

Democracy, Ecological Integrity and International Law

Democracy, Ecological Integrity
and International Law

Edited by

J. Ronald Engel, Laura Westra
and Klaus Bosselmann

**CAMBRIDGE
SCHOLARS**

P U B L I S H I N G

Democracy, Ecological Integrity and International Law,
Edited by J. Ronald Engel, Laura Westra and Klaus Bosselmann

This book first published 2010

Cambridge Scholars Publishing

12 Back Chapman Street, Newcastle upon Tyne, NE6 2XX, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Copyright © 2010 by J. Ronald Engel, Laura Westra and Klaus Bosselmann and contributors

All rights for this book reserved. No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the copyright owner.

ISBN (10): 1-4438-1767-8, ISBN (13): 978-1-4438-1767-7

DEDICATION

In memory of Aldo Leopold, whose ethic of ecological integrity, and life-long dedication to wilderness preservation and democratic land citizenship, inspired the founding of the Global Ecological Integrity Group.

TABLE OF CONTENTS

List of Figures and Tables	ix
----------------------------------	----

Preface	xi
---------------	----

Part I – The Democracy Debate and Ecological Integrity

Introduction	2
J. Ronald Engel	

Chapter One.....	8
Laura Westra	
Ecology and the Law: Democracy, Globalization and the Greek Roots of Environmental Problems	

Chapter Two	26
J. Ronald Engel	
Contesting Democracy	

Chapter Three	41
Johannes Heinrichs	
A Model of Value-Based Democracy as Condition of Ecological Sustainability	

Chapter Four.....	50
Joseph Dellapenna	
Behind the Red Curtain: Environmental Concerns and the Fall of Communism	

Chapter Five	77
May Sim	
From Metaphysics to Environmental Ethics: Aristotle or Zhu Xi?	

Chapter Six	91
Klaus Bosselmann	
Earth Democracy: Institutionalizing Sustainability and Ecological Integrity	

Part II – State Sovereignty, Indigenous Governance and International Law

Introduction	116
Klaus Bosselmann	
Chapter Seven.....	119
Bradford Morse and Michelle Zakrison	
Destroying the Canadian Arctic: A Global Crisis with Devastating Local Ramifications	
Chapter Eight.....	141
Michael Coyle	
Power and the Resolution of Indigenous Land Rights	
Chapter Nine.....	158
Jack Manno	
Haudenosaunee Great Law of Peace: A Model for Global Environmental Governance?	
Chapter Ten	171
Ramy Bulan	
Indigenous Land Rights in Malaysia	

Part III – Environmental Harms, Property Rights and Responsibilities

Introduction	196
Laura Westra	
Chapter Eleven	198
Prue Taylor	
‘The Imperative of Responsibility’ in a Legal Context: Reconciling Responsibilities and Rights	
Chapter Twelve	226
Valentina Sara Vadi	
Reconciling Environmental Health and Investors’ Rights in International Investment Law	

Chapter Thirteen.....	247
Colin Soskolne and Laura Westra	
Public Health in the Face of Global Ecological and Climate Change	

Chapter Fourteen	264
Valerie Brown	
Re-building Babel: Collective Thinking, Democracy, Environment and Health	

Part IV – Water, Food and Climate Change in International Law

Introduction	284
Klaus Bosselmann	

Chapter Fifteen.....	287
Franz Theo Gottwald	
Genetically Modified Food - Ethical Implications along the Food Chain	

Chapter Sixteen	306
David Cassuto	
Owning What You Eat: The Discourse of Food	

Chapter Seventeen.....	321
Owen McIntyre	
Private Investment in Water and Sanitation Services: Rights Based Approaches and International Investment Law – A Possible Way Forward	

Chapter Eighteen	346
Vicky Karageorgou	
Integrated and Adaptive Water Management as Part of the Climate Change Adaptations Strategies – The Legal Approach	

Chapter Nineteen.....	373
Don Brown	
Ethical Issues Raised by Climate Change Cap and Trade Regimes	

Part V – Democracy and Civil Society: Neocolonialism v. Nature Protection

Introduction	386
Laura Westra	
Chapter Twenty	389
Agnes Michelot	
The UNESCO Programme Man-Biosphere: New Perspectives on Protected Areas	
Chapter Twenty One.....	409
Tullio Scovazzi	
La Convention Pour la Sauvegarde du Patrimoine Culturel Immatériel	
Chapter Twenty Two.....	429
Andrew Brennan and Norva Y. S. Lo	
Beyond Individual Responsibility: Environmental Governance and the Affluenzic Society	
Chapter Twenty Three.....	445
Sheila Collins	
Interrogating and Reconceptualizing Natural Law to Protect the Integrity of the Earth	
Chapter Twenty Four.....	467
William Rees	
Globalization and Extended Eco-footprints: Neo-colonialism and (Un)sustainability	
Appendix	490
Hanfried Blume	
List of Contributors	505

