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Bishop Tutu: His Challenge to the Legal Profession on the Morals and Ethics of Climate Change

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Conference commented on: [As Long as the Rivers Flow: Coming Back to the Treaty Relationship in our Time](#), Fort McMurray, AB, May 31-June 1, 2014

I was privileged this past weekend to hear Desmond Tutu speak at a conference on climate change and treaty rights in Fort McMurray Alberta. (See the program [here](#)). His remarks were directed at climate change in general and the Alberta oil sands development in particular. He clearly made the link between carbon emissions from the oil sands and climate change. He then situated the issue of climate change squarely in a moral and ethical dimension. He argued that consideration of this dimension must play a central role in legal and policy decisions about responses here in Canada and around the world.

It is clear that Tutu's ethical and moral concerns touch on fundamental rights and the very nature of justice and equity. Distributive justice, compensatory justice, procedural justice and human rights are all implicated. We heard from many speakers at the conference that in the Canadian context, First Nations bear the brunt of resource development when their treaty rights, food sources, water and cultures are compromised by climate change and environmental damage.

Saying that climate change is the greatest moral question of this era, Tutu's remarks underscored an important ethical and legal theoretical void, especially in Alberta where climate change and development, if discussed at all, are usually talked about in terms of economic or technology-based benefits, not moral, legal or ethical dilemmas.

He set out three major moral imperatives that require an ethical response that should influence our legal thinking:

1. Responsibility to future generations of humanity
2. Responsibility to different populations around the world
3. Responsibility to the natural world and its natural state

1. Future Generations

With respect to the first imperative, Tutu challenged us to consider the effects of climate change on future generations whose rights are at the mercy of those living in the present. Aboriginal elders at the conference echoed this point when they reminded us that Aboriginal peoples see

themselves as having the moral duty to steward the environment for the benefit of seven generations to come.

Both observations are bolstered by the views of philosophers and economists. John Rawls in his famous book, *Theory of Justice* along with numerous other prominent philosophers and economists say it is ethically indefensible to give more weight to the welfare of current generations than to that of future generations just because they were born sooner in time. If we wish to create intergenerational equality, the only morally defensible approach to any intergenerational event is to treat the generations equally. This moral imperative only intensifies when one generation causes the harms by their acts or failures to act, subjecting subsequent generations to foreseeable harm to their resources or opportunities. But the responsibility to mitigate climate change for future generations is difficult to place in conventional legal discourse because it requires legal tools we presently do not have.

In their article “[Climate Change and Future Generations](#)”, (2011) 84 S Cal LR 1097, Revesz and Shahabian discuss the futility of using traditional methods of calculating future losses when it comes to mitigating climate change. Foreseeing harms to climate for future generations that will accumulate and persist for a very long time, even centuries or millennia, is difficult enough. The fact of the irreversibility of the effects of global warming such as the melting of the polar ice cap or the extinction of species, adds a further layer of complexity to legal or philosophical analyses to make decisions regarding responsibility for harms caused, degree of mitigation expenditures and when and on what they should be spent. For example, investments in infrastructure may make mitigation cheaper for future generations but if future generations are already stuck with irreversible, catastrophic damage that can no longer be prevented; mitigation efforts in infrastructure may be futile. Policy making in this scenario is very difficult indeed and underscores the urgency of stopping or slowing climate change as soon as possible.

It is precisely the long-term, possible preventative nature of climate change responses that makes it a moral and ethical issue. The mismatch between the need to act now for benefits that will accrue for future generations explains why so many politicians, economists, industrialists, judges, and other decision-makers find it so difficult to engage and respond to climate change. Their interests are usually focused on immediate evidence of present harm, election cycles or quarterly returns. This short-term thinking or generational buck-passing, Tutu would say, is immoral and unethical.

