the river flood plains as mining continues, and that the bed of the river has been raised by more than a meter of contaminated silt over seven years.

In 1984 the mining company (Ok Tedi Mining, Ltd.) tried to build a tailings dam to contain the sludge, but the dam collapsed in the course of construction and the company gave up the effort. BHP claims that a tailings dam is impossible to build in geologically unstable terrain that experiences an annual rainfall of up to ten meters. Moreover, an unsafe dam would, of course, pose the threat of catastrophic flooding for the 30,000 downstream villagers. But there is no doubt that the villagers have already suffered. Their riverbank gardens have been destroyed, fishing has become impossible, and the wild boar they used to hunt have disappeared.

The project has enormous significance for the PNG economy. The nation was the sixteenth most indebted in the world in 1991. The debt stood at 130% of the GDP (*The Economist*, 1993). A high level of exports is therefore essential to pay the annual interest bill. The Ok Tedi copper mine accounts for at least 16% of the country's export earnings. The after-tax profits from the mine for fiscal year 1994–1995 were Aus$250.9 million (about US$200 million). The company has provided compensation to some of the villagers—the value of Aus$13 million—in the form of "meeting halls, fresh water, and shower blocks" (Skelton, 1995). The villagers, however, have lost the entire environment that supported their way of life. Villagers in the area far downstream of the mine who were not included in the original mining agreement claimed Aus$4 billion in compensation. A compensation package was offered to the villagers of Aus$110 million over the life of the mine.

A Melbourne law firm, Slater and Gordon, took the case for compensation on the basis of a "success fee" and sued the company in both the Australian (State of Victoria) and PNG courts. But the company was able to combine its economic power with the coercive power of the PNG state. A law was drafted with the help of BHP to make it a criminal offense for the

villagers to seek redress through the courts. This is, of course, outrageously unconstitutional and tears up the rule of law. The law firm was harassed and denied access to their clients in PNG. The lawyers acting for the villagers brought an action in the Supreme Court of Victoria against BHP for contempt of court, and a contempt finding was duly delivered on September 20, 1995.[2] The court ruled that the suit against BHP could proceed and that a law introduced by the government of Victoria to prevent such contempt actions was unconstitutional. The government of Victoria, however, altered judicial arrangements to transfer the power to initiate contempt proceedings out of the hands of an independent public prosecutor. The government declined to proceed against BHP for contempt. In an extraordinary later development, it was revealed that at the time of the decision, the attorney general, the government's chief law officer, held 710 ordinary shares in BHP worth over Aus$12,000 (*The Age*, Melbourne, October 18, 1996:1). The solicitor general, the public servant who advised the attorney general against prosecution, was at the time of the decision a director of companies that owned over Aus$800,000 in BHP shares (*The Age*, Melbourne, October 24, 1996:1).

Since German firms were among the partners in the mining venture, the case attracted considerable publicity and criticism in Germany. Eventually, in 1994, the German partners withdrew from the venture. BHP also suffered severe damage to its carefully cultivated public image as a good and environmentally conscious corporate citizen. Richard Jackson, professor of geography at James Cook University in Northern Queensland, describes the "mine of disinformation" surrounding the Ok Tedi dispute in which both sides used the media to present their case. Jackson (1995:13) writes, "No-one in Australia can fail to be aware of the basic issues: uncaring, Australia-based companies have sought huge profits in PNG while impoverishing traditional village communities and destroying a previously pristine environment."

An out-of-court settlement was reached in 1996. Under the agreement BHP will stop dumping tailings from the mine into the Ok Tedi/Fly River system. The firm will support a fully independent inquiry to be conducted by the PNG government and submit to the inquiry their preferred option for tailings disposal. At present, the preferred option is a pipeline to "unused land" below the mountains. The cost of this operation is on the order of Aus$500 million. The $110 million compensation package will stand, with the addition of up to another $40 million for downstream villages most affected by the effluent (press release from Slater and Gordon, June 11, 1996).

Ok Tedi is not an isolated case in PNG. It presages a flood of mining projects that are just waiting for a new surge in global economic growth (now in doubt following the financial catastrophe in East Asia). Baker (1996:46) reports:

> Capitalising on their proximity to Asia, our globally focused resource groups, adventurous junior explorers and deal-seeking entrepreneurs are all leading the rush by Western countries into the highly prospective region. Australian companies are in the vanguard of the vault into Indonesia, the Philippines and Vietnam, and are pioneering pushes into Myanmar (Burma) and Mongolia. They are striding into China and India and getting their feet wet in such places as Malaysia, Thailand and Pakistan.