LIST OF FIGURES AND TABLES

Figures

- 3-1. The unity of horizontal interpersonal reflection and vertical systemic reflection levels
- 3-2. Hierarchy and inner division of the subsystems of a society
- 3-3. The social system as the state with extended division of “powers”
- 3-4. The systemic circle of the social as a parliamentary system
- 13-1. Right-to-health features of a health system underpinned by legal obligations based on general comment 14: preliminary working model
- 14-1. A collective knowledge mandala
- 14-2. Collective learning spiral
- 15-1. Simplified illustration according to Honderich
- 15-2. Decision tree according to Busch et al.
- 15-3. Application of the decision tree by Busch et al.
- 15-4. Is methionine-soy ethically acceptable? Decision tree according to Busch et al.
- 22-1. Loops in the system of reinforcing atrophy
- 24-1. The average area of agricultural land in the Canadian prairies devoted to foreign consumers
- 24-2. Biocapacity “imported” by US consumers, 1995–2005
- 24-3. Sunrise in Suzhou: much of China’s eco-degradation represents the externalized eco-footprints of wealthy consumers halfway around the world

Tables

- 14-1. Five sources of knowledge on health, environment and democracy
- 15-1. Quantities of GM soya, maize, cotton and oilseed rape grown worldwide in 2007 as a proportion of the total harvests

PREFACE

This book resulted from the symposium “Governance for Sustainability” at the European University Institute in Florence, and the Global Ecological Integrity Group Conference “State Sovereignty, Ecological Integrity and International Law” at the University of Florence. Both events were linked in terms of their timing (June 2009) and by their focus on institutionalizing ecological integrity and sustainability.

We live in an era in which governments have all but lost their capacity to secure a good life and a healthy environment for the peoples of the world, to control financial markets and global economics, or to combat climate change; the prospects for humanity are bleaker than ever. Are we now seeing the demise of the most fundamental institutions of modern society – democracy, the state, the corporation, the global financial system and the rule of law? How radical will conceptual and institutional changes have to be to restore trust in, and functioning of, democratic governance?

This question constituted the basic theme of both conferences at Florence and was the overarching framework for the selection of papers in this published volume. Most especially, we have been concerned for the relation of the principle of ecological integrity in environmental ethics, law and policy to current debates on the meaning and future of “democracy.” What this relation involves, and the distinctive position that many contributors to this volume take toward it, is further discussed in the Introduction to Part I.

The general democracy debate of Part I is further developed in relation to other forms of governance (Parts II), rights and responsibilities (Part III), water, food and climate change (Part IV), and civil society and the natural world (Part V). In this way, the book shows how democratic governance, as now practiced and conceptualized, fails to preserve ecological integrity. It also makes the case for ways in which democracy can be reconceived so as to support the integrity of natural processes.

—Ron Engel, Laura Westra and Klaus Bosselmann

PART I –

**THE DEMOCRACY DEBATE
AND ECOLOGICAL INTEGRITY**

PART I INTRODUCTION

J. RONALD ENGEL

In the opening years of the 21st century the question of “governance” has moved to the center of our political, economic, social, personal and religious lives.

The most immediate and obvious reason for this is that the dominant institutions of contemporary societies – international law regimes, state governments, the global financial system and the corporate organization of economic life, educational and cultural institutions of all kinds – have lost their capacity to govern the spheres of human activity for which they are deemed responsible in such a way as to maintain the common good.

Persons throughout the world are experiencing a profound sense of insecurity and there is widespread distrust of the legitimacy and effectiveness of societal leadership and institutions.

Increasingly, this is viewed as a question regarding the adequacy of the prevailing modern ideal of governance – democracy. This question is being pressed from a number of critical angles: whether it is a universal ideal or exclusively Western in form and origin; whether it is necessarily linked to the capitalist organization of economic life; whether it can serve as a meaningful and realistic ideal for the governance of international institutions; how it is used ideologically to advance the interests of the so-called “democratic nations”; whether it finds moral and spiritual support in world religions and indigenous traditions; whether as a matter of internal logic it requires a strong doctrine of human rights; whether under conditions of mass urban society and unprecedented concentrations of military, economic and political power it is more than a nostalgic reminder of the kinds of public participation in governance that once characterized small scale social life; not to speak of spirited debates between advocates of competing conceptions of democracy, from libertarian to liberal to social democratic and more.