UNESCO in its Report, [The Ethical Implications of Global Climate Change](#), suggests that instead of thinking about an infinite number of future generations, it would make more sense legally to think about the next 100 years. Although the full impacts of climate change may not be known in 100 years, at least it is possible for lawyers and judges to think of three future generations in terms of rights, needs, interests, and harms that we can imagine, put a value on, and plan for in the present. Although this approach falls short of the First Nations imperative to steward the environment seven generations into the future, it at least would illuminate wider concerns than those that affect the present generation alone and provide a point of departure for future generations in their struggles to diminish the impacts of climate change.

2. Poorer Populations and Countries

On Tutu’s second point, that of moral responsibility to poorer populations around the world most affected by climate change, ethical challenges abound. Very little has been done by legal scholars to articulate relevant conceptual issues, as well as what policy should look like in practice.

The fact that climate change is a global phenomenon is the starting point. Once emitted, greenhouse gas emissions can have climate effects anywhere on the planet, regardless of the source. While all countries would like to see global emissions curtailed, none wish to experience the economic consequences of doing so individually. Our Prime Minister has made this clear many times, as have leaders in many other countries. For example see the commentary [here](#).

At the same time, many of the countries and populations most vulnerable to climate change are those who have emitted or are emitting the least amount of greenhouse gasses. People living in the Arctic, in desert or semi-arid or equatorial regions, large river deltas or coastal and island regions, the elderly and children, all fall into categories of those most vulnerable to climate change. For a discussion of disproportionate impacts on the poorer nations see [here](#). For a discussion on how climate change impacts millions of Asian children see [here](#).

Procedural justice requires that the most vulnerable groups must participate in the decision-making about measures to prevent, mitigate or adapt to climate change. What mechanisms need to be put in place to ensure this dialogue can take place and that local and traditional knowledge are integrated in the decision-making processes?

Poorer nations who have not emitted comparable amounts of greenhouse gasses believe it unfair to demand that they minimize their emissions for the sake of future generations, especially if future people are likely to be better off, and if many present high emitters are already much richer than the future poor are likely to be. This skewed vulnerability in both cause and effect can result in serious unfairness between countries and regions. I am sure Bishop Tutu would say global cooperation in limiting emissions must consider distributive and procedural justice as a critical part of the decision-making process.

Unfairness in the distribution of the negative consequences of climate change is not the only distributive justice issue. The unfairness in the distribution of the benefits derived from actions that cause climate change should also be considered. For example, the Chipewyan First Nation that is down river from the oil sands and is adversely impacted by the environmental degradation caused by the mining of the bitumen, is not allowed any share in the revenues from resource development on their lands. Chief Alan Adam said at the conference, if the nation had a fair share of the oil sands revenues, they could use them for programs and services to ameliorate some of the impacts of the harms caused by the oil sands development. (See also commentary [here](#)).

On a broader scale, distributive justice principles would dictate that developed countries should be permitted fewer emissions than developing countries because developed countries are responsible for most of the cumulative emissions contributing to climate change and are more able to bear the burden of reducing emissions. Nonetheless, arguments that developed countries should not be responsible for emissions prior to 1990 because of ignorance about the climatic effects of these emissions, and that present inhabitants of developed countries should not be held responsible for past emitters now dead, indicate tension and a lack of consensus that needs to be resolved.

Other issues such as vulnerability to climate impacts affected by previous wrongs, such as the legacy of colonization, slavery, economic exploitation, and so on may compound injustices and increase feelings of alienation and anger which we see played out in the Canadian courts where First Nations feel their treaty and aboriginal rights are disrespected by resource developers and

governments. (For a thorough discussion of case law on these issues see, Bill Gallagher, [*Resource Rulers: Fortunes and Folly on Canada's road to Resources*](#)).