He continues, "Speeding the move into Asia is a range of perceived impediments to doing business at home, such as native title legislation, environmental regulations, high taxes and the fact that there are few places to go exploring."[3] So there is a double standard for environmental and ecological justice for Australia vis-à-vis the countries of Asia. The next project, which will begin within two years, will be the billion-dollar gold mine at Lihir Island off the PNG coast. This project is the child of the giant mining corporation Rio Tinto. The Lihir project will excavate the crater of a collapsed volcano on a small island off the PNG coast and discharge the tailings directly into the sea. If the gold mine uses the usual cyanide process, the tailings will be extremely toxic and the marine environment for many square kilometers around the site will probably be devastated.

In the light of this story, we consider two questions that have arisen in recent debates about justice in environmental ethics: whether there can be a universal ethical basis for a just decision and, if so, what sort of institutions might now be needed to ensure that justice is done.

The Dialectics of Justice

In a moral discourse we cannot argue about justice without recourse to the universal application of principle. In an anthropological or sociological discourse, we can describe what justice means in different social and cultural contexts, and we would expect differences of interpretation. But in a moral discourse, we advise people to behave in a certain way. We must offer the same advice in similar circumstances or we will ourselves be guilty of injustice. We cannot assume that different cultural circumstances alter the circumstances of our common humanity. Just as theories in science have to be internally consistent to make sense in the discourse, so moral principles must be universalizable: "Every expressively veracious judgment, whether in the fields of theoretical or practical reason, has to be universalizable" (Bhaskar, 199:177). It has to be so because otherwise there can be no discourse. Nevertheless, universal principles emerge from the experience of particular situations and cultural contexts.

The terms *morality* and *ethics* come from the same base, meaning "the customs of a society." From the customs of our western world (though not from that world alone) have emerged three abstractions—desert, rights, and need—that are widely regarded as the bases of justice (see Miller, 1976). Justice is giving and getting what is deserved, justice lies in rights being respected, and justice requires that the needs of each be met according to the ability of each. Miller views these bases of justice as incommensurable. To him they are simply alternative conceptions of justice. A radical pluralism of conception seems unavoidable. Harvey (1993: 53) has warned that "the application of *any* universal principles of social justice across heterogeneous situations is certain to entail some injustice to someone, somewhere" (his emphasis). Davy (1996) likewise argues that, in situating hazardous waste facilities, different stakeholders appeal to rival and incommensurable notions of justice. This is to say nothing of "deep ecologists" who argue that the non-human world is also morally considerable (Hayward, 1994:151). Naess (1989:173), for example, states, "The maxim 'live and let live' suggests a class-free society in the entire ecosphere, a democracy in which we can speak about justice, not only with regard to human beings, but also for animals, plants and landscapes." So let us reconsider the bases of justice. Are they incommensurable?

Feinberg (1970:55) begins an essay on "personal desert" by observing, "Many kinds of things other than persons are commonly said to be deserving." He cites "art objects" that deserve to be admired and "bills of legislation" that deserve to be passed. Both are human creations, but it makes perfect sense to say that "animals deserve to be treated humanely" or that "the rainforest deserves to be protected." To say "one who commits a crime deserves punishment" is a different sort of statement from "one who commits the crime of stealing deserves imprisonment." We can see that the general idea that persons who do something bad deserve something bad to happen to them applies across cultures. Yet the definition of what is bad and good, as well as how bad and how good, and what other conceptions of justice are to be brought to bear in judgment (e.g., compassion or the consequentialist idea of "the protection of society") can only be determined within cultures.

Sher (1987) grounds "justice as desert" on the Kantian foundation of "autonomy." He argues that the reason why we consider an outcome deserved is that it flows from an autonomous act, that is, an act freely chosen by the actor. Because (and if) we are free to choose, we therefore deserve the consequences of our actions. In this way, "deserving" is a way of evaluating the consequences of an act for a person against a Kantian ontological criterion: "because we are free," rather than "because we ought to be free." It is just and fair because you deserve it. You deserve it because you had the freedom to act otherwise. This is what Sher terms the "expected-consequence" account of desert. This account certainly

matches some of our intuitions about desert. In law (and not only modern western law), punishment is only deserved if the offender had the freedom to act otherwise. Force majeur provides exculpation, as does insanity, which is believed to limit the person's real freedom to act.