The Global Ecological Integrity Group (GEIG) annual conference in Florence, Italy in June 2009 brought still another critical angle to this discussion – the urgent question of the compatibility of democratic forms of governance with the preservation of the ecological integrity of the biosphere and the human rights of persons throughout the world who depend upon the health of the biosphere for their survival and well-being.

For the members of GEIG the all-encompassing contemporary issue of governance must be cast as the question of how to so organize our lives together that not only human life, but all life is secure and has the conditions necessary for its full flourishing.

GEIG is not alone, of course, in raising the question of the compatibility of ecological integrity and democracy, although it does so in an unusually broad global context, both in terms of the diversity of participants and disciplines represented in the discussions, and in terms of the long-standing concerns that are at issue, such as health, economics, and indigenous peoples' rights, and most especially, the prospects for international law. Indeed, a small library of publications on the subject has emerged in recent years which can be readily accessed by consulting a recent book by three of the present volume's authors.¹ In addition, a number of allied inquiries, such as the discussions currently organized around the concept of "Earth Jurisprudence," draw heavily on democratic political and moral categories in their aim of devising new forms of global environmental governance.

In most of these discussions the meaning of all three terms – democracy, ecological integrity, and the relationships between them – are in dispute. However, in the conversation that has characterized GEIG, the intrinsic importance of ecological integrity is assumed to stand on par with the intrinsic importance of human dignity and is accepted as a "given" of inquiry and debate.² Although there is always opportunity for refinement and further questioning of the scientific and philosophical foundations of the concept of ecological integrity, primary attention is devoted to the ethical requirements of human governance systems to honor it as a precondition of sustainable social life, universal human rights and international law.

Each of the contributors to this volume shares this assumption and in most cases it takes the form of an integrated intellectual and personal commitment. Its centrality is fully evident in the essays in Part I, although a variety of terms in addition to "ecological integrity" – for example, "strong sustainability" (Bosselmann) and "deep ecology" (Sim) – are employed to express it.

"Democracy," however, is another matter. Amartya Sen, following in the footsteps of Jürgen Habermas and John Rawls, argues in the *The Idea of Justice* that the definitive core of democracy is "the exercise of public reason," and its corollary, "government by discussion," and that so defined democracy is a global phenomenon with multiple cultural roots.³ Sen is here giving voice to a widespread shift by contemporary political philosophers toward acceptance of the ideal and practice of "deliberative

democracy” as the central concern of politics and a primary means for the achievement of social justice. The particular institutional means by which deliberative democracy is implemented, such as balloting, while important, are secondary matters. By this definition (*pace* Habermas) – democracy as both open debate about moral values and principles and the justified uses of power and coercion – GEIG has long served as a center of exemplary democratic practice. In Florence in 2009, however, for the first time in the history of the group, the topic of democratic governance as such, and the question of its role in advancing or inhibiting the conservation of ecological integrity and the rule of international law, became matters of explicit critical discussion.

There was large agreement among participants at Florence that “democracy”, as practiced (and indeed in large part defended) in most popular political rhetoric, falls far short of the form of governance required to sustain, much less restore, the healthy functioning of the biosphere. This agreement is evident in the papers selected for inclusion in Part I of this volume, although different flaws in the prevailing forms of democracy are stressed by each of the authors. The strongest indictment of democracy comes from Westra who holds that in current practice it is a totally unprincipled form of governance corrupted by monetary and other partial interests. Engel finds the prevailing forms of democracy “thin” because they take as their primary if not sole moral principle the “consent of the governed” and assume that if the institutionally proper procedures are followed the results must be acceptable. One reason Heinrichs finds contemporary democracies to be deficient is that they are governed by one form or another of a party system which robs voters of the opportunity to choose the full range of values they favor. Dellapenna believes that while contemporary liberal democracy may slow the steady slide of the world toward environmental destruction it is only the best of all the bad alternatives. Bosselmann finds that at its best current democratic theory and practice only go as far as embracing “weak sustainability” – the untenable notion that there can be a “balance” between environmental, social and economic needs. There was considerable criticism by the authors of the dominance of economics in contemporary democratic governance, including any notion that there is necessarily a tight linkage between democracy and so-called free-market capitalism, and the closely associated premise that democratic governance is for the sake of ever expanding economic growth.