Climate change issues also raise considerations of human rights, remedies and compensatory justice. Climate change scientists say it is possible that some impacts such as sea level rise will threaten the very existence of entire coastal countries and communities. *The Universal Declaration of Human Rights* and other applicable human rights conventions will be invoked by displaced populations and climate change refugees who will be seeking asylum in other countries which may be reluctant to receive them. Others will claim that their life, liberty and security of the person rights are violated as well as their rights to use their property to enhance their well-being and choose their own way of life. How will the rights of the most vulnerable be validated? Will human rights bodies even recognize these rights or will the rights themselves be put under threat by climate change? Bishop Tutu recognized the rights issue in his remarks. He said, "Oil sands development not only devastates our shared climate, it is also stripping away the rights of First Nations and affected communities to protect their children, land and water from being poisoned."

If violations of human rights are recognized, numerous compensatory issues arise. Who should bear the costs of mass movements of peoples? How will causal responsibility be assigned? What mechanisms and structures will be required to address these claims? Who will the beneficiaries of the compensation and how will it be distributed?

These questions of distributive justice, human rights, and compensation will only be answered when the ethical discussion about climate change is put at the forefront of negotiation tables, law school courses, economic forecasting, political debates and meetings of world leaders. (The University of Calgary Law School offers the following relevant courses: Law of Species and Spaces, International Development Law, Pollution Control and Waste Management Law, International Environmental Law, Environmental Law and Ethics, Water Law, Environmental Law and Alternative Energy Law. For a description of the courses see [here](#)).

3. The natural world

The third theme Bishop Tutu identified in his talk in Fort McMurray was with respect to the moral and ethical duty to protect the natural world. He said there is a need to develop a much stronger ethical and legal relationship between humans and the rest of nature. He said the concept of justice is meant to be not only for human beings but also for the world's other sentient creatures:

"It is a kind of theological folly to suppose that God has made the entire world just for human beings, or to suppose that God is interested in only one of the millions of species that inhabit God's good earth....We do not honor God by abusing other sentient creatures," he said.

Whether one agrees with Tutu's religious rationale or not, climate change raises numerous new questions about the moral value of nonhuman nature including asking ourselves whether we have obligations to protect nonhuman animals, unique places, or nature as a whole, and if so, when and what form such obligations take?

One influential study placed a third of the world's species on a path to climate-driven extinction as a result of global climate change. (Chris D. Thomas et al, "[Extinction risk from climate change](#)" (2004) 427 Nature 145; see also Lee Hannah ed, [Saving a Million Species: Extinction From Climate Change](#). We heard evidence at the conference that caribou populations have dramatically diminished in their natural, historic habitat which used to occupy the area of the oil sands development.

Historically, philosophers, scientists, and advocates focused on establishing good reasons for caring about the plight of threatened species and their habitats. Now, because of the effects of global climate change, questions like: Should species be protected at all? Should they be protected within the historical habitats in which they evolved? Is it appropriate to modify habitats through creating parks, refuges, and protected areas? are on the table.

It is inevitable that conservation decisions in the future will require more interventionist conservation policies leading to debates regarding risks, benefit and of novel practices as well as consideration of impacts on basic human rights, distributive justice and procedural justice for those whose livelihoods, food supply and cultural practices depend upon the preservation of the natural world.

In speaking out about justice for nature Bishop Tutu sees the similarities to disempowered humans. He says, "I have seen firsthand how injustice gets overlooked when the victims are powerless or vulnerable, when they have no one to speak up for them and no means of representing themselves to a higher authority. Animals are in precisely that position." Should legal theorists adopt the same view?

4. Conclusion

Climate change involves serious ethical issues, especially in its global, intergenerational, human rights, aboriginal and treaty rights and ecological dimensions. The need for work in moral, legal and political philosophy that articulates compelling reasons as to how and why we should address climate change is clear. Are judges, lawyers and legal academics sufficiently prepared to participate in these discussions? Is space being created for those who need to be heard?

Our theoretical tools are underdeveloped in many of the relevant areas and Bishop Tutu's message is one that needs to be carefully considered and acted upon.

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