The emergence of human rights as the basis of justice in western societies historically stemmed from the transcendence of cultural norms. The originators of the idea of natural rights, or human rights, had to sidestep their own culture, which insisted that all moral values came from God. Immanuel Kant and John Locke said that humans were created by God and that they ought to obey God. But they then argued that God had given humans the use of reason and that the law of God is the law of reason. The moral law is that which follows from human beings having the (God-given) capacity to reason, that is, to observe events, draw conclusions from them, and reflect on the consequences of their own and others' action.

Although they differed in some respects, the shared perception of both Locke and Kant is that all human beings are equal in that, under the same conditions, they will equally experience joy and suffering, hardship and pleasure. This is not merely an abstraction but an understanding attained by observation and reflection: the understanding that each person is related in this way to all other persons, the perception that there is such a thing as a human species, a humanity, of which we are each a member and that, despite all sorts of superficial differences, we are similar in body and mind. The widespread repugnance of racial and gender discrimination reflects such a precept.

This is the universal foundation for a number of different and more culture-bound formulations. It is the basis of utilitarian and contractarian systems, of republican and socialist democratic visions of society, of libertarianism and forms of corporatism. In the twentieth century we see an opposition between formulations based on the superiority of property rights and systems based on the superiority of citizenship rights. These two ethical systems take part in a dialectic that is both material and discursive and that results in the various forms of "welfare states" we see throughout the developed world.

Kant's idea of the rule of law has been interpreted as justifying a minimal state concerned only with upholding the rule of the market (Hayek, 1960, 1979; Nozick, 1974). However, Kant himself opened the way for the creation of the welfare state. It is true that he wanted the duty to others to be founded on a less culturally contingent base than need. He writes: "Let us now consider the second group of duties towards others, namely the duties of indebtedness and justice. Here there is no question of inclination, only of the rights of others. It is not their needs that count in this connexion, but their rights" (Kant, 1963:193). He seems tough-minded. He says that a person guided by justice "may close his heart to all appeal; he may be utterly indifferent to the misery and misfortune around him; but so

long as he conscientiously does his duty in giving everyone what is his due, so long as he respects the rights of other men as the most sacred trust given to us by the ruler of the world, his conduct is righteous" (1963:193–194). However, in the very next paragraph Kant makes clear that he does not mean to interpret rights narrowly. It is not provision for needs he is attacking at all, but voluntary and charitable provision on the basis of emotional inclination:

> Although we may be entirely within our rights, according to the laws of the land and the rules of our social structure, we may nevertheless be participating in general injustice, and in giving to an unfortunate man we do not give him a gratuity but only help to return to him that of which the general injustice of our system has deprived him. For if none of us drew to himself a greater share of the world's wealth than his neighbour, there would be no rich and no poor. Even charity therefore is an act of duty imposed upon us by the rights of others and the debt we owe them. (Kant 1963:194)

He goes on from there to prescribe the duties of the commonwealth (the state) in respect to meeting the needs of the poor. Kant thus establishes the universal basis for a welfare state: "The maxim of common interest, of beneficence toward those in need, is a universal duty of men, just because they are to be considered fellow men, that is rational beings with needs, united by nature in one dwelling place so that they can help one another" (Kant, 1991:247).

And in paragraph C of "General Remarks on the Effects with Regard to Rights That Follow from the Nature of the Civil Union" in *The Doctrine of Right* (Kant, 1991), he argues that the wealthy have an obligation to the commonwealth. This duty can be discharged by "imposing a tax on the property or commerce of citizens, or by establishing funds and using the interest from them, not for the needs of the state (for it is rich), but for the needs of the people." Thus, the principle of justice according to rights merges into the principle of justice according to needs. The right to be protected from fundamental harms is the same as the right to the satisfaction of basic needs. Fundamental harms, as we know today, include environmental harms. Indeed, this term—"the right to need-satisfaction"—is used by Doyal and Gough (1991) in developing a conception of justice based on needs. And, as Galtung (1994:70) argues, rights are the means, and the satisfaction of needs is the end.

For Marx, needs are discovered by the processes of society, particularly the process of material production. Thus, needs are inseparable from the means of satisfying them. The more that a society finds ways of satisfying needs, the more that it produces means for their satisfaction and the more it discovers new needs. If, as Marx argues, humanity is rich in needs, this

can only mean that people have a rich capacity to conceive of their needs and work to satisfy them (see Heller, 1974:44). But that capacity is channeled by the system of production, which functions by generating and meeting needs. Capitalism is a system in which the discovery of needs reaches new heights.[4] Capitalism has an almost infinite capacity to develop new objects to possess and thus to develop consciousness of a certain category of need. But this capacity is limited to objects that can be quantified and purchased: "The need to have is that to which all needs are reduced. . . . It is a need directed towards private property and money in ever increasing quantity" (Heller, 1974:57). Capitalism is therefore a one-sided mode of production that inhibits the development of a consciousness of those needs, such as environmental needs, that cannot be quantified or marketed.