The most significant agreement among the authors of the papers in Part I, however, has to do with their generally shared position that an adequate concept of governance must rest upon a comprehensive vision of the good

life which includes a strong normative understanding of not only human but all of nature. Given the centrality of ecological integrity as a comprehensive normative concept in GEIG this outcome may not be surprising, but when it is set within the context of current discussions of democracy as represented in the work of such leading international political theorists as Sen, Rawls and Habermas, it marks a decisive departure, and suggests an important contribution the group may make in future discussions of governance, including the relation of nature and democracy, in international political philosophy.

With the exception of Dellapenna, who exposes the power of civil society associations, fragile and short-lived as they proved to be, to provide the space where citizens' concerns for the health of the environment could expand into effective movements to overthrow the authoritarian regimes of Eastern Europe, each of the authors of Part I argues that ethically defensible institutions of governance must not only provide the opportunities for the "exercise of public reason" which will "help" discern the demands of justice, as Sen would have it, but also substantive and universal norms by which to evaluate the moral qualities of those who govern, citizens and leaders alike, and the actual outcomes of "government by discussion." Given the rejection of strong ideals of the common good or any teleological understanding of human nature in modern democratic societies, Westra is reluctant to associate such an ideal with the name "democracy" and Sim does not declare herself on the matter.

The most crucial and determinative issue that thus emerges is the meaning and possibilities of "reason" in democratic practice and theory. Does not the "exercise of public reason" involve – indeed, in principle, require – debate concerning ultimate frames of reference and commitment as well the moral principles, values and virtues that are derived from those worldviews? And further, does not the "exercise of public reason" require as its precondition certain foundational commitments, however revisable, to a comprehensive vision of the good, most especially at this juncture of human history, a vision that affirms the comprehensive normative status of ecological integrity as well as an ontologically grounded normative view of human nature that grounds human moral responsibility?

Most interlocutors in the contemporary democracy debates eschew such claims, or like Sen, reduce them to their liberal democratic minimum of freedom. And even the few in the Western philosophical tradition who do affirm a rightful place for debates concerning worldviews in deliberative democracy, such as Jeffrey Stout or Franklin Gamwell, or hold out the possibility of agreement upon a substantive vision of the good

life or common good, such as Martha Nussbaum or Michael Sandel, neglect any concept of the normatively natural that extends beyond human capacities alone.

In truth, in virtually all current debates surrounding the meaning of democracy, and even in most debates surrounding the meaning of environmental ethics and policy, including those that seek to make democracy and sustainability mutually supportive, any notion that the concept of nature or the “natural” may be substantive is immediately dismissed as part of the “rhetoric of reaction,” a residual anti-historical and cultural imperialist essentialism.

Yet here we find significant agreement between Westra, Engel, Sim, Heinrichs and Bosselmann regarding the need for explicit concern with ultimate aims, goals and norms, and a substantive naturalistic worldview – ancient or modern – as the foundation of any rationally justified theory of governance, however named. Westra and Engel both argue for natural law as a necessary foundationalist perspective, albeit from different metaphysical positions. Aristotle, Westra argues, provides a basis for reclaiming the classical Greek vision of moral and intellectual virtues and universal principle that can undergird international law. Whitehead, Engel proposes, offers a metaphysical grounding for what he describes as the “thick” moral tradition of democracy. Sim argues for the superiority of the metaphysics of a neo-Confucian Chinese philosopher, Zhu Xi, for purposes of deep ecology ethics on grounds that it affirms the human or moral good is identical with the goodness of everything whereas Aristotle sees humans as morally self-sufficient in separation from the rest of the natural world. Heinrichs proposes an anthropologically grounded “value-based theory of democracy” composed of four elected parliaments, one of which is devoted to public debate and decision regarding the society’s governing worldview and spirituality. Bosselmann argues that the “European cosmology” of dualism, anthropocentrism, materialism, atomism, greed, and economism underlies the reductionist theories of democracy that are proving to be so dysfunctional in light of the crisis of governance today, and that it must be replaced with a more holistic worldview that draws upon the “ecological wisdom” inherent in the world’s great spiritual traditions.

Bosselmann also does something more. He challenges us by concluding his essay with a proposal for a collaborative intellectual and practical agenda, called “Earth Democracy,” which will carry forward the discussion begun here, and hopefully enable the viewpoint shared by the authors of this volume –the view that democracy requires a substantive and comprehensive vision of the integrity of the evolutionary and

ecological processes of the natural world – to find acceptance in the mainstream political debates on governance in our time.