Eventually, however, Marx believed this needs-consciousness would be transcended as a result of the contradictions within capitalism itself. The capitalism of Marx's day seemed to be following a pattern in which the ever-growing discovery and satisfaction of the needs (quantifiable and marketable) of a relatively small class of property owners could only be pursued via the creation of an organized but impoverished proletariat. The latter would become conscious of its needs in terms of an entirely different and new kind of production system: communism. The development of communism would bring into view the full range of human qualitative needs and the means for their satisfaction.

Capitalism was indeed transformed in the twentieth century, and the agents of that transformation were the working class. New ethical standards were inscribed in societies to take account of the injustices pointed out by the working class. But the outcome in the West was a temporary compromise and not a revolution. The compromise suspended the class struggle for a time, but the development of new institutional conditions of global capitalism has led to a weakening of the compromise, the wholesale transfer of industrial production out of the institutional fabric created by class struggle, and new struggles on the periphery (see Altvater, 1993; FitzSimmons et al., 1994; Lipietz, 1992; Salleh, 1994). The class struggle continues today, but increasingly with another contradiction unfolding alongside: the environmental antinomy in which capitalism destroys the "nature" it exploits. The "gale of creative destruction" blown up by capitalism (in Schumpeter's phrase) has taken on a new and alarming meaning.

Like Sterba (1988), we oppose the argument (e.g., Miller, 1976) that the bases of justice are incommensurable. They express in different ways two principles of which Kant was perfectly aware: that there is a universal moral relationship we share with other humans by virtue of their humanness, but that this relationship has to be interpreted through culturally specific institutions that will vary. The words we use to describe justice refer to different aspects of a real relationship between self and other that

we want to achieve. Yes, we want promises to be kept, but we also want to treat people with compassion. Practical judgments seek to resolve these differences and to weigh different demands on the relationship (Light and Katz, 1996). The increasing emphasis on care and compassion today acknowledges the fragility of the human condition (Bauman, 1993, 1995; Davy, 1996; Turner, 1993). To extend the conception of "the other" to include the non-human world in pragmatic terms does not seem so problematic as when we try to address the problem in the abstract.

Over culturally specific institutions (and thus over the interpretation of the universal), there is a continual struggle. We do not have unmediated access to the universal; indeed, we cannot even know it directly—as Kant was to conclude in *The Critique of Judgment* (1892).[5] Harvey (1996) has recently argued in his forceful exposition on environmental justice that the dialectical struggle for meta-ethical frameworks must continue—frameworks that embody, not erase, both the reality of human social difference and the fact of interrelatedness, human to human, human to nature. In his most recent writing, Harvey (1997) looks to the work of James Boyd White (1990) for resolution of the contradiction between the universal and the particular. Discourses in which this contradiction appears are linguistic constructions about reality, but they are not reality itself. We can make translations between discourses, and when we do so, it is remarkable how much common ground appears.

Brennan (1988:184) remarks, "I regard any attempt to capture the truth about human nature in any scheme or theory as almost certainly vain." Kant would disagree, for although he set himself against any closed system of universal ethics, he did not regard the attempt to capture truth as vain. The attempt, however, must be viewed as a continuing and dialectical process, and the belief that one system of thought captures the truth for all time he would certainly have regarded as vain (see Kant, 1970:57).

At this point let us return to the work of Seyla Benhabib, in which she argues:

> The more human perspectives we can bring to bear upon our understanding of a situation, all the more likely are we to recognize its moral relevance or salience. The more perspectives we are able to make present to ourselves, all the more are we likely to appreciate the possible act-descriptions through which others will identify our deeds. Finally, the more we are able to think from the perspectives of others, all the more can we make vivid to ourselves the narrative histories of others involved. Moral judgement, whatever other cognitive abilities it may entail, certainly must involve the ability for "enlarged thought," or the ability to make up my mind "in an anticipated communication with others with whom I know I must finally come to some agreement." (Benhabib 1992:137, citing Arendt)

In making moral judgments, we are always obliged to refer to a number of ethical frameworks and to consider what is for the best in the particular circumstances that present themselves. With the emphasis on communication and persuasion, there is a clear link with the discourse ethics of Habermas and Apel (as discussed by Hayward, 1994:205; Dryzek, 1994). In the present case of the Ok Tedi dispute, there is a matter for public judgment. The parties to the dispute have found an institutional means of opening the case for public debate. The question, though, is whether such a means is at all adequate.

A compromise at Ok Tedi was reached only after immense environmental damage had already been done. Whatever the justice of the amount paid in compensation to the villagers, the question of the rights of the non-human world could not be considered. This is hardly surprising given the cursory attention by the miners to human values, notably the ecological concerns and beliefs of the indigenous Min people. (As Jackson [1982] noted in a prescient essay, both BHP and the PNG government made little attempt from the mine's beginning to understand the Min's ecological worldview.) Moreover, the compromise agreement avoided other questions of justice. Not considered were the rights and wrongs of exploiting the weakness of "developing" countries to feed the seemingly limitless maw of the "developed" world. Not considered was the option of reducing consumption so that such mining became unnecessary (see, for example, the work of the Wuppertal Institute, reported in Lovins et al., 1997).

There is pressure on states to introduce environmental regulation. But the governments of these states rapidly encounter the contradiction of their own precarious economic position in a competitive globalized world. There is a continual global auction of the right to pollute and to destroy local environments. The poorer the nation, the more dependent it is on capital inflow and the more it is forced to bid away its environment. This auction can only result in gross injustice among and within nations unless governments act to regulate not only corporations but also their own competition with one another. Such ecological regulation requires transnational institutions. How could such institutions meet the requirements of justice?

Transnational Justice

Writing about mining in PNG at Ok Tedi, Porgera, Misima, and Lihir, Kumalau Tawali (1996) comments, "These corporations are pure raw material extractors and not engaged in the build up of a long-lasting, downstream processing industry. Once the mining sites are exhausted, they go 'home' and leave behind a big hole, a devastated environment and a broken social fabric." Naess (1989:182) observes that "mankind during

the last nine thousand years has conducted itself like a pioneer invading species. These species are individualistic, aggressive and hustling. They attempt to exterminate or suppress other species." But eventually they destroy themselves by destroying their environment and they are replaced by other species "which are better suited to restabilise and mature the ecosystem. If mankind is to avoid being replaced then the struggle against nature must cease."

If transnational corporations engaging in "pioneer invading" behavior are to be regulated and if this regulation is to be based on the "enlarged thought" in which a wide range of conceptions of justice are brought to bear on particular cases (social, economic, environmental, and ecological justice), the regulating institutions must also be transnational. A number of writers have begun to address the question of transnational justice (Archibugi and Held, 1995; Held, 1995; Rawls, 1993a). We will here consider two different positions, both in the Kantian tradition, those of Rawls and of Held.

Rawls' *Political Liberalism* (1993a) argues for a "political conception of justice": "a moral conception worked out for a specific kind of subject, namely for political, social and economic institutions." In this work he responds to the criticism that his earlier *Theory of Justice* (Rawls, 1971) seems to exclude the possibility of continuing debate about what justice is. He advances a metatheory of justice as concerned with the limited sort of justice (political justice) of the institutions that will enable the dialectic discussed above to proceed within a framework of rules concerning the "basic structure of society." He does not resile from his earlier belief that "justice as fairness" must include fair equality of opportunity and the difference principle (the latter being the principle that actions that support inequality are only justified if they improve the conditions of life of the least advantaged).

Rawls, however, has retreated to a sort of communitarianism in arguing that his theory of justice is no more than that which can be deduced from the cultural constructs embodied in American liberalism and that the principles are not to be understood as universal. When he comes to extend his theory to the international sphere, he retreats even further. In his essay "The Law of the Peoples," he sets out the political conception of right and justice that applies to "the political society of well-ordered people" (Rawls, 1993b:68). He wants us to acknowledge that liberal democracy is not the only "reasonable" social form, that there are ways of securing social representation and fairness other than through individualistic rights (e.g., free speech) and the adversarial party political system.

Rawls' concern is to identify the minimum conditions that will ensure that nations behave fairly toward one another and fairly toward their own citizens. He defines a "well-ordered"—that is, a "reasonable"—society as one that (i) is peaceful and non-expansionist, (ii) possesses a legal system that "satisfies certain requisite conditions of legitimacy in the eyes of its

own people," and (iii) honors human rights. These articles define membership of the political society of peoples. What are the political principles it enshrines? How must member states act fairly toward each other?