Notes

¹ Klaus Bosselmann, Ron Engel, Prue Taylor, *Governance for Sustainability – Issues, Challenges and Successes* (Bonn: IUCN Environmental Law and Policy Series, vol. 70, 2008)

² Laura Westra, “Ecological Integrity: Its History, Its Future and the Development of the Global Ecological Integrity Group.” In Laura Westra, Klaus Bosselmann, and Richard Westra, eds., *Reconciling Human Existence with Ecological Integrity* (London: Earthscan, 2008), pp. 5–20.

³ Amartya Sen, *The Idea of Justice*. (Cambridge, Massachusetts: Harvard University Press, 2009), p. 324

CHAPTER ONE

ECOLOGY AND THE LAW: DEMOCRACY, GLOBALIZATION AND THE GREEK ROOTS OF ECOLOGICAL PROBLEMS

LAURA WESTRA

Introduction

“He who demands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast ... Law [as the pure voice of God and reason] may thus be defined as ‘reason free from all passion’.” (Barker 1973: 146)

So says Aristotle emphasizing the rule of law, above the “rule of man”, that is the presence of regulatory regimes that are based on “reason alone”, or on principles that stand aside from desires, or the choices of individuals. In this chapter I would like to discuss several areas of conflict between what international law demands, and what domestic law, or the actions of powerful, but unprincipled states, or other such agents can achieve, in the light of teaching of Aristotle.

The first thing to note is that Aristotle’s respect for law is based on the fact that he views it as an entirely principled enterprise, as he defends as best a state with “good laws well obeyed” (Aristotle, *Politics*). Today instead, municipal laws of each nation are strongly influenced by the politics of their countries, so that greed or the quest for power influence not only their constitutions and legal infrastructure, but also the way they interact with the rest of the international legal community.

Hence, for example, a capitalist nation like the US will strongly support so-called “free trade” agreements, and the power of the World Trade Organization (WTO), but it will not ratify the *Convention on the*

Rights of the Child (all countries of the world are signatories, except the US and Somalia), or the *American Convention on Human Rights*, because of the presence of Article 4 on the “Right to Life”; in addition, it does not comply with a number of other international Conventions, against torture, for instance, or on the treatment of prisoners of war, among others.

In contrast, in general terms, international law is based on principles of natural justice; the writings of well-known publicists; and positive laws and precedents in jurisprudence (Kindred 2000). The emphasis however remains on principles. For instance, Judge Tanaka, considered general principles of law a primary source of international law, because they have the character of *jus rationale* and are “valid through all kinds of human societies” (Kindred 2000: 148; *South West Africa Case* 1996). Here Judge Tanaka defines the source of general principles of Law, as these include universality and rationality, following precisely what Aristotle considers to be *eunomia*: “good laws well obeyed” (Aristotle, *Politics*; Barker 1973).

Hence the reasoned approach in international law arises from well-established principles, but also in the reasoning of well-respected scholars, and of judges themselves. This triple guarantee of its foundation on reason and principle is not always present in domestic legal instruments, or in the politically dictated choices of the leaders of individual states, including many ratified covenants. The first thing to note is the connection between the laws of nature and natural law, and its origin in Aristotle.

The Laws of Nature and the Origins of Natural Law: Nature and Laws in Aristotle

Nature is central to Aristotle’s argument in the *Politics*. This is routinely accepted by Aristotelian scholars:

“Aristotle conducted his study of things human in the fields of politics and ethics (and also of logic, poetry and oratory), side by side with a study of things natural (physics, medicine, and general biology).” (Barker 1973: xxviii)

In addition, his “inclination towards the Ionic ‘becoming’ – the genetic doctrine of *phusis*” (Barker 1973: xxix) ensures that nature will be and remain foundational for all his arguments, from the admiration he evinces for the beauty of perfected forms, to the presence of design in nature as such (Aristotle, *Parts of Animals*). We noted that governance, citizenship and the *polis* itself were discussed with reference to natural standards (of size, of completeness and the like). In the same sense, the constitution of

the state will provide its “essence”, the explanation of its identity as a “quasi-juridical person” (Barker 1973: 100–101). The constitution is analogous to the natural laws governing physical organisms (Barker 1973).

Like all natural entities, the state has two main ends (in this case, not just one end), for the association it represents. Aristotle starts with the basic “natural impulse” according to which “men desire to live a social life”; the other end is represented by the common interest:

“The good life is the chief end, both for the community as a whole and for each of us individually. But men also come together, and form and maintain political associations merely for the sake of life ...” (Aristotle, *Politics*)

Hence the *essential* nature of a state, the laws that regulate it, exist for the sake of maintaining life, social association and the good life (Barker 1973: chapter III). This simply re-elaborates the theme clearly stated in Book I of the *Politics*, that “every *polis* exists by nature”, and that the “nature of things consists in their ends or consummation”, as “the end, the final cause is the best” (Barker 1973: 5). The *polis* exists “by nature” and man is meant “by nature” to live in a social environment.

If we consider the modern, liberal democratic state, we find something that is in direct conflict with the Aristotelian view of the state. It does provide association, so it satisfies at least one condition Aristotle finds essential to the nature of the state. But note that the other two “ends” or reasons why men join together in political association are missing or under threat. In glaring contrast with the Aristotelian emphasis on the state’s support of the “common good”, or the happiness that is based on the “natural end of man” as a moral ideal, in modern times even a token quest for that sort of good has been completely eliminated from present political institutions (Westra 1998).

Nature, the State and Right Governance

“People form governments for their common defense, security and welfare. The first thing that public officials owe their constituents is protection against natural and man-made hazards.” (Gostin 2004: 7–12)

We do not find anything of significance regarding ecology in Aristotle, but we can start by considering what “good laws” should be in the teleological sense of what they must achieve in order to be termed “good”. Only then we might be able to judge what Aristotle would possibly say

about major ecological problems that beset us all today, in varying degrees:

- 1) climate change and its consequences especially (though not exclusively) in island states, coastal areas and the Arctic;
- 2) globalization and economic oppression; and
- 3) the plight of ecological refugees.

These are all problems far removed from the reality of life in Aristotle's times; hence we cannot expect to find pat, simple answers in his *corpus*. Rather, we must follow Aristotle's thought through the arguments he proposes, in order to see where what he says might shed light on these intractable problems of a different time.

First, if the state, its laws, and its citizen are understood in terms of what is natural, then we must start with the "nature of the end for which the state exists" (Barker 1973: 118). As one might expect, "the end of the state is not mere life; it is rather a good quality of life" (Barker 1973). Such a *polis* will include "the association of families and villages in a perfect and self-sufficing existence; and such an existence, on our definition, consists in a life of true felicity and goodness" (Barker 1973: 120).

Hence the *polis* or the state, must be organized and governed only in ways that will foster "good actions", such that they represent the excellence of character or its citizens, as its laws are meant to make them just. (Barker 1973: 118) A proper understanding of what constitutes justice is basic here:

"In democracies, for example, justice is considered to mean equality [in the distribution of offices]. It does mean equality – but equality for those who are equal, not all. In oligarchies, again, inequality is the distribution of office is considered to be just; and indeed it is – but only for those who are unequal, and not for all." (Barker 1973: 117)

An oligarchy is a constitution ruled by the wealthy; a democracy is here intended as one where the poor rule, hence, each is limited on its understanding of what a just constitution must be. In addition to being limited, neither starts from then required understanding in the operative aim of the state, on one hand, and the true meaning of citizenship, on the other. Barker says:

"The principle of a constitution is its conception of justice and this is the fundamental ground of difference between oligarchy and democracy.

Democrats hold that if men are equal by birth, they should in justice have equal rights: oligarchs hold that if they are unequal in wealth, they should in justice have unequal rights.” (Barker 1973: 116)

Aristotle states the problem clearly: both fail to acknowledge “... the really cardinal factor”, i.e. the nature of the end for which the state exists (Barker 1973: 118). The state exists to support and promote the “good life”, and – *pace* Nussbaum – the “good life” is the life of moral excellence, with the basic means thereof, not a life that entails the right of “flourishing”, given the economic connotations that normally attach to that concept.

Instead, its legal structure must encourage habituation to the moral life by its system of rewards and punishments, as no man is born ethical, but only becomes such through habituation (Owens 1959: 343; Aristotle, *Nicomachean Ethics*, II, 1, 1103b 23–25). Only with men are so habituated, their choices will be morally just, and exhibit that individual excellence that is the *causa causans* of a well governed *polis*:

“Justice is ‘that kind of state of character which makes people dispose to do what is just and makes them act justly and wish for what is just ...’. (Aristotle, *Nicomachean Ethics*, V, 1, 1129a 7–9). In a wider sense justice is used to mean virtue in general, and in this meaning it, of course, includes all the virtues.” (Owens 1959: 347)

Hence, it is neither “alliance for mutual defense against all injury, or to ease exchange and promote economic intercourse” (Barker 1973: 118), that represent the true ends of the state, but the promotion of individual virtue and collective excellence, indicative of true happiness.