Rawls thinks that only a set of "general liberal ideas" are necessary to a law of the peoples. Explicitly, this means the abandonment of three egalitarian features that are common to "strong" liberal formulations of justice (e.g., his own "justice as fairness"): the fair value of political liberties, fair equality of opportunity, and the difference principle. What remains is "the veil of ignorance." But the veil of ignorance is supposed to remove the class- and culture-specific assumptions people might bring to constitutional decision-making. Under the veil of ignorance, people confront one another as human persons, not as embodiments of cultures. So if the veil of ignorance is to remain, it is hard to see why the other principles that are presumed to follow from that condition are to be abandoned. Alternatively, if the other principles are abandoned, why not the veil of ignorance also?

For Rawls the law of the peoples "covers only political values and not all life" (1993b:38). The global extension of justice to future generations, incapacitated citizens, social groups (e.g., families), and "what is owed to animals and the rest of nature" (Rawls, 1993b:38) is explicitly ruled out of the discussion, though Rawls recognizes the importance of these issues. However, at a critical point in his essay, Rawls establishes resource stewardship as an essential duty of every reasonable nation:

> An important role of a people's government . . . is to . . . take responsibility for their territory and the size of their population as well as for maintaining its environmental integrity. . . . They are to recognize that they cannot make up for [any] irresponsibility in caring for their land and conserving their natural resources by conquest in war or by migrating into other peoples' territory without their consent. (Rawls, 1993b:47–48)

While this argument recognizes people's responsibility in their relationship with nature, it does not show any understanding that, as in the case of PNG, a nation may not be able to afford responsible stewardship, at least while aspiring to the sort of life held out as desirable by global capitalism.

After Kant, Rawls fears the potential for despotism of any form of "world government," but thinks that there will be a need for "various forms of cooperative association among democratic peoples" to secure the common global good (1993b:46). These new cooperative associations (he cites the United Nations as just one example) would in some cases have the power to sanction, economically or even militarily, any state that violates basic human rights. This role may also extend to include providing assistance for impoverished countries. Rawls says that "in all *reasonably*

developed liberal societies a people's basic needs should be met" (1993b:47, emphasis added). But this worrying specificity allows him to discount the needs of those in countries that are not "reasonably developed" and "liberal." This circumscription of the right to the fulfillment of needs reflects a failure to grasp the political–economic origins of underdevelopment and dependency.

Rawls is no doubt right to argue that there are fair ways of securing the representation of human interests in a society other than through the political institutions of western-style adversarial, representative democracy. But a pluralism of institutions and a pluralism of interpretations of justice are not the same as a pluralism of principles of justice. If we are to argue about justice at all, we must argue for the same justice for all people, qua humans, and indeed for the relationship between humans in general and nature. And that argument must range over all the spheres of human relations in which the origins of injustice may be seen to lie. One of these spheres is the global economy and its governance (see Martin and Schumann, 1997, for a critical discussion). Where Rawls is particularly wrong is in his implicit assumption that states can be regarded as independent entities with full sovereignty and autonomy.

Held (1995:135) points out that there already exists a complex system of international governance: "The operation of states in an ever more complex international system both limits their autonomy (in some spheres radically) and impinges increasingly upon their sovereignty." The form of international governance is not unlike that of premodern Europe (see Mann, 1986; Tilly, 1975). It is not a centralized, pyramidal "state" based on the model of monarchy. International governance consists of a many-dimensioned nexus of authority and power. A nation-state such as PNG is enmeshed in a nexus of governance that includes the megacorporations that control the global financial markets, UN organizations such as the World Bank and the International Monetary Fund, and multinational corporations offering the quick fix of minerals exports. The international "estate" does not rule over a clearly defined territory. Different territories are subject to different aspects of its rule. There is, in short, a mosaic of territories controlled by a variety of powers.

Held's critique proceeds, like that of Rawls, from the principle of autonomy via a "democratic thought experiment." This experiment conceives of the constitutional rules a group of persons would agree upon to govern their relationships under conditions in which they are free "in equal measure," that is to say, in which coercive relations of any sort are wholly absent. The principle of autonomy can be stated thus: "Persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others" (Held, 1995:147). The invention

of democratic institutions results from the working through of this principle. Conversely, the justification for democratic institutions can be sourced to this principle.