Once we have ascertained what is the nature of the *polis* itself for Aristotle, and its basic aim (Barker 1973: 92), we need to consider the nature of its components: its citizens. Citizens are not such in virtue of being residents in the *polis* or of being entitled to sue and be sued, or of being admitted as resident aliens. Aristotle says “We may lay down that citizens are those who share in the holding of office as so defined”, e.g. as office held for an indeterminate period (Barker 1973: 94). Hence, we can conclude that for Aristotle, a citizen is only someone who actively participates in the operation and then governance of *polis* and therefore, one who is dedicated to furthering its aims. All that pertains to the state, from its component parts, to the rational laws that govern it, to its ultimate aim, are in clear conflict, however, with the goals, constitutions, and most of the legal instruments that govern today’s Western industrialized

“democratic” states. We will consider this problem in the next section, before considering the ecological problems listed, in turn.

The Aims, the Composition and the Laws of the Present Western Affluent States

“In order to protect the biosphere, we can make provisions for the power of sanctions to be exercised by a specific institution. This was provided for in the Declaration adopted by twenty-four States at The Hague on April 3, 1989. Having taken their motto ‘My country is the planet’, they studied the idea of authority endowed with super state powers capable of directing policies and responsible not only for controlling the conduct of states, but also for taking sanctions against those who violate the fundamental principles that are the basis or respect for the global environment. Such an approach is not possible without acknowledging that humankind has a right to integrity and, in the end, to survival.” (Dupuy 1991: 201–204)

As we turn from Aristotle’s time to our own, we note the first, basic difference. Aristotle’s *polis*, was not only homogenous insofar as its citizens ethnicity was concerned, but also limited in size (for best governance), and self-sufficient. Today’s nation’s especially Western affluent states are precisely opposite: multi-ethnic large, and – most of all – unable to survive without steady intercourse with other national entities.

Aside from these vast material differences, there is still a major difference, that is a difference of principle, that is, to some extent unavoidable, given the physical discrepancies: the modern Western country’s main *raison d’être* is a twofold one: to protect its citizens and its borders, and to thrive economically, while asserting its own power vis-à-vis other nations. The development and the pursuit of virtue, individual and collective, are not even considered as valid objectives. In fact, for the most part, Western nations tend to view morality as something of a personal choice, possible linked with one’s religious beliefs and practice: something to which all have a right to, to be sure, but not something that is the state’s concern, except insofar as it is obliged to protect that right of their citizens.

In contrast, some have argued (Gostin 2008), and I concur (Westra 2006), that the State’s obligations to protect should include the protection of public health, which is gravely threatened by today’s environmental attacks, both external (through climate change and toxic exposures), and internal, through the effects of environmental pollutants, both industrial chemicals (Grandjean and Landrigan 2006; Westra 2007) and endocrine

disruptors (Colborn et al 1996; Westra 2007). On that topic, Allyn Taylor notes that:

“WHO’s advancement of national and international public health and supervisory institutions is critical to furthering the realization of the right to health. Encouraging countries to develop specific binding legal obligations with respect to the right to health and publicizing their compliance and non-compliance with those obligations, can powerfully influence states to rethink priorities and redirect national resources to national health care.” (Taylor 1992: 310–346)

Nevertheless, by appealing to the WHO, we are already transcending the state as such, and this remains yet another cardinal point of difference with Aristotelian doctrine: the question of self-sufficiency no longer applies to today’s state. Not only other states are needed for trade, alliances, and the like, but pathogens travel from continent to continent, hazardous industrial operations and their effluents reach far and wide beyond the site of their operations, most notably through the effects of climate change (McMichael 1995: 310–317; Patz, 2005: 310–317).

Hence, not only trade and education transcend all borders today, but also do infectious diseases and the vectors that travel together with the movement of persons and airplanes and other conveyances, and as do toxic materials and other pollutants.

Hence the “good law” that Aristotle extols cannot be only municipal (or domestic) law today: it has to be international law, in order to be a “good law”, at least based on principles and rationality. Its capacity for enforcement is almost non-existent, unfortunately, so that it is weak on the practical side; on the theoretical side, we find that it encompasses some principles that might have even met Aristotle’s approval. I am speaking of a special sort of norms that are non-derogable, unlike conventions and agreements that are often ignored, through lack of compliance by powerful countries.