The democratic thought experiment is not a pure abstraction with little reference to practical reality. Oran Young (1994) records contemporary instances that approximate the equality and uncertainty (if not "ignorance") of the conditions of Rawls' thought experiment in the practices of negotiation over environmental regimes. Instructively, Young found that the possibility of reaching agreement on an environmental regime is enhanced by the presence of uncertainty as to its eventual outcomes. Similarly, a broad concern for the fairness of the regime itself becomes the primary issue, just as Rawls predicted.

However, because the autonomy of the nation-state is restricted by the web of international ties within which states are today enmeshed, the pursuit of personal autonomy cannot be conducted within the state alone. The constitution of nation-states can no longer be made to respond to demands (for justice) arising from the principle of autonomy. No one wants the destruction of rainforests, but trapped within the prisons of their nation-states, people are subject to the "prisoner's dilemma." As we know, the prisoner's dilemma can only be resolved by communication among the "prisoners." Thus, a new constitutional order is required that enshrines the principle of personal autonomy through new institutions of democracy. This new democratic order must be cosmopolitan; that is to say, it must extend beyond national boundaries. "Cosmopolitan democracy" need not entail a single global structure of governance, but it does entail a mixture of institutions encompassing different territorial scales, some of which will be global.

Held explains that cosmopolitan democracy does not at all imply a global hierarchical state. Rather, "cosmopolitan democracy says that we live in a world where we must come to enjoy multiple citizenships: in our own communities, in the wider regions in which we live, and in the form of cosmopolitan global community" (Held, 1997:28). However, new global institutions will be necessary to give meaning to this multiple citizenship and its associated rights. The sort of global institutional framework Held (1995) has in mind is, briefly, as follows:

- A global parliament (with limited revenue raising capacity) connected to regions, nations, and localities.
- A new charter of rights and duties locked into different domains of political, social, and economic power.
- Separation of political and economic interests and public funding of deliberative assemblies and electoral processes.
- An interconnected global legal system embracing elements of criminal and civil law with mechanisms of enforcement from the local to the global and the establishment of an international criminal court.

- Permanent shift of a nation-state's coercive capability to regional and global institutions, with the ultimate aim of demilitarization and the transcendence of the war system.

A more detailed agenda for reform of the UN system is provided by Archibugi (1995).

As Held recognizes, such a reform can only be undertaken step by step, much as the European Union was (and is still being) constituted. We propose two institutions under the mantle of the UN mandated to deliver environmental and ecological justice: a directly elected World Environment Council (WEC) and an international court of environmental justice (Low and Gleeson, 1998). The former would provide a forum for political debate and public scrutiny of environmental issues with a view to authorizing both the creation of suitable settings for negotiation and the terms of reference of these negotiations. The latter, which could be a branch of the International Court of Justice, would adjudicate specific disputes involving matters affecting the environment that have a clear international dimension. These two institutions would provide the mechanisms through which justice can be discursively defined in conditions in which coercion is largely absent. Together they would acquire the legitimacy to implement such measures as are necessary to ensure the effectiveness of world environmental law.

Burnheim (1996) warns against the danger of a global sovereign state becoming totalitarian. But a nexus of transnational institutions equipped with democratic authority would serve the aims of democracy: "A group of recognised international authorities backing each other up could be powerful enough to exercise decisive sanctions even over most states in most circumstances" (1996:62). Though some issues, such as global warming and nuclear testing, might well come within its direct purview, the purpose of a directly elected WEC would not be to make decisions on specific issues of environmental conflict; it would establish the principles for making such decisions and would therefore be a constitutional council. Such a council would not replace the negotiated order but strengthen it. Summing up the idea of transnational ecological democracy, Burnheim writes, "A fully defensible democracy must be conceived as a set of institutions and procedures that secures for all human and non-human beings the best natural and social environment that can be achieved with the means available to us" (1996:64).

These institutions would help to resolve questions of environmental and ecological justice in the Ok Tedi case in three ways. First, the WEC would have debated the different and sometimes conflicting conceptions of justice that would need to be taken into account in the human use of mineral resources. Second, the WEC would have mandated a negotiated regime for the management of mineral resources and mining. The negotiation would have brought together a range of different interests in mining,

including representatives of people affected, governments, organizations advocating the rights and needs of non-human nature, and mining corporations. Such a regime would have to take into account the development needs of Third World countries and would award appropriate compensation for income foregone. Such compensation would be drawn from a fund created by taxes on, say, international financial transactions (see Esty, 1994; French, 1995). Finally, when mining proceeds and there is further conflict, including questions of interpretation of regime guidelines, such cases can be brought to a properly constituted international court of environmental justice.

Of course, such a scenario is highly speculative. Once we are decided on the goal to be pursued, many other questions arise. What is the first step to be taken in the pursuit of this goal? How might a global constitution be developed via the negotiated order of the UN? What form of popular representation should be adopted? How are citizens to be guaranteed participation in and access to institutions of cosmopolitan democracy? How are the interests and rights of the non-human natural world to be represented and advocated? What means are available to a global institution to ensure compliance with its decisions? What form of sanctions may be used in the implementation of global regulation, and how shall such sanctions be applied? What is the timeframe for the negotiation of a global constitution to be formed? How much time do we have left? Once we are decided that opening up the dialectic of justice requires new institutional forms growing out of the old, a new agenda for debate takes shape.

Conclusion

The need to find justice in the environment becomes ever more pressing as environmental conflicts surface all over the globe. But the world will have to arrive at a structure of justice in the knowledge of the plurality of valid conceptions of justice. The hope of arriving at a single abstract conception of justice that would subsume all others must now be firmly set aside. As Harvey points out, this dialectical engagement of meta-ethical issues is an enduring feature of western thought: Heraclitus, the Greek philosopher, observed that "The finest harmony is born from differences[;] . . . discord is the law of all becoming" (quoted in Harvey, 1995:19–20).

"Justice" is an abstraction drawn from reflection upon the outcomes of particular conflicts in the light of our human sense of fairness. White (1990:21) poses some questions that go to the heart of the dialectic of justice:

> Can we learn to produce texts that are more "integrated" in the sense that in them we put two things—two systems of discourse, two sets of practices—together in such a way as to make

> a third that transforms our sense of both? Can we become more fully conscious of what we, and our languages, leave out, and find ways to reflect that consciousness in our speech? Can we find ways to connect the way we talk professionally with the ways we talk in ordinary life? The object is not connection but integration: the integration of parts of our culture, and parts of ourselves, into new wholes.

What is required is a global politics that will allow such practical reflections to take place in circumstances in which the sense of fairness can be given full opportunity for expression. The problem today is not the plurality of conceptions of justice but the inadequacy of political structures at the global level in which the dialectics of justice can come into play. The problem is not plurality but a cramped uniformity that excludes all but those conceptions of justice functional for commodity exchange in a market order: a limited utilitarianism, entitlement, property, and contract.

The political institutions required to regulate environmental relations must be based on a conception of justice, and this conception of justice will have to be regarded as global in application. The material reality of environmental conflict is global. It concerns the globe as an indivisible, ecological whole. The problem of the world's ecology cannot be defined and confronted with anything less than a transnational conception of justice. Appropriate transnational institutions are needed to govern the relationship between humanity and nature and to form a context for the dialectics of justice. These institutions will have to embody a politically sustainable resolution of the questions of justice that they raise and address.

This globality of justice has affinities with the universality claimed for certain conceptions of justice. The argument must be based on an understanding of the relationship between human and human and between human and nature, which transcends local culture. Nothing less can form the basis of global agreement. But this global conception is not universal in the sense of being unchangeable over time. Spatial universality need not be matched by temporal universality. As global institutions are created, justified, contested, and defended, the conceptions of justice that support them will develop over time in ways that cannot be and should not be predetermined.

Notes

1. According to the *South East Asia Mining Newsletter* (September 10, 1993:5), "Mines and Petroleum Minister Masket Iangalio was reported to have said in Parliament . . . that there was considerable damage to the environment and the Fly River system. He said there is no technology available to neutralise the pollution caused. Iangalio reportedly told Parliament that the government

could only counter the pollution problem by compensating the people concerned and relocating them to other areas."

2. *The Age* (Melbourne, September 20, 1995) reported, "Justice Philip Cummings ruled that BHP had interfered with the administration of justice by cooperating with the Papua New Guinea government in drafting an agreement enabling legislation that would end a massive environmental damages claim by villagers against the giant Ok Tedi copper and gold mine."
3. The native title legislation recognizes the first occupancy of the continent by indigenous peoples and the seizure of their land by European settlers without treaty or contract.
4. See, for example, the famous passage in *Grundrisse* (Marx, 1973:409).
5. Guyer (1992:23) observes in relation to Kant's mature thought, "He thus suggests that the deterministic perspective of the mechanical worldview is not something that we can simply impose on nature, but a perspective that we bring to bear on it just as we do the perspective of freedom itself."

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