In contrast, *jus cogens* norms are truly universal, and they impose obligations *erga omnes* on both states and individuals. (Ragazzi 1997: 3; *Barcelona Traction Light and Power Co. Ltd.* [second Phase] 1970: 3) These obligations deal with such terrible crimes as genocide, crimes against humanity, war crimes, racial and gender discrimination: no nation may transgress these rules or may sign on to any treaty that would permit any of these crimes. Even if, *per absurdum*, any of the rulers of a state does not believe in the justice of these rules, and despite the fact there are actions that are forbidden, nevertheless, they are bound not to transgress these norms (Westra 2007: 37).

It would be highly desirable if environmental harms or, as I have termed them, forms of “ecoviolence” (Westra 2004) were to be counted among the gravest crimes. My own move from philosophy to jurisprudence was motivated, for the most part, by my desire to work to establish the connection between environmental/ecological rights and other human rights. The Honorable Christian Weeramantry, former Judge of the International Court of Justice, puts it best in his well known “dissenting opinion” in the *Gabcikovo-Nagymaros* case:

“Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner to constitute a denial of human rights, as understood at the time of their application. A Country cannot endorse activities that are a violation of human rights by the standard of their time, merely because they are take under a Treaty which dates back to a period when such action was not a violation of human rights.” (*Gabcikovo-Nagymaros Case* 1997)

Today, these are the only norms based on solid principle. Some other related Conventions share status, *The Convention on Genocide*, the *Convention Against Torture and Cruel and Dehumanizing Treatment of Punishment* are examples, although some powerful Western countries as we all know, are not observing them at this time. Instead, they employ well-placed government lawyers to treat these universally binding treaties, as they would tax laws, attempting to find or even manufacture loopholes (Cole 2006: 627).

That said, questions arise about why even the non-derogable, absolute norms that would ensure the protection of human rights against the most heinous crimes, are not fully respected everywhere, as they represent international law. We need to compare the aims of the nation that join together, thus forming the international community, with what Aristotle considered the state’s right aim, the right laws, and the right citizens to share in its governance.

The Aristotelian Difference: *Ergon*, *Eudaimonia* and Community over Individuals and Justice

Much of Aristotle’s work in the *Nicomachean Ethics* is devoted to an analysis of what it means to live a “good life” and to achieve *eudaimonia*. The latter is a difficult term to translate: its meaning is not simply “happiness”, as it is often translated. Happiness is a psychological state, quite different from the activity of *eudaimonia* (Nussbaum 1986). Translations such as “living a good life for a human being” (Nussbaum

1986: 6) or “human flourishing”, (Nussbaum 1986: 6; Cooper 1975) both understood as “living well and doing well” are far more accurate. The reason why that is so, is precisely the reason we are reaching back to Aristotle’s thought here: *eudaimonia* only makes sense in relation to the proper understanding of what man does and what man is, his *ergon* (“function”) and his excellence. In an earlier section we noted how dangerous it is to propose a public policy that was detached from a defensible, logically coherent “public good,” as Plato argued in the *Republic*. Further, since, as Plato also argued, the *polis* is only as good as its citizens, the “good” has to be consonant with man’s natural excellence in order to be logically and morally defensible, that is, in order to be that “for the sake of which” everything must be done.

The function argument

Aristotle’s “function” argument starts, as is his custom, from observations about the natural world. Everything has a natural excellence, and all that is done or happens naturally is also for the sake of something. All natural species pursue the eternity of being in the way available to them, that is, not individually and separately but through their species’ reproduction. The physical “function” that supports this quest for “eternity” is shared with all life, from plants to nonhuman animals. In the well-known discussion in the *De Anima* (Aristotle, *On the Soul*), Aristotle acknowledges our link to all other life, even plants. But what we share with plants is simply being alive; in contrast, we share motion and sentience with nonhuman animals: in both cases their respective function lies in the specific capacities and excellences of each kind.

Therefore, our function and excellence cannot lie in anything that we share with other species; it must lie in that which is particularly ours – our rational nature, shared by neither plants nor other animals, for Aristotle. Hence our function embodies our “difference” and indicates the basis for our excellence, and Aristotle’s argument provides the tie between the “good”, the “good life”, or *eudaimonia* – and our own nature: the good is not the choice of the majority, as such, nor one preference among others. The real good for humans is the only choice that is at once logical, practical, moral, and natural. It represents the only way that “flourishing” is meaningful for humans, our most proper function. Aristotle concludes the *ergon* argument as follows:

“The human good turns out to be activity of soul in accordance with virtue, and if there is more than one virtue, in accordance with the best and most perfect. (Aristotle, *Nicomachean Ethics*, 1098a 16–18)”